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ENFORCING AMERICAN PRIVATE ANTITRUST DECISIONS IN JAPAN: IS COMITY REAL?

Michael Peter Waxman*

Introduction

The explosion of international business over the past twenty years has created a crisis in the transnational enforcement of law. This has been particularly true in the area of competition law. Despite efforts to allow contractual parties to select fora for the resolution of antitrust disputes, the absence of international or bi-lateral legal standards for competition law has forced parties to wrestle with the

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N.B. In order to assure as complete an understanding by American attorneys as is possible, the author has chosen intentionally to provide English language authorities (sometimes unofficial translations) and to use the American method of stating a person's name (i.e. family name last). The reader must consider the risks created by this editorial decision and adjust her/his analyses accordingly. See Dan Feno Henderson, The Japanese Law in English: Some Thoughts on Scope and Method, 16 VANDERBILT J. OF TRANSNATIONAL LAW 601 (1983).


conflicts created by the diversity of domestic business/legal cultures and the importance to each sovereign of its own competition law.\(^3\) Naturally, the dearth of international law standards has fostered a search for common ground on competition law issues that requires a greater emphasis on comity.\(^4\) However, despite the constant bleating


\(^4\) The importance of harmonizing competition policies of the United States and its trading partners is reflected in a report prepared by the Special Task Force on Competition Policy of the antitrust law section of the ABA, printed in a Special Supplement found at 64 Antitrust & Trade Reg. Rep. (BNA) No. 1604, at S-4 (Mar. 4, 1993). See U.S./European Agreement, supra note 3, at 1491 (noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation’); see also International Antitrust Enforcement Assistance Act of 1994 ("IAEAA"), 15 U.S.C.A. §6201 (West. Supp. 1995) (noting "the Attorney General of the United States and the Federal Trade Commission may provide . . . antitrust evidence to assist the foreign antitrust authority" on a reciprocal basis); Hartford Fire Ins. Co. v. State of Cal., 1993 Trade Cas. (CCH) ¶ 70,280 (U.S. June 29, 1993) (Souter, J. majority) (discussing the role of international comity in the enforcement of antitrust laws); id. at 70,420 (Scalia, J., dissenting) (refuting that claims against petitioners constituted an inappropriate extraterritorial application of the Sherman Act); Mitsubishi Motors Corp., 473 U.S. at 629 (noting that international comity concerns outweigh the public policy interests associated with antitrust claims in a purely domestic setting); Yoichiro Hamabe, Changing Antimonopoly Policy in the Japanese Legal System -- An International Perspective, 28 INT'L L. REVIEW 903, 920 n.13 & 926 (lending strong support for foreign countries to push for enforcement of antitrust law in Japan). Japan has clear precedent for transnational antitrust cooperation. See Yasuhiro Fujita, Japanese Regulation of Foreign Transactions and Private Law Consequences, 18 N.Y. L. FORUM 317, 329-30 (1972) [hereinafter Fujita, Japanese Regulation] (discussing a rule invoked to provide a remedy to a foreign buyer where a Japanese seller sold goods in violation of dumping regulations); Mitsuo Matsushita, The Antimonopoly Law of Japan, 11 LAW IN JAPAN: AN ANNUAL 57, 68 (1978) (noting the In re Toyobo case, in which two governments cooperated in an effort to control restrictive international business practices). Of particular interest are the comity concerns for the enforcement of U.S.
by American courts, lawyers and legal scholars about the need to respect international comity, serious questions remain whether the international respect for comity in the recognition and enforcement of foreign decisions is real.

Unfortunately, the growing need for transnational enforcement of antitrust law has spawned legal and political solutions that tend to reinforce the self-protective concerns of sovereigns rather than provide effective solutions. This is especially true for the United States and Japan. The United States has used a mixture of legal arm-stretching and political/economic coercion to address what ap-


6. See Hartford Fire Ins. Co., 1993 Trade Cas. (CCH) at 70,408-70,416; Hamabe, supra note 4, at 918 (“[T]he JFTC and many Japanese commentators deny the extraterritorial effect of the Antimonopoly Act.”).

[i]n this regard, a study group set up by the Fair Trade Commission reported in 1990
pears to be the incongruity of Japan's broad competition law\(^8\) and its puny application of that law.\(^9\) Despite regular statements to the

that the Anti-Monopoly Law should be applicable to foreign companies residing outside Japan, if they act against the Law. However, the report added that there may be cases where Japan should refrain from applying its law out of various considerations.


8. Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade translated in EHS Vol.II KA-KJ. [hereinafter AMA]. This law is commonly called the Antimonopoly Act, or the AMA.

9. See Haley, Enforcement, supra note 3, at 304 n.5 (noting that commentary on the enforcement of the AMA outside of Japan, has been nearly all critical); John O. Haley, Antitrust and Foreign Enterprise in Japan, 2 E. Asian Exec. Rep. 3-4 (July 15, 1980) (discussing the Japanese FTC and its problems of enforcing Japan’s antitrust laws); Richards, supra note 7, at 935-41 (discussing antitrust measures that the United States wanted and the Japanese promised to implement); James F. Rill, Competition Policy: A Force For Open Markets, 61 Antitrust L. J. 637, 637 (1993) (stating there is a widespread belief that there is lax enforcement of Japan’s antimonopoly act and analyzing the success of current “market-opening” initiatives, such as the SII talks); see also Morita, supra note 7, at 786-99 (discussing the history of Japan’s antimonopoly policy); Kenji Sanekata, Antitrust in Japan: Recent Trends and Their Socio-political Background, 20 U.B.C. L. Rev. 379, 381-866 (1986) (discussing Japan’s patterns of enforcement of its antimonopoly statute); JFTC’s Annual Report Outlines Enforcement Agenda, 67 Antitrust & Trade Reg.
contrary by the Japanese government, it is highly unlikely that Japan will increase significantly either its public enforcement of competition law (much less expand its virtually non-existent private enforcement) or recognize and enforce foreign decisions based on

Rep. (BNA) 713 (Dec. 15, 1994) [hereinafter JFTC's Annual Report] (providing data and statistics on the activities of the Japan Fair Trade Commission); see also supra note 7 and accompanying text (providing support for the political/economic coercion the U.S. has used to encourage effective enforcement of Japanese antimonopoly laws). But see Takeo Kosugi, Recent Developments in the Enforcement of the antimonopoly Law in Japan, Int'l Bar Ass'n, 25th Biennial Conferences (Nov. 1994) at 6 (arguing that despite the Tokyo High Court's decision in the Shiseido case, a continuing and gradual trend will be stricter enforcement of the AMA by the JFTC and the Japanese courts).

10. See Seita & Tamura, supra note 5, at 115-25 (discussing how Japan says it will publicly enforce its competition law); Fair Trade Commission Issues Rules on Enforcement of Japan's Antimonopoly Law, 8 Int'l Trade Rep. (BNA) 1077 (July 17, 1991) (explaining that the JFTC has been drawing up new guidelines in response to criticism from the U.S. on its enforcement of its antimonopoly law); Haley, Enforcement supra note 3, at 308-14 (discussing the enforcement regimes of Japan as compared to the U.S., and explaining Japan's trend toward stricter enforcement of antimonopoly rules); Lipsky, supra note 5, at 285-87 (discussing the Japanese response to date of the draft guidelines of the Structural Impediments Initiative); Morita, supra note 7, at 787-91 (discussing the Japanese governmental structure and response to business cartels); Hiroshi Oda, Introduction in JAPANESE COMMERCIAL LAW IN AN ERA OF INTERNATIONALIZATION, supra note 7, at 1, 8 (stating that Japan accepts the idea that business cartels can be potentially anticompetitive); U.S. Negotiators, supra note 5, at 623 (noting that Japanese negotiators viewed U.S. demands to prepare annual deregulation reports as "numerical targets, which Japan adamantly refuses to accept."); see also, Kosugi, supra note 9, at 1-6 (illustrating the U.S.‘s pressure on and Japan’s compliance with stricter enforcement of various aspects of the AMA); see, e.g., Japanese Agency Urges Associations to Open Doors to Foreign Competitors, 10 Int'l Trade Rep. (BNA) No. 11, at 462 (Mar. 17, 1993) (stating that the JFTC will take “appropriate action” to pry open certain industries to foreign companies); Japan’s discounts safeguarded, FIN. TIMES, Feb. 11, 1993, at 6 (describing an order from the JFTC requiring electronic companies to allow retailers to discount their products without fear of losing supply contracts).

11. See JFTC's Annual Report, supra note 9, at 713 (providing data on JFTC cases for previous years that are below U.S. expectations for tougher enforcement); Harry First, Japan's Antitrust Policy: Impact on Import Competition, in FRAGILE INTERDEPENDENCE 63, 69-70 (T. Pugel ed., 1986) (explaining less than vigorous activities by the JFTC in enforcing its Antimonopoly Act); Lipsky, supra note 5, at 287 (expressing a number of key objections by commentators on Japan's guidelines for business cartels); see also, John O. Haley, Japanese Antitrust Enforcement: Implications For United States Trade, 18 N. KEN. L. REV. 335, 335 (1991) [hereinafter Haley, Implications] (listing shortcomings of Japanese antitrust enforcement e.g., lack of staff, restricted investigatory power, and weak sanctions); Haley, Enforcement, supra note 3, at 311 (discussing the limited role the Japanese judiciary plays in enforcing antimonopoly laws). But see Richards, supra note 7, at 936 (discussing various recent improvements in Japanese antitrust enforcement); Rill, supra note 9, at 640 (discussing how much Japan’s FTC enforcement activity has expanded). Cf. Thurston, supra note 5, at 537 (giving reasons on why the policy of the JFTC will succeed or not). See generally, J. Mark Ramseyer, The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan, 94 YALE L. J. 604, 616 (1985) (discussing the framework for antitrust enforcement in Japan); Sanekata, supra note 9, at 381 (describing the JFTC’s patterns of enforcing the antimonopoly laws).

12. See First, supra note 11, at 65 (noting that a private right of action exists under the Antimonopoly Act, yet it “is contingent on there being at least an initial decision by the FTC that the act has been violated”); Ramseyer, supra note 11, at 617 (stating that “private antitrust
the exercise of extraterritorial jurisdiction by U.S. courts. However, the appropriate forum and law for the resolution of antitrust disputes between American or other parties and Japanese parties is often the law and courts of the United States. Therefore, it is important that a plaintiff be prepared for the possibility that if the defendant does not have sufficient assets in the United States to compensate a victorious plaintiff for the damages awarded, it may be necessary for the plaintiff to obtain recognition and enforcement of the U.S. decision in Japan. Indeed, both the Japanese and American governments may be significantly relieved to find a cooperative middle ground that permits recognition and enforcement in Japan of American antitrust decisions without the rancor raised by U.S. demands for greater Japanese enforcement of Japan's own laws or by the U.S. of its extraterritorial jurisdiction. Surprisingly, despite successful recognition and enforcement in Japan of U.S. cases in various areas of the law, this avenue of redress has never been tried in the area of antitrust. This method of decision, recognition and enforcement would allow successful plaintiffs in the U.S. to obtain redress through the Japanese courts while meeting the need of the Japanese courts to ensure security and respect for the Japanese legal system and Japan's law and public policy. Notwithstanding the absence of conventions or treaties between Japan and the U.S. that directly address the recognition and enforcement of for-

enforcement has been almost nonexistent); Rill, supra note 9, at 640-41 (noting that some measures have been adopted to increase the opportunities for obtaining private damage relief under the AMA); Sanekata supra note 9, at 397 (discussing how ineffective the sanctions on businesses were for violations of the antimonopoly laws); U.S. Negotiators supra note 5, at 623 (explaining the U.S. demands for establishment of a mechanism for private sector participation in deregulation); see also Younghee Jin Ottley & Bruce L. Ottley, Product Liability in Japan: An Introduction to a Developing Area of Law, 14 GA. J. INT'L & COMP. L. 29, 40 (1984) (explaining the reasons for the small amount of private litigation in Japan).

13. See Hamabe, supra note 4, at 918 n.101 (explaining why antimonopoly issues in Japan should be discussed under the Antimonopoly Act, not under U.S. antitrust laws).

14. See infra notes 19-24 and accompanying text (discussing why it is advantageous for plaintiffs to select the U.S. as the forum for potential disputes with Japanese companies). But see, infra notes 25-27 and accompanying text (discussing problems those plaintiffs may encounter when trying to get the decision recognized and enforced in Japan).

15. See Thomas S. Mackey, Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants, 5 TRANSNAT'L LAW. 131, 172 (explaining what a plaintiff needs to show in order to obtain recognition and enforcement of a U.S. decision in Japan).

16. Takao Sawaki, Recognition and Enforcement of Foreign Judgments in Japan, 23 INT'L LAW. 29, 34-35 (1989) (discussing a well known case in Japan, the Kansai-Tekko case, where a Japanese court refused to recognize and enforce a U.S. judgment against a Japanese company in a personal injury suit); see infra notes 70 & 73 and accompanying text (discussing procedural issues involved in conforming a U.S. case to meet Japanese standards).
eign antitrust decisions obtained by traditional means, the likelihood of successful recognition and enforcement of U.S. antitrust decisions obtained through the exercise of traditional jurisdictional means (i.e., non-extraterritorial) in Japan seems much stronger today than ever. This Article introduces the significant difficulties a plaintiff may encounter in attempting to obtain recognition and enforcement of a U.S. antitrust decision in Japan and the recent developments in Japan that may signal increasing opportunities for such recoveries.

I. SELECTING THE JAPANESE LEGAL SYSTEM OR OTHER FORA

A plaintiff usually has the opportunity to file a claim before the courts of the sovereign where the defendant or plaintiff is located or sometimes may use an alternative dispute mechanism (e.g. international arbitration) in lieu of such fora.\(^{17}\) A review of the application of the competition and trade laws of Japan often will promptly discourage a plaintiff from selecting a Japanese forum and Japanese law.\(^{18}\) Moreover, where the U.S. or Japanese plaintiff has the opportunity to elect the U.S. or Japanese legal system,\(^ {19}\) the appropriate

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17. The selection of international arbitration should lead to effective enforcement of arbitral decisions through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [the "New York Convention"], June 10, 1958, 21 U.S.T. 2517, 2519, 330 U.N.T.S. 38,40 (entered into force in the United States, Dec. 29, 1970) ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."). However, the potential for international arbitration enforcement in Japan is a mixed bag. The Japanese experience with the recognition and enforcement of antitrust decrees is unclear and decisions by the Japanese Commercial Arbitration Association have been asserted to be highly suspect and at the minimum no different than using the Japanese courts. John Kakinuki, *Dispute Resolution in Japan: Choosing the Right Alternative*, 9 E. ASIAN EXEC. REP. 6, 12-14 (Nov. 15, 1987).

18. See Hamabe, *supra* note 4, at 904-05, 910, 914 & 925-26 (explaining that the Japanese judicial system has generally failed to protect consumers and other individuals' interests); Ramseyer, *supra* note 11, at 631-34 (discussing general barriers to litigation in Japan); Richards, *supra* note 7, at 956 (stating the Japanese government has done little to facilitate private party actions under the Guidelines); Sanekata, *supra* note 9, at 396 (explaining why very few individuals choose to litigate civil actions in Japan); see also, Yasuhiro Fujita, *Service of American Process Upon Japanese Nationals by Registered Mail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN: AN ANNUAL 69, 70, 81 (1979) [hereinafter Fujita, *Service*] (listing the requirements for enforcing foreign judgments in Japan); Mackey, *supra* note 15, at 172-77 (explaining the criteria provided for in Article 200 of the Japanese Code of Civil Procedure which is used to determine whether to enforce a foreign court's judgment in Japan). Compare the possibly inaccurate assumption in JFTC distribution guidelines that Japanese "distributors have less bargaining power than [foreign] manufacturers." See THE EXECUTIVE OFFICE OF THE FAIR TRADE COMMISSION, THE ANTIMONOPOLY ACT GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES (July 11, 1991); Hamabe, *supra* note 4, at 919-22.

forum and law to address a particular claim can be that of the United States.  

There are several good reasons for selecting the United States as the forum and preferring its law over that of Japan. First, in Japan the traditional procedures of the civil law system reduce significantly the opportunities for discovery, while enhancing the difficulty in proving conclusively the necessary degree of proximate causation between illegality and the harm to the plaintiff. Additionally, the Japanese system reduces the likelihood for prompt resolution of issues culminating in a judicial decision and, for strong counsel advocacy before the court. Next, Japanese competition law is structured to remove the very incentives used in the United States to attract private enforcement of claims addressing competition law issues — there are no treble damages and there are limited grounds

courts' reaction to them).

20. Id. at 140 (noting that a U.S. company should attempt to sign a choice of forum clause with the Japanese company which specifies a U.S. court as the forum in the event of a dispute). It might be better to bring such claims in the United States. Of course, where it is appropriate that a Japanese forum and Japanese law be used, the plaintiff has no right to attempt to avoid that system unless it is using a mutually acceptable forum such as may be agreed to in a contract clause permitting the selection of arbitration. Id. at 139-40.

21. See Elliott J. Hahn, Japanese Business Law and the Legal System 87 (1984) (stating that there is no discovery process in Japan, specifically, no interrogatories are sent and no depositions are taken); Haley, Enforcement, supra note 3, at 312 (discussing Japan's evidentiary problems particularly with respect to discovery); Ramseyer, supra note 11, at 631 (explaining that Japanese civil procedure provides few means of effective discovery either before or during trial); see, e.g., Civil Code [C.Civ.] art. 311-314 (Japan) translated in EHS Vol. II FA-FAA; see also Mackey, supra note 15, at 149-60 (explaining extraterritorial discovery and the problems an attorney can face trying to discover evidence abroad); Sanekata, supra note 9, at 396-97 (explaining that civil actions for damages have been much less effective because courts are prone to strictly interpret the law and because it is extremely difficult to prove proximate causation between illegal cartels and price levels); Yoshio Ohara, Judicial Assistance to be Afforded by Japan for Proceedings in the United States, U.S. 23 Int'l Law. 10, 18-27 (1989) (discussing the taking of evidence in Japan for proceedings in the United States); cf. James H. Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the U.S.: Existing Rules and Procedures, 13 Int'l Law. 5, 9-17 (1979) (discussing methods for obtaining discovery and evidence abroad).

22. See Oda, Japanese Law, supra note 6, at 88 (raising the question of whether there are institutional barriers which make the Japanese reluctant to go to court); John O. Haley, The Myth of the Reluctant Litigant, 4 J. of Japanese Studies 359, 381 (1978) (stating that proceedings that continue for eight to ten years are not uncommon); see also Hahn, supra note 21, at 87-88 (discussing major differences in the litigation time frame in the United States and in Japan); Arthur Taylor von Mehren, Commentary in Law in Japan: The Legal Order in a Changing Society 193-96 (Arthur Taylor von Mehren ed., 1963) (pointing out several reasons why the elements of the American advisory system introduced in Japan did not function very well).

23. See, Hahn, supra note 21, at 12-19 (discussing how the high attorney's fees coupled with the paucity of attorneys in Japan prevent many Japanese from consulting an attorney, even if a dispute arises); Hamabe, supra note 4, at 904 (noting that there are few attorneys in Japan and that "private parties and companies rarely exercise their rights in court by using attorneys").
upon which to base a claim.\textsuperscript{24}

However, the selection of U.S. courts and law can be fraught with problems that are different but no less intimidating for plaintiffs. The structuring of a U.S. case and decision for potential recognition and enforcement in Japan may cause significant difficulties in addressing the presentation of the case for American judges and juries.\textsuperscript{25} American courts may balk at procedures that are not intended for the U.S. proceedings, but are rather intended instead to make the case more effective for recognition and enforcement in Japan. In addition, there are important issues that must be addressed in approaching the Japanese courts with the U.S. decision before recognition and enforcement shall be provided.\textsuperscript{26} Still, it is clear that more and more plaintiffs will be faced with the necessity of following this course to remedy harms suffered in the U.S. at the hands of Japanese defendants.

II. STRUCTURING AN AMERICAN CASE AND DECISION FOR RECOGNITION AND ENFORCEMENT IN JAPAN

Plaintiffs and judges in the American system rarely consider structuring their cases and decisions for effective recognition and enforcement in the Japanese system.\textsuperscript{27} This is particularly unfortunate

\begin{footnotes}
\item[24] See HAHN, supra note 21, at 132 (stating that "[o]ne reason for the lack of private antitrust suits in Japan is the absence . . . of treble damages for victorious private plaintiffs"); J. Amanda Covey, \textit{Vertical Restraints Under Japanese Law: The Antimonopoly Law Study Group Report}, \textit{14 Law in Japan: An Annual} 49, 71 (1981) (explaining that, until recently, the sole enforcement agency of antimonopoly policy has been the JFTC, by virtue of the fact that cases could reach the courts only after the Commission had ruled); Mackey, \textit{supra} note 15, at 174 ("It does appear that Japanese courts are ruling against punitive damages and treble damages as against public policy."); Ramseyer, \textit{supra} note 11, at 628-30 (describing barriers to antitrust litigation in Japan like the "pass-on" defense and high standards of proof for damages); Rill, \textit{supra} note 9, at 646 (describing barriers to private damage actions like high filing fees, lack of discovery, and no class action lawsuits); Sanekata, \textit{supra} note 9, at 396 (explaining that civil actions for damages are ineffective because personal damages are usually nominal and it is very expensive to litigate); see also Toshiaki Nakazawa & Leonard W. Weiss, \textit{The Legal Cartels of Japan}, \textit{34 Antitrust Bull.} 641-43 (1989) (discussing the guidelines and requirements a cartel has to meet in order to get JFTC approval).

\item[25] Ramseyer, \textit{supra} note 11, at 616 (explaining the large differences between U.S. and Japanese antitrust enforcement, such as sanctions).

\item[26] See Mackey \textit{supra} note 15, at 172-73 (discussing the criteria listed in article 200 of the Japanese Code of Civil Procedure which must be fulfilled before a foreign judgment will be recognized and enforced in Japan).

\item[27] Id. at 177 (discussing the problem a U.S. plaintiff had in enforcing a U.S. compensatory and punitive damage award in Japan, in the case of Bryant \textit{v. Mansei Kogyo Co.}; see also id. at 134 (noting that enforcing a foreign judgment in Japan can be very difficult and that "[b]efore filing a lawsuit, the attorney must anticipate how to enforce the judgment").
\end{footnotes}
because many potentially successful American plaintiffs may be unable to obtain recoveries from defendants who have insufficient assets in the U.S. to discharge their indebtedness. Yet, where the U.S. court has subject matter jurisdiction and obtains personal jurisdiction through service of process acceptable to both the Japanese and the United States legal systems, a finding of a violation of U.S. antitrust law by an American court that states both the findings of fact and determination of law may have the potential for enforcement in Japan. Of course, in order to increase the likelihood of enforcement by Japanese courts, the successful American plaintiff must meet both the specific criteria set forth in the Japanese Civil Procedure Code for recognition and enforcement of foreign decisions under Japanese law and the underlying special problems of competition law that would distinguish this case from a garden variety recognition and enforcement case.

A. The Standard For Recognition and Enforcement Under The Japanese Civil Procedure Code

Article 200 of the Japanese Civil Procedure Code sets forth a fairly simple and standard set of criteria by which a foreign judgment will be measured for its recognition and enforcement by the courts of Japan. Presuming that the foreign judgment to be recognized is final and conclusive, it shall be valid only upon the fulfillment of the following four criteria:

1. That the jurisdiction of the foreign court is not denied in laws,
orders or treaty;\textsuperscript{34}
2. That the defeated Japanese defendant has received service of summons or any other necessary orders to commence procedure otherwise by a public notice or has appeared without receiving service thereof;\textsuperscript{35}
3. That the judgment of a foreign court is not contrary to the public order or good morals of Japan;\textsuperscript{36}

\textsuperscript{34} See Tasuku Matsuo, Jurisdiction in Transnational Cases in Japan, 23 INT'L LAW. 6, 6-7 (1989) (discussing how a Japanese court should decide whether it has the adjudicatory authority over a transnational case); see also Sawaki, supra note 16, at 31-32 (stating it is generally accepted that the standards for the determination of direct and indirect jurisdiction should be the same). Exercise of personal jurisdiction by U.S. courts overseas may not be so easy. Peter Nadler & Ryan P. Parham Hadle, The Assertion of Personal Jurisdiction Over Japanese Corporations by New York Courts, 4 F.ACE YEARBOOK OF INT'L LAW 319, 342-57 (1992) (analyzing five cases where the New York Courts took personal jurisdiction over Japanese corporations); see also Robert W. Preston, Jurisdiction and the Japanese Defendant, 25 SANTA CLARA L. REV. 555, 579-85 (1985) (discussing the enforceability in Japan of judgments rendered in the U.S. courts).

\textsuperscript{35} See Ohara, supra note 21, at 11-18 (discussing various methods of providing service of process in Japan for proceedings initiated in the United States); see also John H. Merryman, David S. Clark & John O. Haley, The Civil Law Tradition: Europe, Latin America, and East Asia 93-96 (1994); Fujita, Service, supra note 18, at 72 (explaining that the sufficiency of service of process upon the Japanese national will be examined under Japanese concepts and standards); Sawaki, supra note 16, at 32-33 (explaining that the condition of adequate service of process is based on the requisite fairness, justice, and due process). Japan is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague Service Convention) and service is proper if it adheres to the Convention rules. For the specific rules applicable, see The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force with the U.S. on February 10, 1969, and with Japan on July 27, 1970).

\textsuperscript{36} Note that Japan's concept of public policy is broader than the United States and requires analysis of the foreign court's procedural laws, as well as substantive laws. Thus, a Japanese court may refuse to recognize and enforce a foreign court's judgment if it finds the foreign court's procedures violative of public policy. See Sawaki, supra note 16, at 33 (identifying problems with this criterion such as whether this compatibility test applies only to the substance of the foreign judgment or extends to procedure, and whether a conflict between a domestic and a foreign judgment is deemed to be against public policy within the meaning of Article 200 of CCP); see also Itsuko Mori, The Difference Between U.S. Discovery and Japanese Taking of Evidence, 23 INT'L LAW. 3, 3-4 (1989) (discussing general differences between U.S. and Japanese discovery of evidence). The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention), Mar. 18, 1970, 23 U.S.T. 2555, 2557, 847 U.N.T.S. 231, 241 (entered into force with the U.S. on October 7, 1972; has not entered into force with Japan) (allowing judicial officers of Contracting States to request "competent authority of another Contracting State" to obtain evidence according to the rules spelled out in the treaty). Although Japan has no blocking statute against extraterritorial application of U.S. antitrust law for discovery, Japanese Ministers may use administrative guidance to instruct Japanese companies not to comply with U.S. orders to produce documents located outside the U.S. by administrative guidance. This "instruction" has almost the same function as law to Japanese companies. Ohara, supra note 21, at 27-28. I believe that while this might be a hostile but arguably reasonable defensive response to an extraterritorial reach by the U.S., the application of blocking statutes to
4. That there is mutual guarantee.\textsuperscript{37}

These criteria have been examined and applied by Japanese courts to plaintiffs seeking recognition and enforcement of U.S. cases, as well as interpreted by Japanese and American scholars. For example, in \textit{Burroughs Corp. v. Taeyong Chung (a/k/a Tei Tai Ryu)}, the Tokyo District Court recognized and enforced a decision of the United States District Court for the District of Columbia.\textsuperscript{38} The Tokyo District Court found that the decision in the case the plaintiff submitted was final and conclusive and that the foreign judgment fulfilled all of the requisites of Article 200 of the Code of Civil Procedure of Japan.\textsuperscript{39} The court easily found that as for item 1 of Article 200 [jurisdiction of a foreign court] there was no law, order or treaty which intends to deny in general the competence of a foreign court as to a civil case in our country.\textsuperscript{40} Clearly, this would also be true for virtually all antitrust cases in U.S. courts.

Next, the court addressed item 2 of Article 200 [appropriate service of process or voluntary appearance].\textsuperscript{41} The court declared that since the defendant was not Japanese [“defendant defeated, being Japanese. . .”],\textsuperscript{42} when the action was brought in the U.S. court, this item was not applicable.\textsuperscript{43} Although many implications may be drawn from this finding, most significantly it implies that non-Japanese defendants will not be provided the same service of process standards as Japanese citizens. Nevertheless, the court found that whether or not the defendant was Japanese, item 2 was fulfilled because the defendant actually had received the personal service and

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\textsuperscript{37} \textit{See} Sawaki, \textit{supra} note 16, at 34 (discussing the holding of the Supreme Court of Japan, 37 Minshu 611, that there is reciprocity “where, in the country in which the foreign court rendering the judgment is situated, the same type of judgment as rendered by a Japanese court would have effect under conditions not different in import from those prescribed in article 200.”); \textit{see also} HAHN, \textit{supra} note 21, at 86 (stating that “Japanese courts on several occasions emphatically reaffirmed that American judgments satisfy the Japanese requirement of reciprocity”).


\textsuperscript{39} \textit{Id.} at 203.

\textsuperscript{40} \textit{Id.} at 201.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.} at 203.

\textsuperscript{43} \textit{Id.}
appeared in the U.S. court.\textsuperscript{44} However, vigilance in addressing item 2 can not be overstated. Strict adherence to Japanese criteria for effective service of process is essential.\textsuperscript{46} Plaintiffs must not be seduced into believing that because Japan did not object to the use of service of process by mail in the Hague Convention for the Service of Process\textsuperscript{46} that such service is acceptable for Japanese courts in either original jurisdiction or recognition and enforcement situations.\textsuperscript{47} As for item 3, the Burroughs court found that since the foreign decision involved an account for credit sale, it was not contrary to public order or good morals in Japan.\textsuperscript{48} Finally, in addressing item 4, the court set forth prior decisions in the U.S. [Hilton v. Guyot] and Japan [Decision of Daishinin, December 5, 1933 Horitsu Shimbun, No. 3670 at 16] for the principle that "it is reasonable to consider that there exists between our country [Japan] and the District of Columbia, U.S.A. the reciprocity prescribed in Article 200, Item 4 of the Civil Procedure Code of Japan."\textsuperscript{49} Therefore, although the party requesting the recognition and enforcement of a U.S. decision which is final and conclusive must meet each of these criteria, only the third one — "public policy" — should be a factor in the recognition and enforcement of a properly prepared United States antitrust case.\textsuperscript{60} Japan accepts the rule that review for recognition should not include looking behind the ele-

\textsuperscript{44} Id. at 201; see also Mackey supra note 15, at 173 (noting that under subsection 2 of article 200, if a Japanese defendant makes an appearance, the subsection is satisfied, regardless of service).

\textsuperscript{45} See Ohara supra note 21, at 13 (noting that the Japanese Central Authority "does not accept request from foreign courts if the forms for request are incomplete, documents not translated into Japanese in cases of service in the manner prescribed by Japanese law or in a special manner, or service affords insufficient time to enable the defendant to defend. The number of such unexecuted requests is considerable.").

\textsuperscript{46} The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, Article X(a), 20 U.S.T. 361, 363, 658 U.N.T.S. 163, 169 (entered into force with the United States on Feb. 10, 1969, and with Japan on July 27, 1970)("Provided the State of destination does not object, the present Convention shall not interfere with — (a) the freedom to send judicial documents by postal channels, directly to persons abroad . . .").

\textsuperscript{47} See Ohara supra note 21, at 14-16.

\textsuperscript{48} Burroughs, supra note 38, at 201-02.

\textsuperscript{49} Id. at 203.

\textsuperscript{50} Kim, supra note 36, at 1, 6. (noting that "[i]n a few exceptional cases, the application of foreign law is to be set aside if it is repugnant to fundamental principles of public order and morality of the Japanese polity"); see also Fujita, Japanese Regulation, supra note 4, at 339 ("In a proceeding for the enforcement of a foreign award or judgment, the defendant may plead a defense based on the Anti-Monopoly Law, since it constitutes a strong public policy of Japan . . .").
ments in the decision. However, because public policy is defined much more broadly in Japan than the U.S., it provides an opportunity for the Japanese courts to examine both the findings of fact and the determinations of law as they relate to the violation of the law and the damage award. In addition, other relevant code provisions support the right to exclude judicial decisions that violate public policy.

B. The Anti-Monopoly Act And Private Enforcement of Japanese Competition Law

The recognition and enforcement of a U.S. antitrust decision may very well involve an examination by the Japanese courts (for public policy purposes) of the comparability of the United States and Japanese competition law. American antitrust law appears and, for the most part, is consonant with Japanese competition law. The Japan-

51. See Sawaki, 775, supra note 16, at 30 (stating that if a decision is deemed to meet the requirements of article 200 of the Japanese Code of Civil Procedure, a court will then usually accept the decision as enforceable).

52. The role of the judge in shaping and interpreting public policy in Japan is quite substantial. For a general discussion of the history and development of theories of judicial interpretation and decision-making in Japan, see Hiroshi Itoh, How Judges Think in Japan, 18 AM. J. COMP. L. 775-804 (1970); see also Sawaki, supra note 16, at 30-31 (noting that in Japan "judgments are classified into three categories, namely, civil affairs judgments, criminal affairs judgments, and administrative affairs judgments. Among them, only the civil affairs judgments are recognized and enforced"); Jiukichi Koshikawa, Principles of Equity in the Japanese Civil Law, 11 INT'L LAW. 307, 308 (1973) (discussing the equitable principle of public welfare that "constitutes the backbone of the civil law;" private rights are subordinate to the public welfare "the people try on their rights to the extent that such exercise does not interfere with the public welfare"). E.g., in the measurement of equity, because the doctrine of "abuse of rights" (defined as an improper exercise of one's right contrary to social order) may be in stark contrast to the American concept of the vindication of individual rights, the Japanese courts may examine carefully the fairness and justice of the recognition and enforcement of a decision on Japanese law and social order generally.


54. See Ramseyer, supra note 11, at 616.

55. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, (1985) ("Moreover, while our attachment to the antitrust laws may be stronger than most, many other countries, including Japan, have similar bodies of competition law."); WILBUR FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS §16.13, at 308 (4th ed. 1991) ("The present law, [the AMA], which still has many similarities to the U.S. Sherman, Clayton, and Federal Trade Commission Acts prohibits monopoly, unfair business practices and unreasonable restraints of trade."); HIROSHI IYORI & AKINORI ÜESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 11 (1983) ("The [Antimonopoly] Act was patterned after the United States antitrust laws, previously the Sherman Act, the Clayton Act and the Federal Trade Commission Act."); First, supra note 11, at 67 ("It is time to recognize that the Antimonopoly Act is as much a part of Japan's legal system as any of the other laws which, at that time, Japan borrowed from the West."); Sanekata, supra note 9, at 380 ("Japan's basic antimonopoly statute was enacted in 1947 on the model of the antitrust regime of the United States."). However, although the AMA is based on U.S. antitrust law, the
nese legal establishment has clearly accepted and applied the under-lying values of both U.S. and European competition law theories. A review of the Anti-monopoly Act (hereafter “AMA”) will reveal whether the violation found in the U.S. decision is one that is contemplated in the AMA. Of course, although the violation need not be one found among those listed in the AMA, a consonant provision will assist in eliminating this difference as a ground for claiming it is against public policy to recognize and enforce in Japan as illegal those activities that are legal within Japan.

Japanese interpretation of the AMA differs substantially from the U.S. experience. See Hamabe, supra note 4, at 916, 922-23 (“Overall, prohibited trade practices under U.S. and Japanese law are substantially similar, even though actual commercial practices in each country may be quite different.”); Iyori, supra note 7, at 61 (“Japan’s Antimonopoly Law was enacted in 1947 under the strong influence of U.S. antitrust laws. Although these laws continue to share many fundamental similarities, considerable differences have developed over time.”); Ramseyer, supra note 11, at 604, 616 (observing that although the Japanese Antimonopoly Act prohibits most acts that are illegal under American antitrust law, American and Japanese antitrust policies sharply diverge at the point of enforcement); Seita & Tamura, supra note 5, at 122 (“Although the aims of American and Japanese antitrust laws appear similar, interpretations of similar laws can, and will, diverge in the context of different legal and business traditions.”). Professor Haley notes that although the systems have a great deal in common, the Japanese enforcement structure differs significantly from the U.S. because it is the appropriate one for that society. Haley, Enforcement, supra note 3, at 317-18. He further emphasizes that the introduction of U.S. enforcement techniques will be much more detrimental to foreign companies than Japanese companies. Id. at 322; see also John Williams III, Note, The Sun Rises Over the Pacific: The Dissolution of Statutory Barriers to the Japanese Market for U.S. Joint Ventures, 22 LAW & POL’Y IN INT’L BUS. 441, 452-57 (1991) (discussing the Antimonopoly Act’s conferral of regulatory power on the Japanese Fair Trade Commission and FTC guidelines on license provisions, noncompetition clauses, and quality control provisions); MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 5-10 (1990) (discussing generally three categories of conduct prohibited by the AMA). See generally ELEANOR HADLEY, ANTITRUST IN JAPAN (1970) (discussing the historical, particularly post-war development of antimonopoly measures in Japan).

66. See, HAHN, supra note 21, at 11 (noting that Japan’s commercial legal system was modeled primarily after the American and German systems). For example, Japan’s rules of jurisdiction found in the Japanese Code of Civil Procedure are nearly identical to those of the German Code of Civil Procedure. Id. at 81; see also M.K. Taxi Co. v. Ministry of Transport, 1143 JUDICIAL PRECEDENTS REV. 46 (Osaka Dist. Ct. Jan. 31, 1985).

57. Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, translated in EHS Vol.II KA-KJ. In addition to the AMA, the JFTC regulates unfair business practices under two supplementary laws - the Subcontract Price Delayed Payment Prevention Act and the Improper Premiums and Improper Representation Prevention Act. A discussion of these two supplementary laws is beyond the scope of this article. For an overview of these supplemental laws, see Akinori Uesugi, Supplemental Laws in 5 DOING BUSINESS IN JAPAN, Part IX, Chapter 9, §§ 9.01-9.03 (Zentaro Kitagawa, ed. 1992).

58. But cf. Fujita, Service, supra note 18, at 71 (noting that some scholars argue that “any foreign money judgment must be enforced in Japan, be it based on illegal or immoral transactions”).

59. See Fujita, Japanese Regulation, supra note 4, at 339 (discussing the Amano Pharmaceutical K.K. case); Hamabe, supra note 4, at 918 n.101. (“Therefore, the antimonopoly issues in Japan should be discussed under the AMA, not under U.S. antitrust laws.”); Kim, supra note 36,
Article 25 of the AMA permits private parties to bring a private damage claim for an antitrust violation when Japan's Fair Trade Commission (hereafter "JFTC") has issued a final order of violation of competition law against the same defendant. However, there are very few opportunities to bring Article 25 cases due to the JFTC's regular use of administrative guidance, informal dispute resolution mechanisms and negotiated settlements. Further, foreign plaintiffs

at 7 (noting that prior to the 1990 revision of the Horei, "[f]acts alleged to be tortious under foreign law must also have been wrongful under Japanese law. Even if the act in question constitutes a tort under both foreign and Japanese law, the injured person cannot institute an action" for damages or remedies not prescribed for under Japanese law).

60. Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, Art. 25 translated in EHS Vol. II KA-KJ. Any "injured party by private monopolization, unreasonable restraint of trade or unfair trade practice" may file "damage remedy suits" under Section 25 of the AMA. Akira Negishi, Recent Developments in the Japanese Antimonopoly Act, Helmut Coing and Others (ed.) Staat Und Unternehmen aus der Sicht des Rechts (1994 J.C.B. Mohr (Paul Siebeck) Tubingen), 145-59. However, the JFTC plays a significant part even in the "private" action under Section 25 because Section 25 provides strict liability, only after the JFTC's decision is final and conclusive. Id. Furthermore, "[u]nder section 84 of the Antimonopoly Act, the Toyko High Court requests the opinion of the FTC on the amount of damages caused by the violation." Id.; see also AMA, sec. 84, EHS II (KA 46).

61. "Administrative guidance" is called gyosei shido in Japan. Wolfgang Pape, Gyōsei Shido and the Antimonopoly Law, 15 LAW IN JAPAN: AN ANNUAL 12, 12 (1982). It is defined as "the means by which administrative organs exercise influence by nonauthoritative means without binding legal directives in order to guide the recipient by way of consent and cooperation towards the realization of administrative aims by positive act or omission." Id. at 14. This "administrative guidance" is prevalent in Japan. Id. at 12. For a discussion of the Antimonopoly Act and gyosei shido, see id. at 17-23; see Ramseyer, supra note 11, at 627-43 (discussing how the Japanese perceive their society as "consensual and harmonious" and that this perception perpetuates and legitimizes the bureaucratic rule in Japan which creates an institutional barrier to litigation); Sanekata, supra note 9, at 397-98 ("The JFTC has been dealing effectively with many investigations but there have been relatively few formal proceedings. There have also been few recommendations, although informal warnings against violators have been issued frequently. Such warnings have been used in order to avoid the difficulty of proving violations."); see also IYORI & UESUGI, supra note 55, at 121-28 (discussing the JFTC's administrative, civil and criminal procedures); Hamabe, supra note 4, at 917 (discussing the broad administrative and enforcement powers of the JFTC). In order for the JFTC to act where there is an alleged illegal restraint of trade, Article 2 (5) requires that the restraint be "contrary to the public interest" (not unlike the standard in Article 200 (3) of the Code of Civil Procedure). Matsushita, supra note 4, at 61. There are two theories as to the meaning of public interest: the JFTC, courts and scholars assert that public interest is "the maintenance of competition for its own sake, and that therefore, the public interest is harmed whenever free competition is substantially restrained in any market." Id. Alternatively, both MITI and the business leadership assert that the public interest is harmed when a possibly anticompetitive plan is not otherwise beneficial for the society. Id. at 62. For a description of the methods of enforcement of the JFTC and private enforcement, see id. at 72-73; see also Iyori, supra note 7, at 79-80 (noting that in this respect the U.S. and Japanese competition law is the same); Seita & Tamura, supra note 5, at 124 (explaining that the JFTC primarily uses "non-transparent methods" of administering the AMA such as unofficially notifying entities of possible violations before engaging in formal investigation); Hamabe, supra note 4, at 917 (discussing steps a prospective party entering into an international contract should take with the JFTC to
may not even have the standing to use Article 25 due to their lack of legal presence in Japan under Japanese law. There have been only seven cases, all unsuccessful, brought under Article 25 in the nearly half century since its passage. Of the seven cases, even

ensure it is not violating the Antimonopoly Act).

See Hahn, supra note 21, at 61-62 (discussing the Novo Indus., Ltd. v. JFTC case) (Judgment of Nov. 28, 1975, Supreme Court of Japan, 29 Minshu 15)). The Novo case involved a Danish company attempting to nullify a JFTC order issued to a Japanese company. Id. at 61. The Danish and the Japanese companies had entered into a technology assistance agreement that contained a provision that the Japanese company would not manufacture similar competitive products within three years after the termination of the contract. Id. at 62. After signing the contract, the JFTC ordered the Japanese company to strike out the provision because the JFTC held it violated the AMA. Id. The Danish company was not notified of the proceedings. Id. The Japanese company gladly consented to the decree, since it now could violate the provision of the contract. Id. The Danish company appealed the JFTC’s order. Id. However, the Toyko High Court dismissed the action, holding that a third party to the proceedings (the Danish company) had no standing to appeal the order against the Japanese company since it was at best only “indirectly” affected by the order. Id. It represents a “rarity” in the law where a foreign company, who was truly the defendant, could not intervene in the matter because it had no standing. Id.; accord Hamabe, supra note 4, at 918-19 (“[T]he Supreme Court denied Novo’s [the Danish party] standing, reasoning that a JFTC recommendation was binding on the Japanese respondent party who had accepted the recommendation but was not binding on any third party, including Novo, a foreign party.”); Fujita, Japanese Regulation, supra note 4, at 339-40 (discussing the Novo case); see also Lipsky, supra note 5, at 285-87 (commenting on the draft guidelines and U.S. response); Matsushita, supra note 4, at 74-75 (discussing Komatsu-Bucyrus case in which “FTC must have jurisdiction over the foreign party, which means that personal jurisdiction, discovery jurisdiction and enforcement jurisdiction requirements must be satisfied as regards such foreign party. Satisfying such requirements is often a very difficult task”). Further, none of the cases cited in JFTC guidelines involve a complaint by a foreign firm. Peter B. Edelman, Japanese Standards as Non-Tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue, 24 STAN. J. INT’L L. 389, 442 (1988) (“Significantly, none of the cases cited in the guidelines involved a complaint by a foreign firm.”). However, foreign firms in Japan may have reason to fear that a complaint to Japan’s Fair Trade Commission “JFTC” will bring retaliation from the ministries involved in the supervision of the industry or company complained about. Id.

It has been reported that between 1947, and April, 1990, there were only seven private cases brought under Article 25 of the AMA and only nine cases under Article 709 of the Civil Code. Iyori, supra note 7, at 85 (noting that although only seven cases were brought under the AMA, it “continues to be very difficult for plaintiffs to prove violations of the Antimonopoly Law and the resulting damages”). Plaintiffs won no suits (lost-12, settled-2, withdrew-1, joint cases-1). Id.; see also Ramseyer, supra note 11, at 617-27 (reporting that between 1947-1985, there were only seven private antitrust damage suits filed and that besides the two plaintiffs who settled, the others did not collect any compensation). The one victory by antitrust plaintiffs came in 1985, in the Tsuruoka Oil case, where a Japanese appellate court reversed a lower court decision that had ruled against plaintiff’s challenge to price-fixing in the oil industry. Hamabe, supra note 4, at 909-10 & nn. 42-47. However, the Japanese Supreme Court reversed and denied liability for failing to prove damages. Id. Professor Young was prescient when he declared this the exception that proves the rule. “Private enforcement, moreover, is almost unheard of, with the exception that proves the rule being a recent decision of the Sendai High Court reversing a lower-court decision that had held against plaintiffs who were seeking damages for alleged price fixing by members of the oil industry.” Michael K. Young, Comment in FRAGILE INTERDEPENDENCE, supra note 11, at 77. The court not only held the private plaintiffs to a strict evidence rule in the civil action, but declared that the JFTC’s recommendation decision does not bind the court. See Hamabe, supra
those where the plaintiff seemed likely to succeed have been lost due
to the limited discovery for antitrust plaintiffs, and the extremely
burdensome, almost insurmountable, standards of proof for harm as
well as damages under Japanese law.64

Recently, a significant avenue of potential redress for private anti-
trust injuries (Article 709 ((Tort)) of the Civil Code) that previ-
ously had been thought to be closed was opened.65 Although all nine
prior attempts to use Article 709 had been unsuccessful,66 in the

note 4, at 910. However, recommendation decisions are not a part of adjudicated practice. Id. at
912 n.65. Further, the Japanese Supreme Court has ruled that an act in violation of the AMA is
not necessarily null and void in terms of Civil Law. ODA, JAPANESE LAW, supra note 6, at 147.

64. See Iyori, supra note 7, at 85 (noting that although the JFTC announced in 1991 its inten-
tion to facilitate discovery in actions brought under the AMA, it “continues to be very difficult for
plaintiffs to prove violations of the Antimonopoly Law and the resulting damages”); Ramseyer,
supra note 11, at 617-34 (discussing three cases where private plaintiffs in antitrust suits had
difficulty proving damages); Sanekata, supra note 9, at 396-97 (noting that most civil actions
against cartels have been unsuccessful because of the difficulty in proving proximate causation
between illegal cartels and price levels during cartel periods). Compare Nijenhuis, supra note 3,
at 1013-16 (discussing how expansive discovery in America is often “percieved by foreigners as a
tool that can be used to undermine a country’s sovereignty”). However, in 1991, the JFTC pub-
lished guidelines to help private parties obtain access to JFTC investigation materials to prove
facts. Hamabe, supra note 4, at 910. In addition, upon the court’s request, the JFTC has offered
to assist in providing documentation of violations and the amounts of damages. Id.; see also Peter
B. Maretz, Antimonopoly Enforcement, 12 EAST ASIAN EXEC. RPTS. 8, 8 (1990) (noting that in
issuing the guidelines, the JFTC, “intended to aid plaintiffs in overcoming the extremely high
burden of proof placed on them in a private enforcement action”).

65. “A person who violates intentionally or negligently the right of another is bound to make
compensation for damages arising therefrom.” C. Civ. art. 709 (Japan), translated in in EHS Vol.
II FA-FAA; see also Ramseyer, supra note 11, at 623 n.108 (quoting same statute). Such an
antitrust theory for sec. 709 was suggested by the Japanese Supreme Court in 1972. See id. at
623 n.109 (citing Judgment of Nov. 16, 1972, (Ebisu Shokuhin Kigyo Kumiai v. Kosei Torihiki
linkai), Japan Sup. Ct., 26 Sai-han Minshu 1573, 1576, as the first case where the Supreme
Court suggested this theory). However, it was not until 1981, in the Sato v. Sekiyu Renmei case
that plaintiffs relied on the tort theory of Article 709. Id. at 623; see also Mitsuo Matsushita,
Court Proceedings in 5 DOING BUSINESS IN JAPAN, Part IX, Chapter 11, 6, § 11.03 (Zentaro
Kitagawa, ed., 1992),("Although there was some controversy as to whether a person who has been
injured by conduct which may constitute a violation of the Antimonopoly Act may bring an Arti-
cle 709 tort claim, recent decisions support such a claim."); Covey, supra note 24, at 78 (discuss-
ing how a district court in the Tsuruoka Oil Cartel case held that consumers had a direct cause of
action under article 709 for damages resulting from the AMA; however the appellate court re-
versed, holding that the plaintiffs failed to prove proximate cause). In early discussions about
private action for antitrust damages under article 709, scholars thought this opportunity was
rather hollow. Fujita, Japanese Regulation, supra note 4, at 344-45 ("The fact that the FTC has
decided not to take any action against the alleged violator is very likely to be presumed by a civil
court to be prima facie evidence that the allegation is not well-grounded. . . . the court’s assump-
tion that one can go to a civil court and get damages is rather empty.").

66. See Iyori, supra note 7, at 85 (noting that only nine cases have been filed under Article 709
and none have been successful). But cf. Recent legal actions by private parties in Japan indicate a
slight increase in private antitrust enforcement activities in non-financial recovery cases (i.e.
avoiding terminations of current business relations and cut-off of supplies). See Kosugi, supra note
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Toshiba Elevator case the Osaka High Court permitted a private plaintiff to recover for damages in a trade injury situation. This award was made based on a tying arrangement that had been the subject of a prior proceeding under the AMA, in which the JFTC had merely issued a warning to Toshiba regarding its policies of supplying parts for its elevators. Although the award was small, this case acknowledged for the first time that private parties may sue privately for anticompetitive harm rather than use Article 25 of the AMA. Most significantly, Article 709 can serve as a valuable support for a U.S. antitrust decision that has been brought to Japan for recognition and enforcement.

III. Conforming The U.S. Case To Meet Japanese Standards

There are several issues that an attorney must face in preparing for the possibility that a U.S. antitrust decision may need recognition and enforcement in Japan. Although these issues all revolve around the concept of public policy as stated in Article 200 above, each issue needs to be addressed prior to the initiation of the U.S.
proceeding.

A. Procedural Issues

As noted above, it is important that the U.S. plaintiff use the personal jurisdiction and service of process standards set out by Article 200 of the Japanese Code of Civil Procedure as interpreted by the Japanese courts. This requires avoiding the temptation to use American methods of service of process that are unacceptable practices in Japan. This will prevent the unsuccessful defendant from using technical procedure issues to delay the addressing of the major policy issues by the court. Although default judgments may be enforced, naturally Japanese courts are quite suspicious about default cases and will be particularly concerned about jurisdictional and service issues. Most importantly, the possibility of "double action" must be faced. Plaintiffs must be prepared to submit to the Japanese courts a large sum of money that will be escrowed for defendants if the plaintiff should fail to prove its case. This sum may be used to compensate the defendant for court costs.

73. See supra notes 34-35 and accompanying text & supra notes 39-47 and accompanying text (discussing the jurisdiction and service of process requirements and how the Japanese courts have interpreted them).

74. See supra note 35 (discussing what types of service are acceptable in Japan). For example, transient jurisdiction, service by mail, or service upon an American subsidiary of a Japanese corporation may be unacceptable methods of service in Japan. See generally Fujita, Service supra note 18, at 69-81 (discussing the Japanese concepts and rules for service of process).

75. But see Fujita, Service, supra note 18, at 69 (noting that default judgments awarded in the U.S. may not be enforced in Japan if the Japanese courts find lack of service according to Japanese law).

77. Double action occurs when a foreign plaintiff initiates a claim in a country outside Japan, and before the judgment is rendered, the Japanese defendant (now a plaintiff) brings suit in Japan, seeking a judicial declaration as to the non-existence of facts to support the claim that is the basis of the foreign action. Sawaki, supra note 16, at 34-35 (discussing the Kansai-Tekko case as a perfect example of "double action"). Once the Japanese court has concluded that there is no liability and enters a judgment for the Japanese party, the presentation of the subsequently decided foreign suit for recognition and enforcement must be rejected on public policy grounds (e.g. res judicata). Id. at 35 (noting that double action of this kind works "as a tool to prevent possible enforcement of foreign judgments"). Although this practice is condemned by many parts of the legal community in Japan, American attorneys must be vigilant to insure that their clients are not caught in this trap for the unwary. See also Fujita, Service, supra note 18, at 71 n.6 & 81 (discussing the Kansai v. Tekko case as a perfect example of "double action" and asserting that the simplest way to sue the Japanese defendant is to just bring suit in Japan).

78. CODE CIVIL PROCEDURE [C. CIV. PRO.] art. 89 (translated in EHS Vol. II LA) (Japan); see C. CIV. PRO. art. 107-17 (translated in EHS Vol. II LA) (Japan).

B. Public Policy Issues

The division of public and private law in both the American and Japanese legal systems will form a core element that must be addressed prior to and during the U.S. antitrust case as well as in preparation for the recognition and enforcement part of the Japanese case. First, Japanese law, much like that of many civil law countries, divides public and private law at a much different place than the law of the United States.80 Competition law is generally cast as a public law issue that leaves the predominant part of enforcement to the government.81 Therefore, in addition to showing the same philosophical grounding in the competition law of both the United States and Japan, and the consonance of the two countries' antitrust law statutes and codes, several factors must be addressed to overcome the Japanese predisposition to deny the power of a private party to act in competition law cases.82 Further, this public/

80. See Fujita, Japanese Regulation, supra note 4, at 318 (noting that government regulations carry severe public law sanctions, while Japanese judges are reluctant to give effect to these same regulations in the private law domain); Ottley & Ottley, supra note 12, at 40 (noting that the Japanese legal system does not encourage private persons to become involved in law enforcement, but rather views intervention in areas that require protection of the public as the exclusive function of the government); Ramseyer, supra note 11, at 605-06 (noting that the Japanese preference for public enforcement over private litigation is in sharp contrast to the U.S.); Report of the Consultant, supra note 4, at 362-63 & 368 (describing the debate by American scholars about whether private or public enforcement of antitrust law is more appropriate and outlining the international implications of private treble damage actions in the United States); see also, Haley, Enforcement, supra note 3, at 311 (noting that in civil law countries, like Japan, administrative enforcement agencies are responsible for enforcing administrative orders and decisions, while in the U.S., the judiciary is more involved in enforcement). See generally JOHN OWEN HALEY, AUTHORITY WITHOUT POWER 19-24 (1991) (providing an explanation of Japan's evolution into a "public law regime" as compared to the West's focus on private law and a judicial process of enforcement).

81. See Ramseyer, supra note 11, at 617-18 (noting, for example, that a plaintiff may sue under the Japanese Antimonopoly Act only after the Fair Trade Commission has issued a final administrative order against the defendant); Ottley & Ottley, supra note 12, at 35-36 (citing reasons for the reluctance of Japanese to resort to the courts to resolve disputes); see also Hamabe, supra note 4, at 910-11 (noting that private antitrust actions in Japan are very limited and will only "supplement antimonopoly policy"); Fujita, Japanese Regulation, supra note 4, at 338-39 (noting that undue restraints of trade are closely scrutinized by the JFTC); Report of the Consultant, supra note 4, at 362-63 (describing the debate among American scholars over whether private or public enforcement of antitrust violations is most appropriate).

82. See HAHN, supra note 21, at 132-33 (stating that Japanese prohibition against class action damage suits, the limited methods of discovery, the high standards of proof of violations and damages, and the high costs of litigation are "all factors that suggest that private suits under the civil code will, . . . not be an active force in Japanese antitrust law enforcement in the future"); see also Hamabe, supra note 4, at 910-11 (noting that civil actions in antitrust actions "will be more widely used only after the adoption of more effective methods to utilize civil lawsuits or the emergence of more civil precedents in the Japanese litigation system"); Ottley & Ottley, supra
private dichotomy will be a major issue in the examination of what is the appropriate standard for the assessment of damages.\textsuperscript{83}

In German and French law, unlike American law, the ubiquitous role of the government in vast areas of business reflects the historical significance of public law in these societies.\textsuperscript{84} In particular, un-

\footnotesize
83. But cf. Ramseyer, supra note 11, at 611 (noting that Japanese bureaucrats may have failed to serve their own public by underenforcement). An interesting alternative in some cases to the potential private U.S. antitrust litigation might be the use of an international arbitration tribunal. For a discussion of this alternative, see Jill A. Pietrowski, Comment, \textit{Enforcing International Commercial Arbitration Agreements—Post- Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.}, 36 \textit{AMER. U. L. REV.} 57 (1986). Japanese courts have enforced foreign arbitration awards and judgments even when violative of the former Foreign Exchange Control Law. Fujita, \textit{Japanese Regulations}, supra note 4, at 325. “But Japanese courts have held that the prohibitions and restrictions in the Control Law and related orders do not embody a strong public policy.” \textit{Id.} Clearly, the U.S. accepted such jurisdiction as an independent forum for the resolution of the dispute so long as U.S. antitrust law is applied, if appropriate. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (upholding arbitration clause in an argument embodying an international commercial transaction even where clause would have been invalid in a domestic antitrust context). Interestingly, the court in \textit{Mitsubishi} assumed that an international tribunal would award the U.S. treble damages remedy for violation of its antitrust law, since the court indicated that arbitrators must decide a dispute “in accord with the national law giving rise to the claim.” \textit{Id.} at 637. However, “most arbitral tribunals address contractual issues and tend not to award damages in excess of reasonable commercial compensation for actual, unavoidable injury.” Pietrowski, supra, at 87-88. But cf. Mastrobuono v. Shearson Lehman Hutton, 63 U.S.L.W. 4195 (Mar. 6, 1995) (finding that punitive damages may be applied in arbitration). If arbitration awards do provide for treble damages, Japanese courts may be forced to recognize and enforce the foreign arbitral decree pursuant to its obligation under the New York Convention. \textit{Id.} at 69 (noting that the Convention’s goal is to encourage recognition and enforcement of foreign arbitral awards). Of course, there is a “public policy” clause in the Convention which may be the basis of denial of both the decision and award or either. See \textit{id.} (noting that a court may refuse enforcement if an award would be contrary to the public policy of the forum state); see also \textit{RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS} §488, Reporters’ Notes, Note 2 (ALI, 1986) (noting that the public policy defense has been narrowly construed by courts in the United States). The Japanese business community, however, still rarely resorts to arbitration. See Christine Lecuyer-Thieffry & Patrick Thieffry, \textit{Negotiating Settlement of Disputes Provisions In International Business Contracts: Recent Developments In Arbitration and Other Processes}, 45 \textit{BUS. LAW.} 577, 621 (1990) (noting that recognition and enforcement of arbitration awards may be subject to the policy of the country where enforcement is sought).

84. See Ottley & Ottley, supra note 12, at 40 & n.63 (citing the Japanese Antimonopoly Law as an example of the civil law preference for government regulation over private involvement). For a discussion of the relationship between tort and criminal law in civil law jurisdictions, see JA
less a matter is totally private, governmental action protects these societies against most anticompetitive and other improper trade behavior.\textsuperscript{85} Although the Japanese AMA bears a marked resemblance to American antitrust law, because most modern Japanese law is based on German and other civil law, it is not surprising that Japan follows the civil law model as to the role of public law.\textsuperscript{86} Therefore, under Japanese law, only the government can use punitive damages and criminal sanctions for anticompetitive behavior.\textsuperscript{87} The Japanese law that provides for tort action to recover for individual harm suffered due to unfair trade practice activities appears to provide only exactly provable damages.\textsuperscript{88} Conversely, the American system at-

\textbf{Jolowicz, Procedural Questions in XI International Encyclopedia of Comparative Law, Torts, Part II, Chapter XIII, 3-15 (Andre Tunc, ed. 1986); see also Fujita, Japanese Regulation, supra note 4, at 319 (noting the traditional importance of public law in civil law countries).}

\textsuperscript{85} For a discussion of the government's role in antitrust enforcement in Japan, see supra note 81 and accompanying text; see also Nijenhuis, supra note 3, at 1017 (noting that except for the United States, "control of the economy through enforcement of antitrust law . . . generally rests in the hands of government agencies"). However, "[s]ince the AMA has no substantial evidence provisions, even final JFTC adjudicated decisions do not bind courts in civil lawsuits." Hamabe, supra note 4, at 909; Fujita, Japanese Regulations, supra note 4, at 338-45 (discussing how a private plaintiff is virtually left without a remedy for an AMA violation, unless the JFTC decides to get involved); see also John O. Haley, Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law, 59 Wash. L. Rev. 471, 473 (1984) [hereinafter Haley, Antitrust Sanctions] (discussing criminal and administrative sanctions imposed by the Japanese and German governments for improper, anticompetitive trade behavior).

\textsuperscript{86} Limits on law enforcement powers of the JFTC are to some extent shared by all civil law systems. See Haley, Enforcement, supra note 3, at 312 (noting that the "investigatory powers of U.S. enforcement authorities are considerably broader and more coercive than any of their counterparts in Japan or Europe"); see also Restatement (Third) of the Foreign Relations Law of the United States § 488, Reporters' Notes, Note 1 (American Law Institute, 1986) (noting that laws of most states consider "public law issues such as antitrust . . ." to be outside the scope of arbitration); Haley, Antitrust Sanctions, supra note 85, at 472 (noting that German law was the principal model for Japan's legal reforms during the late nineteenth and early twentieth centuries).

\textsuperscript{87} See Fujita, Japanese Regulations, supra note 4, at 343 (noting that in an action brought pursuant to Article 25 of the AMA, the court must ask the opinion of the FTC in determining the amount of damages); Ramseyer, supra note 11, at 616 (citing examples of the civil and criminal sanctions the government may impose for violations of the AMA); see also Young, supra note 63, at 77 (noting that private enforcement of antitrust violations in Japan rarely, if ever, occurs).

\textsuperscript{88} The topic of remedies, damages and judicial relief, in general, receives scant attention in the Code of Civil Procedure, nor is there much positive law. John H. Merryman, David S. Clark, John O. Haley, The Civil Law Tradition: Europe, Latin America, and East Asia 1056 (1994) (citing Haley & Henderson, Law and the Legal Process in Japan 814-16, 897-902 (1988)); see Hamabe, supra note 4, at 909 (discussing how the Japanese Supreme Court denied the private plaintiffs' claim for damages by finding that the plaintiffs "failed to prove the defendants' price cartel caused the increase in price"); Mackey, supra note 15, at 176-77 (noting that although "very few remedies are unavailable in Japan in transnational cases," certain damages and injunctions may not be available). Getting a remedy is particularly difficult considering the standards of discovery and proof in Japanese cases. See Sanekata, supra note 9, at 396 (noting
tempts to reduce government activity in the area of competition law to address primarily blatant illegal behavior that effects the society as a whole. American law recognizes that the vast majority of cases of anticompetitive behavior relate to matters between private parties. In keeping with the American view that the government should keep out of private matters and let the private marketplace resolve its own disputes, the law attempts to encourage the private enforcement of antitrust law through the provision of treble damages. While the American treble damage system may give the appearance of having private parties act as "private attorneys general" serving in a quasi-governmental capacity, throughout the history of antitrust enforcement Congress, the courts, and commentators have observed that this is not the primary purpose for the awarding of treble damages. Rather, it has been clearly stated that the purpose

the systemic disincentives to private litigation); see supra note 64 and accompanying text (discussing the limited discovery available in Japan and the high standards of proof in private actions). Japanese law does not provide for class action damage suits. Hahn, supra note 21, at 132-33; see also Ramseyer, supra note 11, at 631 (noting that the unavailability of class actions renders victims unable to raise the damage pool high enough to make litigation financially worthwhile). 89. Ramseyer, supra note 11, at 613 (noting that while the government can sue for criminal sanctions, private damage actions have become the primary deterrent to anticompetitive behavior in the American system).

90. Nijenhuis, supra note 3, at 1018 (noting that the number of private antitrust suits far exceeds the number brought by the government).

91. See id. at 1019 ("The treble damages remedy is the centerpiece of the private antitrust remedy."). Despite U.S. internal disputes as to the value and costs of the private treble damage action, it is a clear expression of the significance of the private action self-help philosophy in the U.S. Id. at 1019-22.

92. The purpose and effect of treble damages has been the subject of exhaustive debate since the legislative discussions during the formation of the Sherman Act in 1890. Extensive debates have raged over the compensatory versus punitive role of treble damages. The primary nature of treble damages as compensation is revealed in legislative history and many legal and economic analyses. For a collection of cases dealing with the measure and elements of damages for antitrust violations, see John P. Ludington, Measure and Elements of Damages Under 15 U.S.C.S. § 15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages - Injury, 16 ALR Fed. 14 (1973). For a glimpse of the debates and legislative history, see STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY, REPORT OF THE Comm. ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, 98th Cong., 2d Sess. (Feb. 1984) at 7-10; see also, Charles A. Sullivan, Breaking Up The Treble Play: Attacks On The Private Treble Damage Antitrust Action, 14 SETON HALL L. REV. 17, 56 (1983) (arguing that treble damages are not punitive); Lawrence Vold, Are Threefold Damages Under the Antitrust Act Penal or Compensatory, 28 Ky. L. J. 117, 119 (1939-40) (arguing that in the context of antitrust litigation, treble damages should be seen as compensatory, not punitive); William J. Nissen, Comment, Antitrust and Arbitration in International Commerce, 17 HARV. INT'L L. J. 110, 116 (1976) (viewing treble damages as a deterrent that discourages antitrust violations); see also Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, at 635) ("Notwithstanding its important incidental policing function, the treble-damages cause of action...")
for the treble damage provision is to encourage private parties to act

enable an injured competitor to gain compensation for that injury."); For examples of holdings that treble damages are remedial, not a penalty or forfeiture, see Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 485-86 (1977) (noting that while treble damages play an important role in penalizing wrongdoers and deterring wrongdoers, treble damages are essentially a remedial measure) cited with approval in Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 635-36 (1985); John Lenore & Co., v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977)); Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 651 (4th Cir. 1942) (noting that since antitrust treble damages survive the death of a defendant, they are more likely to be viewed as compensatory and less as a deterrent); Martin Oil Serv., Inc. v. Koch Refining Co., 718 F. Supp. 1334, 1361 (N.D. Ill. 1989); Bonjorno v. Kaiser Aluminum & Chem. Corp., 74-122. 1988 U.S. Dist. LEXIS 3208 at *32-33 (E.D. Pa. DATE 1988) (noting that interest on treble damages was permitted despite the argument that part of the purpose for treble damages was punitive) citing for approval American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) (holding that the primary purpose of treble damages under 15 U.S.C. §15 is to encourage private parties to enforce the antitrust laws and undertake difficult litigation); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 509 (D. Colo. 1952). However, there have been numerous voices asserting that the U.S. public policy as reflected in the setting of treble damages is compensatory, deterrent and punitive. See STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY supra, note 92, at 1 [N.B. This report contains an extensive collection of research projects, articles and comments reflecting the views on this topic by leading scholars, government representatives and practitioners. The Congressional subcommittee even considered an offer to limit recoveries to actual damages when trebling would jeopardize plaintiff's rights to collect or retain a judgment under applicable foreign law. Id. at 44; see, e.g., Report of Consultant, supra note 4, at 356 (noting that throughout its history, "the treble damage suit has been perceived as a vehicle for punishing a violator, deterring misconduct and compensating the victim"). Although the author declares that in a private system treble damages are an effective force for compensation and he is troubled by the international implications of treble damages, he fears the abandonment of U.S. consumers and competitors in a rush to satisfy foreign interests. See also Cira, supra note 2, at 264, 267 (noting that the availability of treble damages in international antitrust suits makes intergovernmental resolution more difficult). Others see treble damages as a troubling domestic problem. See Ramseyer, supra note 11, at 605-15 (noting that the American system of treble damages has proven inappropriate in many cases); see also Clare Deffense, Comment, A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damage Actions, 72 CA. L REV. 437, 456 (1984) (arguing that the availability of treble damages exposes defendants to excessive liability, which "undermines both the efficiency and effectiveness of the private antitrust enforcement scheme"); Haley, Enforcement, supra note 3, at 318 n.24 (citing to other authorities who have criticized the availability of treble damages in private antitrust actions). Interestingly, Haley notes that despite the availability of treble damage actions in the U.S. and the absence of such damages in Japan, the collected data does not show a greater proportion of damage actions involving foreign (especially Japanese) defendants in U.S. suits. Id. at 319. There has been some debate as to whether the wording of the U.S. antitrust statutes allow the awarding of untrebled damages or whether there must be legislation to permit such a variance. See Sullivan, supra note 92, at 54-55; see also THE STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY, supra, note 92, at 44 (considering limiting recovery to actual damages when trebling would jeopardize plaintiff's rights to collect or retain a judgment under applicable foreign laws). But cf. Atlantic Purchasers, Inc. v. Aircraft Sales, 705 F.2d 712, 720 (4th Cir. 1983) (sitting in a diversity action applying the North Carolina Unfair Trade Practices Act of 1969, the court held that where the complaint gave the defendant no warning that successful prosecution of the claim could result in an award of treble damages, the treble damage award was properly denied); Inland Steel Prods. Co. v. MPH Mfg. Corp., 25 F.R.D. 238, 247 (N.D. Ill. 1959) (holding that the "prayer for treble damages has been waived," and that injunctive relief was the appropriate remedy for the antitrust claim).
on their own behalf and be sure that they will receive appropriate compensation for not only that which can be specifically proven, but with the understanding that it is nearly impossible to establish complete actual damages in an antitrust proceeding and to ensure that the injured party is made whole. If there must be a space for error, wrongdoers should not benefit from their misdeeds.

Therefore, although the parallel competition laws should resolve any arguments as to the comparability of the substantive coverage of the laws of both countries, the matter of treble damages will raise a major public policy issue for Japanese courts. Unfortunately, Japanese writers (and by implication most likely Japanese courts) interpret treble damages as punitive and therefore see these awards as matters for only government enforcement. The inability of the Japanese courts to understand the distinction between statutorily required treble damages and punitive damages (measured by the intentional nature of the defendant's "bad" acts) can have an extremely negative effect on a U.S. antitrust case brought to Japan for recognition and enforcement.

93. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931) (upholding award of treble damages where exact amount of damages could not be ascertained); Lehman v. Gulf Oil Corp., 500 F.2d 659, 667 & 667 n.36 (5th Cir. 1974) (noting that treble damages serve a compensatory function in antitrust cases because the jury's verdict may not reflect the numerous intangible economic harms resulting from an antitrust violation), cert. denied, 420 U.S. 929 (1975); see also supra note 92 (lending support for the proposition that treble damages are meant to be compensatory, not punitive in nature).

94. See Nijenhuis, supra note 3, at 1021 (noting that from the foreign perspective, private individuals should not be permitted to threaten penal sanctions). However, a treble damages provision for Japanese antitrust law was considered in the Kime Draft for the adoption of the 1947 Antimonopoly Law. Iyori, supra note 7, at 66. Indeed, the interpretation of Japanese writers contradicts two practices in Japan. First, Japan does permit double damage recoveries under the Labor Standards Act (Law No. 49, 1947). Second, private recoveries for emotional distress ["ishariyo"] are permitted. In fact, recovery for ishariyo is an accepted practice in Japan and would be particularly appropriate for what we call "pain and suffering" or to compensate for immeasurable damages (such as is used in treble damage actions) in addition to actual provable damages. See Yamanouchi & Cohen, supra note 79, at 451-53. Although the amount recovered would be substantially smaller than treble damages, the method for this type of recovery through ishariyo already exists and is common in Japan. See infra notes 101-03 (detailing an interview with Professor Nomura).

95. A prominent American legal scholar on Japan has observed "Japanese and European resistance can be anticipated to any attempts to equalize such costs [U.S. costs of private antitrust enforcement] by seeking to impose similar burdens through reforms designed to introduce American-styled enforcement measures, such as treble damage actions." Haley, Enforcement, supra note 3, at 323-24. However, placing economic burdens on Japanese society is not the reason to obtain enforcement of U.S. cases awarding treble damage antitrust decisions. There is a quite valid desire to obtain appropriate compensation as has been perceived by the U.S. courts and law. See, e.g., Sinclair Oil Corp. v. Atlantic Richfield Co., 720 F. Supp. 894, 902-04 (D. Utah 1989) (distinguishing the Economic Stabilization Act's ("ESA") punitive nature as against antitrust
the only case where there has been an attempt to obtain recognition and enforcement in Japan of an American award of punitive damages,\textsuperscript{97} the Tokyo District Court, after a discussion of the public policy against the recovery of punitive damages in Japan, accepted the possibility of recognition and enforcement of a U.S. punitive damage award, but found the facts insufficient in this case to order the recovery of punitive damages.\textsuperscript{98} However, on appeal to the Tokyo High Court, the Court opined that the district court was wrong and that Article 200 (3) prevented the recognition of private punitive damages as violative of public policy in the Japanese legal system because the concept of punitive damages implies criminal behavior and punishment for criminal behavior that is reserved solely to public law.\textsuperscript{99}

Although scholars in Japan have debated these decisions quite actively, significantly their commentaries fail to address the dichotomy between punitive damages and the broad compensatory damage theories that relate to treble damage practices in American antitrust law.\textsuperscript{100} Therefore, in addition to the presentation of jurisdictional sufficiency, it is essential for the foreign plaintiff to provide the findings of fact by the trier of fact that establish the determination of damages, as well as the final damage decree and award. Following

\begin{itemize}
\item treble damages). The court noted these criteria: (1) under ESA treble damages are awarded only if the act was intentional unlike an antitrust compulsory award regardless of mental state of the defendant; and, (2) the ESA grants the court discretion as to the amount of the damages, "presumably being better able to match the 'punishment' with the evilness of the violation" and, (3) "the antitrust damages are required to fully compensate the antitrust plaintiff because proving actual damages resulting from price-fixing is extremely difficult." \textit{Id.} at 903 (citing Martin Oil Service, Inc. v. Koch Rehnig Co., 718 F. Supp. 1334, 1361-63 (N.D. Ill. 1989)); STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY, supra note 92, at 2; see supra note 92 (reviewing the arguments asserted about whether to characterize treble damages as punitive or compensatory). In the U.S., treble damage actions have been likened to: "tort for trespass on the case", \textit{Wolf Sales Co.}, 105 F. Supp. at 508; property rights, \textit{Barnes Coal Corp.}, 128 F.2d at 649; and early forms of trade law in common law England. \textit{Id.}
\item 96. Santa Clara Super. Ct. [Dkt. No.] [hereafter referred to by the name for the plaintiff used in the Japanese case "Northcon"] (a non-antitrust business and contract law case); see also An Oregon Partnership, Northcon I v. Yoshitaka Katayama; Mansei Kogyo K.K., Judicial Decisions (Private International Law), 35 THE JAPANESE ANNUAL OF INT'L LAW, 177 [hereafter "Northcon"].
\item 97. \textit{See} Mackey, supra note 16, at 174 (noting that besides Bryant, "there are no other Japanese cases that are on record on the issue of punitive or treble damages"); see also, Northcon, supra note 96, at 181-83.
\item 98. \textit{Id.}
\item 99. Translation of the Tokyo High Court decision.
\item 100. See Translations of articles by Professors Dougauchi, Watanabe, Kono, Ebisawa and interviews with Professors Watanabe and Nakano.
\end{itemize}
this, it would be incumbent upon a U.S. plaintiff to make one of three arguments in a claim for recognition and enforcement in Japan of damages awarded by an American court in an antitrust case: 1 — the plaintiff will accept an award of specific actual proven damages as set forth in the U.S. decree (whether or not the original complaint and award included a treble damage provision); 2 — the plaintiff was awarded treble damages as compensation (not as punishment of the defendant) and the case for this distinction can be supported through a substantial brief to the Japanese courts explaining how this comports with Japanese law; or, 3 — the plaintiff resubstantiates the damages. Although this last method seems to violate the standard that comity expects recognition without looking behind the decision of the deciding foreign court, arguments have been espoused in Japan that there is a division between the recognition of the decision in the foreign case and the awarding of damages. The implication of this process is that the respect for the legal doctrines of the foreign sovereign are maintained yet the appropriate compensation must be measured as is appropriate within each society. Finally, in keeping with Japanese law, a successful plaintiff should be able to recover court costs and possibly reasonable attorneys fees. Of course, the plaintiff must be prepared to provide substantiation for these expenses. Interest may also be recoverable.

CONCLUSION

Japanese and American courts and governments are searching for ways to resolve the disparity between the two countries as to the role and application of competition law in their societies. The recent United States Supreme Court approval of extraterritorial jurisdiction in U.S. antitrust cases has heightened the need for resolution of this conflict with a special focus on comity. Whatever the Japanese government's intentions by its recent expansion of its competition laws for both public and private use, the JFTC concession of its inability to expand significantly its antitrust enforcement makes the benefits of these laws largely illusory. Furthermore, although the

101. This concept is accepted in Japan. See Fujita, Service, supra note 18, at 71 (stating that "a Japanese court is not allowed to look behind the face of the decree and inquire into the nature of the underlying transaction of the original claim").
102. Interview with Professor Watanabe.
103. Id.
Toshiba Elevator case indicates the long-range potential for private enforcement of competition law in Japan, and may have opened a path for comity through the recognition and enforcement of foreign competition law cases, that path is still littered with barriers due to the diversity of the Japanese and American legal and governmental systems. Therefore, the potential for recognition and enforcement in Japan of the antitrust decisions of the American courts requires that plaintiffs elect to proceed in a very deliberate fashion recognizing the differences in the systems and guiding their cases so that they will fit the structure and values of the Japanese system. It is not unreasonable for the Japanese government and its courts to expect that its law and procedures will be followed. However, recognition and enforcement does not require equality or parallel laws. Instead, a good faith effort by the U.S. courts to meet the requirements of Japanese law should not be denied under arbitrary and broad readings of public policy under Japanese law. Hopefully, the recognition and enforcement of U.S. antitrust decisions obtained through traditional procedural means will bring greater harmony and respect between our two systems and avoid the distrust and acrimony that currently prevails.