Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis

By
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The success of the United States in curbing anticompetitive behavior in its domestic markets led South Korea and Japan to adopt antitrust laws similar to those of the United States. This article compares and contrasts the antitrust laws and enforcement regimes of the United States, South Korea, and Japan in the context of each country's national economic policies. The author first examines how consistent enforcement of antitrust laws in the United States has enabled the government to achieve its goals of breaking existing monopolies and preventing their creation. The author then examines how South Korea's consistently lax approach to enforcement of its antitrust laws has facilitated the growth of Korean industries and increased their international competitiveness. Lastly, the author examines how the inadequacy of the measures and sanctions available to Japanese agencies acts as a major impediment to achieving the goals of Japan's antitrust laws.

I. INTRODUCTION

The history of American antitrust regulation dates back to the year 1890 and the enactment of the Sherman Act. While the government's approach to antitrust issues has changed depending on the political beliefs of the president or Congress, antitrust regulations have nevertheless been enforced with rigor. The success of antitrust regulation in the United States is a compelling reason why industrial countries adopted legislation dealing with monopolies and restrictive business agreements. South Korea and Japan have modeled much of their antitrust laws after those of the United States. Therefore, one would expect these countries to enforce their laws as rigorously as the United States does.

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The success, however, of any government in achieving its antitrust objectives depends on two equally important factors. The first is whether the measures set forth by the government to regulate trade and business activities are sufficient to achieve those goals. The second and equally important factor is the manner in which antitrust regulations are enforced by the responsible government agencies. Additionally, other factors such as domestic and international policies and variable economic trends may help or hinder the government in achieving its objectives.

This article will focus on monopoly and merger regulations in the United States in comparison to those of South Korea and Japan. The article will first examine how the United States addresses its goals, which are more domestic in scope, through strict enforcement of a complete set of antitrust laws. This article will then demonstrate how Japan and South Korea achieve their goals of domestic and international growth through a more relaxed set of laws and care-free enforcement.

Accordingly, Part II examines the treatment of monopolization and mergers in the United States. Parts III and IV analyze the antitrust laws of South Korea and Japan. Lastly, Part V compares anti-monopoly and anti-merger laws and enforcement in the three countries.

II. THE UNITED STATES

Section 2 of the Sherman Act and the broad language of the Federal Trade Commission Act (FTC Act) regulate monopolization in the United States. Section 7 of the Clayton Act regulates mergers and acquisitions, but the language of the FTC Act also regulates such transactions. The following is a brief overview of these statutes and their role in U.S. antitrust regulation.

A. Monopolization

1. Sherman Act Section 2

Section 2 of the Sherman Act of 1890 provides in pertinent part that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ... ²

Section 2 prohibits anyone who possesses monopolistic power in a market from controlling prices or creating barriers in order to prevent others from entering the market. Although an intent to exercise such power can be either shown or presumed,³ the mere possession of such market power is not illegal per se. Without exception, a firm which creates a monopoly through innovation and

introduction of a product into the market for the first time would be charged with a felony.\(^4\)

However, the Act does prohibit the possession of monopoly power, where the monopoly is acquired or maintained through practices which constitute unreasonable restraints of trade.\(^5\) Thus, monopolization in violation of Section 2 is either the unlawful acquisition or exercise of monopoly power. It is important, therefore, to examine the two elements of monopolization, possession and maintenance of monopoly power.

a. Possession of Monopoly Power

In the United States, monopoly power has been defined as the power of one firm, or several firms acting together, to control prices or to exclude competition.\(^6\) The most significant factor in making a determination as to whether a firm actually possesses this power is the market share held by the firm in question.\(^7\) In *United States v. Grinnell Corporation*, Grinnell acquired approximately 87% of the fire protection market. The Court, reiterating the rule that a firm with monopoly power must not use its power to maintain control over the market, stated that the existence of monopoly power may be inferred from the firm's predominant share of the market.\(^8\)

In determining a firm's market share, the court must define a relevant market, which consists of a geographic and a product market.\(^9\) The court must establish where and with whom the firm in question competes in order to set forth the parameters of the market in which the firm's power can be evaluated.\(^10\) Due to the importance of market share in establishing monopoly power, defendants in monopolization cases attempt to establish the broadest possible relevant market.\(^11\)

In *United States v. E.I. du Pont de Nemours and Co.* (hereinafter *Cellophane*), du Pont was charged with the monopolization of cellophane.\(^12\) The Government argued that the relevant market consisted solely of cellophane. Du Pont successfully established the relevant market as the market for flexible packaging materials, of which cellophane accounted for less than 20% of the market.\(^13\) The Court found the relevant market included products that had reasonable interchangeability with cellophane, considering price, use and quali-

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4. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979); cert. denied 444 U.S. 1093 (1980); United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2nd Cir. 1945).
8. Id. at 571.
10. Id.
11. Id. at 5-33.
13. Id. at 399-400.
ties. In determining the relevant market, the Court considered cross-elasticity of demand, product characteristics, product pricing, product use and product advertising.

b. Maintenance of Monopoly Power

Once it is established that a particular firm has monopoly power, the relevant question becomes how such power is maintained. It is not the mere possession of monopoly power that is sanctioned, but the intent to maintain this power, along with unreasonable anticompetitive conduct by the firm. There is no need to show specific intent; general intent is sufficient to show monopolization. For example, evidence that a firm has obtained monopoly power through means other than superior products or services, superior skill or business acumen, or historic accident, is sufficient to establish the requisite intent for a violation of Section 2, so long as there is no evidence of a legitimate business reason for the firm’s activities.

In addition to prohibiting actual monopolization, the Act prohibits attempts to monopolize. The Federal Trade Commission (FTC) has set forth three factors that need to be satisfied in order to demonstrate an attempt to monopolize: (1) presence of a specific intent to control prices or destroy competition; (2) exclusionary or anticompetitive conduct; and (3) a “dangerous probability” that the defendant will succeed in monopolizing the market. The Supreme Court has focused mainly on specific intent and the dangerous probability of success. However, evidence of anticompetitive or exclusionary conduct remains essential to proving an attempt to monopolize.

The FTC determines whether there is specific intent by direct evidence of the firm’s goals or the reasons for its actions, or by inference from the type of business practices or conduct the firm engages in. Further, the FTC must show that the firm intended to destroy competition or achieve monopoly power, and not that the firm substantially increased market share through reasonable and non-predatory behavior.

There are a number of exclusionary or anticompetitive practices associated with monopolization. Among these are predatory pricing, unjustified refusals

14. Id. at 404.
15. Id. at 399-404
18. VAKERICS, supra note 9, § 5.03, at 5-15 (citing E.I. du Pont Nemours & Co., (Titanium), 96 F.T.C. 653 (1980)).
20. Id.
21. Id. § 5.03, at 5-20.
22. See Id. § 5.05, at 5-19 to 5-21.
23. Predatory pricing is defined as pricing below cost for the purpose of eliminating or reducing competition. Id. at 5-49.
to deal by dominant firms, and unfair practices designed to injure or eliminate competition.

Finally, the FTC establishes the dangerous probability of success by demonstrating that if the firm continues to engage in the conduct in question, the firm will eventually acquire the power to control prices or to exclude competition. In order to determine whether the firm has such power, the court looks at the market share of the firm in the relevant market.

2. The Federal Trade Commission Act

Congress enacted the FTC Act in 1914 to strengthen and clarify the authority of the government to proceed against business practices which pose a threat to free competition. Having sole jurisdiction over the enforcement of the Act, the FTC responds to various practices which constitute unfair methods of competition. The principal antitrust provision of the Act is in Section 5(a), which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." With the exception of Section 12, which prohibits certain false advertising, the remainder of the statute deals with the constitution and jurisdiction of the FTC.

Due to its broad scope, any violation of the antitrust laws, including monopolization in violation of Section 2 of the Sherman Act, constitutes a violation of the FTC Act. The FTC Act also regulates mergers and acquisitions that violate Section 7 of the Clayton Act.

B. The Clayton Act and Merger Regulation

The Clayton Act of 1914 is an important antitrust statute in the United States, second only to the Sherman Act. Section 7 of the Clayton Act prohibits any person from making corporate acquisitions which may result in a substantial lessening of competition or tend to create a monopoly. Congress enacted this section in order to address increasing concentration in the American economy and the dangers imposed on the economy by unchecked corporate expansions through mergers and acquisitions.

24. While, in general, a firm may refuse to deal whenever it chooses to do so, refusal to deal coupled with an anticompetitive intent violates the antitrust laws. Id. at 5-64.
25. VAKERICS, supra note 9, § 5.03, at 5-21 (citing Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), cert. denied, 405 U.S. 1066 (1972); TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co., 462 F.2d 1256 (8th Cir. 1972); Hillard Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969)).
26. VAN CISE ET AL., supra note 3, at 22.
27. VAKERICS, supra note 9, § 1.02[4], at 1-9.
29. VAKERICS, supra note 9, § 1.02[4], at 1-8.
30. Id.
33. VAKERICS, supra note 9, § 1.02[3], at 1-7.
tions to the FTC and the Antitrust Division of the Department of Justice (DOJ) on certain mergers and acquisitions.34

Economists generally classify mergers in view of the relationships between the merging firms.35 Mergers may be classified as horizontal, vertical, conglomerate, involving potential competitors, or as a combination of these elements.36 The FTC and the DOJ have tended to focus their enforcement on horizontal mergers.37

1. Horizontal Mergers

Horizontal mergers combine firms that are in direct competition with each other. Since such combinations directly affect the structure of the market, they receive more scrutiny than other types of mergers.38 The DOJ and the FTC set out the government’s position with respect to the regulation of mergers in the Horizontal Merger Guidelines (hereinafter the Guidelines).39 Businessmen rely upon these Guidelines to determine whether the DOJ or the FTC is likely to challenge a particular merger.40 According to these guidelines, horizontal mergers will be challenged if they create or aid in the exercise of “market power,” which is defined as the ability to sustain prices above prices dictated by supply and demand in a competitive market.41 The three main elements which the agencies take into consideration in determining market power for merger regulation are the relevant market, the existence of entry barriers to that market, and the concentration of the market.

a. Relevant Market

In regulating mergers, enforcement agencies consider market power. The Guidelines recognize that the definition of the relevant market plays a crucial role in merger enforcement.42 This brings us back to the definition of relevant market. The relevant market is defined in terms of relevant product and geographic markets.

The Guidelines define a relevant product as a product or group of products. In determining the relevant product market, the agencies will look at the products produced by the merging firms, and if both firms are participants in one or more such markets, the merger will be classified as horizontal.43 The agencies

36. Id.
37. VAKERICS, supra note 9, at 9-2.
41. BRUNNER ET AL., supra note 35, at 16; see also VAKERICS, supra note 9, § 9.04, at 9-25.
42. VAKERICS, supra note 9, § 9.04[2], at 9-27.
43. Id. § 9.04[2], at 9-29.
will then attempt to determine the effect of hypothetical price increases in such markets should the merger take effect.44

The relevant geographic market is the geographic area where products are sold and in which a monopoly could impose small but significant and non-transitory price increases.45 The agencies determine a geographic market for each product market and the effects of hypothetical price increases in such markets.46

b. Entry Barriers

Once the relevant market has been defined, the agencies then determine whether they will challenge mergers that take place in that particular market. In making such a determination, they look at both the existence of entry barriers which may prohibit new competition in that market and the concentration of that market. The Horizontal Merger Guidelines state that the DOJ will not challenge mergers that have no long term effect in the relevant market.47 For purposes of this analysis, "entry" is defined as "new competition that requires expenditure of significant sunk costs of entry and exit."48

In determining the conditions of the barrier to market entry, the agencies examine whether entry into the market in question would be: (1) timely, (2) likely, and (3) sufficient in magnitude, character and scope.49 There are two ways to view the question of whether entry is likely. On the one hand, the agencies could determine whether a firm could enter the market, i.e., have the ability to enter the market. On the other hand, the question could be whether any firms have interest in entering the market in the near future. Presently, there is great debate as to which approach is more appropriate in assessing barriers to entry. Since both the DOJ and the FTC emphasize barriers to entry as an important non-market share factor in assessing mergers,50 the decision as to which approach should be utilized by the agencies becomes even more important.

c. Market Concentration

If the agencies find that there are significant barriers to entry in the relevant market, the agencies then focus on the structure of the relevant market.51 The

44. Id.
45. Id. (citing the Horizontal Merger Guidelines, 57 Fed. Reg. 41552, § 0.2, ¶ 1 (1992)).
46. VAKEROCS, supra note 9, ¶ 9.04[2], at 9-30.
47. Horizontal Merger Guidelines, 57 Fed. Reg. 41552, § 3.0, ¶ 1:
  A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above pre-merger levels, such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.
See also BRUNER ET AL., supra note 35, at 18 (quoting a superseded version of the Horizontal Merger Guidelines disseminated in 1984).
49. VAKEROCS, supra note 9, ¶ 9.04[5], at 9-39.
50. BRUNER ET AL., supra note 35, at 19.
51. Id. at 20.
FTC and the DOJ examine the concentration of the market before and after the merger in order to determine the effect of the merger on the concentration of the relevant market.\footnote{52} When the merger in question takes place in a market with low concentration and does not result in a large increase in concentration, the agencies will usually not challenge the merger.\footnote{53}

The FTC and the DOJ use the Herfindahl-Hirschman Index (HHI) in order to determine the concentration of a particular market.\footnote{54} The agencies generally use the annual data of the relevant market to determine the respective market shares of all the firms in that market.\footnote{55} The agencies then add the squares of these market shares in order to determine the concentration in that market.\footnote{56}

For example, if there are four firms in the market before the merger, each with a 25% share, the concentration of that market before the merger would be 2500 HHI (25² + 25² + 25² + 25²). By merging two of the firms in this market, the HHI of the market would increase to 3750 HHI (25² + 25² + 50²). This merger, in an already highly concentrated market, increased the HHI of that market by 1250 points.

Under the Guidelines, a market with an HHI of less than 1000 is unconcentrated, one between 1000-1800 is moderately concentrated, and a market with an HHI above 1800 is highly concentrated.\footnote{57} The agencies, except in extraordinary circumstances, will not challenge mergers where the post-merger HHI is still below 1000.\footnote{58} The agencies rarely challenge mergers in moderately concentrated markets where the change in the HHI as a result of the merger is less than 100 points.\footnote{59} The agencies scrutinize all mergers in highly concentrated markets, but do not challenge them if the merger results in less than a 50-point change in that market’s HHI.\footnote{60}

If the market’s post-merger HHI is above 1000, the agencies take note of the financial conditions of the merging companies, changing market conditions which may affect the current or future concentration in the market or the market share of the firms, and the significant net efficiencies that could not be achieved by other means.\footnote{61} The agencies weigh these conditions against the entry barriers to the relevant market.

d. Premerger Notification Requirements

Section 7(a) of the Clayton Act requires parties to mergers or acquisitions falling under certain criteria to file a premerger report with both agencies.\footnote{62} The
agencies use these premerger reports in order to adequately investigate mergers which may violate the Clayton Act. After filing this report, the parties must wait for a specified period of time before finalizing the transaction.\textsuperscript{63} This waiting period is generally thirty days; however, failure to take immediate action against a merger subject to premerger notification requirements does not bar the agencies from subsequently challenging the merger as a violation of Section 7.\textsuperscript{64}

The parties to a merger are required to report to the two agencies if the transaction meets the following criteria:

(1) At least one of the parties to the merger must do business in or affect interstate or foreign commerce.\textsuperscript{65}

(2) The size of the merging parties must meet one of three conditions:
   (a) the acquiring party’s assets or annual sales equal $100 million or more and the acquired party engaged in manufacturing has assets or annual sales equal to $10 million or more; or
   (b) the acquiring party’s assets or annual sales equal $100 million or more and the acquired party not engaged in manufacturing has assets equal to $10 million or more; or
   (c) the acquiring party’s assets or annual sales equal $10 million or more and the acquired party has assets or annual sales equal to $100 million or more. This test can be satisfied without the total acquisition of the assets of the acquired party.\textsuperscript{66}

(3) After the transaction is complete, either the acquiring party will hold an aggregate total amount of securities and assets of the acquired party totaling $15 million or more in value, or the acquiring party will hold 15% or more of the voting securities of the acquired party.\textsuperscript{67}

If a merger subject to reporting requirements is consummated without filing the necessary reports with the two agencies and observing the waiting period, the parties will be subject to civil penalties of up to $10,000 per day, for each day the violation continues.\textsuperscript{68}

e. Defenses

Since mergers are generally considered to promote efficiencies in the economy, and are sometimes the measure by which companies are saved from complete failure, the agencies allow exceptions to the general rules of merger regulation. These exceptions, or defenses (since they need to be raised and demonstrated by the merging parties), are the failing company defense, the failing division defense (similar to the failing company defense), and enhancement of efficiencies.\textsuperscript{69}

There are a number of requirements set out by the agencies which need to be demonstrated by the parties in order for the particular defense to be success-

\textsuperscript{63} Id. at 152.
\textsuperscript{64} Vakerics, supra note 9, § 9.03[2], at 9-20 to 9-21.
\textsuperscript{68} Vakerics, supra note 9, § 9.03[1], at 9-16 (citing 15 U.S.C. § 18a(g)(1)).
\textsuperscript{69} Id. § 9.04[6], at 9-40 to 9-41.
ful. But, in general, these requirements suggest that if comparable, less anticompetitive measures are available to achieve the same results, then the particular defense is not available.

C. Remedial Measures

1. Enforcement

Responsibility for enforcing the antitrust laws in the United States falls on the FTC and the DOJ. Since the 1970s, the states have also had a significant role in antitrust enforcement. Presently, over forty states have criminal sanctions for antitrust violations. State involvement in antitrust enforcement creates additional incentive for compliance with antitrust regulations, an element of enforcement not present in the systems of Japan and South Korea.

Both the FTC and the DOJ must seek the assistance of the federal courts in order to enforce compulsory process or final orders enjoining anticompetitive conduct. While the DOJ may elect between initiating a civil or criminal action, or both, there are no criminal penalties for violation of the laws which the FTC has jurisdiction to enforce. In practice, however, the majority of such disputes are settled at the pre-complaint or post-complaint period.

One remarkable fact about antitrust enforcement in the United States is that over 90% of the antitrust suits filed in the federal courts each year are those initiated by private parties for treble damages. Although a majority of these cases do not involve monopoly or merger violations, by providing for a private cause of action for violations of antitrust laws, Congress accomplishes two important objectives—providing a remedy for injured parties, and deterring anticompetitive activities.

2. Legal Remedies

The legal remedies available for the regulation of antitrust laws in the United States depend to some degree upon the enforcing agency. When the DOJ initiates an action, it may institute a criminal action to impose a fine or imprisonment for violations of the monopoly laws. The DOJ may also file a civil suit, seeking an injunction against the continuance of the activity in question, or in an appropriate situation, divestiture, dissolution, or some other equitable remedy. The DOJ institutes a criminal action where there is evidence of a willful violation of the laws or there is a per se violation. Corporations may be fined up to

70. Id.
71. See id.
72. Id. § 2.04, at 2-68.
73. Id. § 2.01, at 2-6.
74. Id. § 2.01, at 2-6.
75. Id.
76. Id. § 3.01, at 3-1.
77. Id. § 3.01, at 3-2.
78. VAN CISE ET AL., supra note 3, at 233.
79. Id. at 234.
$1 million for violating the Sherman Act. The penalty for an individual’s violation may be a fine of up to $100,000 and/or imprisonment for up to three years.\textsuperscript{80} Further, a criminal violation of any section of the Sherman Act is a felony, and conviction results in the loss of civil rights.\textsuperscript{81} There may also be increased penalties under other related statutes.\textsuperscript{82}

The FTC enforces antitrust laws by encouraging compliance through non-adversarial procedure and discourages willful antitrust defiance by the use of traditional adversary proceedings.\textsuperscript{83} The FTC may institute a “consumer redress” civil action for unfair or deceptive acts or practices in violation of its rules or cease and desist orders, and may seek relief in the form of rescission or reformation of contracts, the refund of money or return of property, and the payment of damages.\textsuperscript{84} In addition, violations of the FTC’s orders are punishable by fines of up to $10,000 per offense, or per day for each day of a continuing offense, and, if the order has been affirmed by a court, the offending executive may be sentenced to jail.\textsuperscript{85}

\textbf{D. Conclusion}

In the United States, antitrust laws place a great amount of weight on the ability to control the size and the number of firms in various markets. The best indication for this conclusion is that two of the most important statutes dealing with antitrust regulation are directed at monopolies and mergers/acquisitions which may lead to monopolies. As stated earlier, the success of the United States in achieving its objectives depends on both the adequacy of the measures set forth for this purpose and the manner in which they are enforced.

Based on their broad and detailed coverage, both the anti-monopoly and anti-merger regulations provide the necessary measures to achieve the antitrust goal of controlling the size and number of firms in each market. The judiciary’s interpretation of antitrust standards and thresholds may limit how the agencies enforce antitrust laws. Since there are a number of standards which are subject to a case-by-case review, these interpretations can be subject to drastic changes depending on a particular judge’s political affiliation or understanding of the antitrust laws.

The combined efforts of the FTC and the DOJ and the private actions brought in federal courts for violations of antitrust laws lend to strict enforcement of the United States’ antitrust laws. Further, the agencies’ continuous watch over the activities that take place in concentrated markets has caused increased compliance with the laws.

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 235 (citing the Criminal Fine Enforcement Act of 1984, 18 U.S.C.A. § 3263 (West 1985)).
\textsuperscript{83} Id. at 244-45.
\textsuperscript{84} Id. at 244.
\textsuperscript{85} Id.
The Horizontal Merger Guidelines, which set out the government’s approach to antitrust regulations, allow businesses to self regulate; these businesses make better decisions in an effort to avoid violating the antitrust laws. This alone may have decreased the number of challenges made by the two agencies. Furthermore, as stated earlier, the agencies try to avoid the institution of suits through pre- and post-complaint settlements.

The existence of detailed regulations for anticompetitive activities, strict enforcement of those regulations, and increased compliance as a result of the guidelines set forth by the FTC and the DOJ indicate that the United States has been successful in implementing the goals of its antitrust laws. However, it is subject to debate whether the results achieved have produced the goals the government had hoped for in drafting those laws.

III.
SOUTH KOREA

The history of South Korea’s efforts to regulate abuses of business concentration through antitrust legislation dates back over 20 years.86 Witnessing remarkable economic growth in spite of unfavorable conditions, such as lack of natural resources, high population density and low accumulation of capital, the government of South Korea sought to achieve economies of scale in order to strengthen international competitiveness and promote exports.87 Due to resistance from entrepreneurs and the passive attitude of the executive and the legislature, it was not until late 1975 that the “Price Stabilization and Fair Trade Act” (hereinafter the PSFT Act) was enacted.88 The primary purpose of the enactment of the PSFT Act was to deal with price restraints and prohibition of cartels.89 While the Act emphasized short-term price stabilization and regulated market behavior rather than market structure,90 it failed to address monopolies or oligopolies.

The Korean government’s failure to effectively regulate the market resulted in reduced competitiveness of Korean enterprises in international markets and an imbalanced national economy.91 The percentage of industrial goods produced by monopolists or dominant firms (with 70% or more market share) in Korea rose from 36% of all goods in 1977 to 89% in 1979.92 In late 1980, these circumstances led to Korea’s enactment of the “Monopoly Regulation and Fair Trade Act” (hereinafter the MRFT Act), which was aimed at regulating monopolies and restoring the market function.93 The MRFT Act also abolished various

87. Id. at SK 1-3.
88. Id. at SK 1-4.
89. Id.
90. Id. at SK 1-5.
91. Id.
92. Id.
93. Id.
laws and regulations, which, up to that point, had lessened competition among industries.  

A. The Monopoly Regulation and Fair Trade Act

The Monopoly Regulation and Fair Trade Act came into force on April 1, 1981, and has been extensively amended since its enactment. The Minister of Economic Planning enforces the terms of the MRFT Act. As part of the Economic Planning Board, the Fair Trade Commission has the authority to deliberate and make decisions regarding violations of the provisions of the Act. Persons injured by the act of an entrepreneur in violation of the MRFT Act can file a private action. The courts enforce the Act in private suits and through review of the Fair Trade Commission’s administrative decisions.

1. Abuse of Market-Dominating Position

One of the most important objectives of the MRFT Act is to regulate anticompetitive behaviors of monopolists and oligopolists. Article 3 of the Act prohibits a market-dominating entrepreneur from: (1) unreasonable determination or maintenance of the price of a commodity or the charge for services; (2) unreasonable control of sales volume or commodities or rendering of services; (3) unreasonably interfering with the business activities of other entrepreneurs; or (4) unreasonably establishing barriers of entry for new competitors of such an entrepreneur with a dominating share in the market.

a. Entrepreneur

The Act defines an entrepreneur by the nature of the business or the industrial classification of the business, rather than the entrepreneur’s legal form. An entrepreneur for the purposes of the MRFT Act may take the form of a sole proprietor, partnership, limited partnership, stock corporation or close corporation. Before the beginning of each year, the Minister must designate and announce the following year’s market-dominating entrepreneurs based on the provisions set forth in Article 2 of the Act.

The Act’s jurisdiction is limited to the following industries: manufacturing, wholesale or retail marketing; transportation; warehousing; construction; electricity, gas and water utilities; banking, insurance, real estate; communications;

94. Id. at SK 1-6.
95. Id. at SK 1-8.
96. Id.
97. Id. at SK 1-11.
98. Id. at SK 8-9.
99. Id. at SK 1-11.
100. Id. at SK 1-8 (citing MRFT Act ch. 2); SK 6-1, n.1 (quoting MRFT Act art. 3).
101. Id. at SK 2-3.
102. Id.
103. Id. at SK 6-3 (citing MRFT Decree art. 5, ¶ 1).
and the personal and household service industries.\textsuperscript{104} Jurisdiction over the personal service industry does not extend to the activities of professional practitioners, such as doctors, accountants and attorneys.\textsuperscript{105} The reason for a limited extension is the nature of the professions; competition in these professions is based on quality of service rather than on price.\textsuperscript{106}

\textit{b. Market-Dominating Entrepreneurs}

The MRFT Act defines market-dominating entrepreneurs as entrepreneurs dealing in the same or similar commodities, or rendering same or similar services in: (i) a market where there are neither competing entrepreneurs nor substantial competition; (ii) a market where the entrepreneur holds a dominant position in relation to others in the same field; or (iii) a market where a small number of firms hold a dominant position in the same field.\textsuperscript{107} In determining an entrepreneur’s dominance in a particular market, the Commission must examine both market size and market share.\textsuperscript{108}

The scope of the Act’s jurisdiction is limited to market-dominant entrepreneurs whose gross domestic supply in the previous year exceeds 30 billion won (which roughly equals $38 million).\textsuperscript{109} This figure is controversial. The government has been trying to lower the threshold in order to regulate more manufacturers, while businesses complain that even the current limitation is too low, and have been fighting for a 50 billion won threshold.\textsuperscript{110} Furthermore, in order to qualify as a market-dominant entrepreneur, a firm’s market share must be either 50\% or more, or the aggregate market share of two or three entrepreneurs must be 75\% or more (this test is only applicable to entrepreneurs with at least a 10\% market share before aggregation).\textsuperscript{111}

\textit{c. Remedial Measures}

The Minister of Economic Planning deals with abusive practices of market-dominating positions. The Minister has the power to force the entrepreneur violating the MRFT Act’s provisions to lower the price in question, stop the action(s) in question, or take any other necessary steps to remedy the situation. If the firm in question does not comply with the Minister’s orders, the firm must pay a surcharge to the National Treasury. This surcharge is calculated by taking into account the period of time lapsed between the Minister’s order and the date of actual decrease in the prices, and the difference between the required price and the actual price during the period in question.\textsuperscript{112}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{104} \textit{Id.} at SK 2-3.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at SK 6-2 (citing MRFT Act art. 2(5)).
\item \textsuperscript{108} \textit{Id.} (citing MRFT Decree art. 3, ¶ 1).
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.} at SK 6-3, n.6.
\item \textsuperscript{111} \textit{Id.} at SK 6-3.
\item \textsuperscript{112} \textit{Id.} at SK 6-9.
\end{enumerate}
\end{footnotesize}
B. Mergers and Acquisitions

The MRFT Act prohibits any action which is likely to substantially restrict competition in the "particular field of trade." The MRFT limits firms' ability to engage in the acquisition of shares, create interlocking directorates, perform mergers, take over businesses, or establish a new firm. The term "particular field of trade" is similar to the United States' definition of a relevant market, and takes into account the relevant product and geographic markets. The relevant product market includes competing entrepreneurs dealing with the same or similar kinds of goods and services. The relevant geographic market is determined by transportation conditions, consumer behavior, and the domain of the entrepreneurs' business activities.

The merger provisions of the MRFT Act regulate two types of combinations. The first are combinations which may result in restricting competition in a particular field of trade (anticompetitive combinations). These regulations only apply to enterprises with paid-in capital of more than 1 billion won (approximately $1.3 million) or with total assets of more than 5 billion won (approximately $6.5 million). The Act requires any firm which merges with another firm or falls within the borders of the threshold set by the Act to report its act to the Minister. The second type of combination is achieved through compulsion or other unfair practices (unfair combinations). All enterprises, regardless of size, fall under the regulations concerning unfair combinations, and the use of unfair methods by firms is prohibited regardless of whether there is "substantial restraint of competition.

The Korean government views mergers as an important means of corporate growth, especially for small and medium-sized firms. Accordingly, the Act

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113. Id. at SK 5-2 (citing MRFT Act ch. 3).
114. Id. at SK 5-8.
115. Id.
116. Id.
117. Id. at SK 5-4 (citing MRFT Act art. 7, ¶ 1, 2). The MRFT Act prohibits any corporation which meets the Act's capital or asset threshold from engaging in any of the following activities, unless the Fair Trade Commission deems it necessary in order to rationalize the industry concerned or to reinforce its international competitiveness:
(i) acquiring or owning shares of another corporation (including equity, hereinafter the same); (ii) allowing an officer or an employee (meaning a person, other than an officer, regularly engaged in the business of the corporation) to concurrently hold a position as an officer of another corporation (hereinafter referred to as "interlocking directorate"); (iii) merging with another corporation; (iv) taking over or leasing of the whole or a substantial part of the business or undertaking the management of another corporation, or taking over of the whole or a substantial part of the fixed assets used for the business of another corporation (hereinafter referred to as "takeover of business"); and (v) participating in the establishment of a new corporation.
118. Id. at SK 5-4.
119. Id. at SK 5-5 (citing MRFT Act art. 12).
120. Id. at SK 5-4 (citing MRFT Act art. 7, ¶ 3).
121. Id. at SK 5-10.
122. See id. at SK 5-2.
allows the Commission to permit certain combinations of enterprises when the purpose is to rationalize the affected industry or to strengthen the industry's international competitiveness. The burden of proof concerning the motive of a particular combination rests on the enterprise seeking the combination.

The Minister authorizes combinations on the basis of the rationalization of the industry if one of three factors is satisfied. First, the combination must be the only way to reorganize the industrial structure and organization in order to achieve efficiency of an industrial activity and rationalization of management. Or second, there must be a showing that it is difficult to gather by normal methods such a large fund as is needed for the investment in equipment and operations. Or third, the combination is necessary in order to serve a public interest. As this last circumstance is quite broad, the Minister has ample room to use its discretionary power.

The MRFT Act also provides an exception for combinations which will strengthen the international competitiveness of that particular trade or industry. In order to fall within this exception, the firm in question must make a showing of one of two results: (1) the merger will significantly enhance international competitiveness in terms of price and quality through promoting technology development, securing optimal size of management, et cetera, or (2) the merger will significantly contribute to an increase in export in that industry through promoting overseas business activities such as information collection and marketing.

In addition to the rationalization and the international competitiveness exceptions to the merger and acquisition provisions, the Act provides an exception for mergers which are executed in accordance with the Medium and Small Enterprises Basic Act (promoting improvements in the medium- and small-sized businesses) and the Industrial Development Act.

The leading decision based on the Act's anti-merger provisions came in the 1982 case of the Dong Yang Chemical Industrial Co. Ltd. Dong Yang, a producer and seller of hydrogen peroxide and other chemical products, acquired 50% of the total issued shares of Hankuk Peroxide Company, a competitor which also produced and sold hydrogen peroxide. Dong Yang filed a report

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123. Id. at SK 5-2 (citing MRFT Act ch. 3).
124. Id. at SK 5-4 n. 6 (quoting MRFT Act art. 7, ¶ 2). The section holds:
(2) If the Fair Trade Commission intends to authorize a combination of enterprises on the grounds of rationalizing the industry concerned or reinforcing its international competitiveness, in accordance with the provisions of the proviso to Paragraph 1, it shall consult in advance with the competent Minister. In such cases, the entrepreneur concerned shall bear the burden of proving the need for such rationalization or reinforcement.

Id.

125. Id. at SK 5-11 (citing MRFT Decree art. 13).
126. Id.
127. Id. at SK 5-18, 19.
128. Id. at SK 5-9 (citing Corrective Order No. 82.1, January 13, 1982, EPB, 1982 MRFT Act Decisions 153).
129. Id.
with the Minister in accordance with the requirements of the MRFT Act, arguing that the Commission should authorize the acquisition because it was necessary for the rationalization of the industry and the strengthening of international competitiveness.\textsuperscript{130}

In support of its argument, Dong Yang sought to show that the combination would result in a 13\% reduction of production costs through technology exchange, a reduction in transportation and packing costs, a raise in export prices, and avoidance of overlapping R & D investments. The Fair Trade Commission found that the factors cited by Dong Yang would not necessarily exist as a result of the transaction.\textsuperscript{131} The Commission held that the acquisition of shares by Dong Yang would result in a monopoly in the hydrogen peroxide market and that the consequent abuse would be enormous. The Commission ordered Dong Yang to assign the shares to a third party.\textsuperscript{132}

1. Reporting Requirements

The MRFT Act requires firms to notify the Fair Trade Commission of merger and acquisition transactions so that the Commission has an opportunity to identify combinations which may have an anticompetitive impact on a particular market. The partners to mergers where the acquiring entity owns or will own 20\% or more of the acquired entity have a duty to notify the Fair Trade Commission.\textsuperscript{133}

In the case of mergers, takeovers, or the establishment of new firms, notification must be filed before the event. The Act requires notification to be reported 30 days prior to the commencement of the action in question.\textsuperscript{134} The notification requirement for acquisitions stipulates that any acquisition of shares or interlocking directorates must be reported within ten days after the date of acquisition of shares or formation of an interlocking directorate.\textsuperscript{135}

\textsuperscript{130} Id.
\textsuperscript{131} Id. at SK 5-10.
\textsuperscript{132} Id. at SK 5-10 (citing Corrective Order No. 82.1, January 13, 1982, EPB, 1982 MRFT Act Decisions 153).
\textsuperscript{133} Id. at SK 5-14 (citing MRFT Act art. 12, § 1). The Act especially requires notification where:

(1) a company acquires or owns 20\% or more of the total issued shares (non-voting shares under Article 370 of the Commercial Code are excluded) or of the total amount of equity investment of another company; (2) anyone other than a company owns 20\% or more of the total shares of two or more companies respectively which are in competition with each other; (3) an officer or an employee of a company concurrently holds a position as an officer of another competing company; or (4) a company intends to merge with another company, take over another company, or establish a new company; or (5) a company intends to subscribe for 20\% or more of shares of a newly established corporation.

\textsuperscript{134} Id. (citing MRFT Act art. 12, § 5).
\textsuperscript{135} Id. (citing MRFT Act art. 12, § 3).
2. Remedies

If an activity violates the merger and acquisition provisions of the MRFT Act, the Commission may order the party or parties to stop the merger, to dispose of all or part of the acquired shares, to resign from the position of officer, to transfer part of the business, or to take any other steps necessary to remedy the situation.\(^{136}\) In determining the legality of each transaction, the Commission utilizes a set of guidelines called the Combination of Enterprises Examination Guidelines. The review period for examining merger reports is generally limited to 30 days (60 days under exceptional circumstances). It is questionable whether the Commission may still order any corrective measures after the lapse of this examination period. Further, the Commission can bring an action to nullify any incorporation or merger in violation of the Act.\(^{137}\) However, unlawful combinations of enterprises are not considered to be null and void until there is a final and conclusive court decision nullifying the combination on the grounds that it violates the Act.\(^{138}\)

The MRFT Act also provides penal sanctions of fines up to 200 million won (approximately $255,000) and three years in jail for any person who violates its provisions. These penalties may be imposed concurrently.\(^{139}\) In addition, the Act imposes a fine of up to 100 million won for the submission of false merger reports.\(^{140}\)

C. Conclusion

The Fair Trade Commission has been less than aggressive in using the MRFT Act to challenge the abuse of market-dominating positions or mergers.\(^{141}\) The anti-concentration policies of the MRFT Act are weak because they fail to challenge previously existing monopolies and oligopolies. The provisions of the Act focus on preventing future anticompetitive mergers and abuses of market dominating positions.\(^{142}\) Finally, the broad language of the rationalization and strengthening exceptions presents problems in the regulation of anticompetitive activities.\(^{143}\)

These factors indicate that, unlike its U.S. counterpart, the South Korean antitrust objectives of free trade and competition are not being met as a result of less than adequate measures and lax enforcement. However, the South Korean government, unlike the United States, may not seek control of market structure through regulation of monopolies and mergers. South Korea places great weight on the effects of antitrust enforcement in the growth of industries both domesti-

\(^{136}\) Id. at SK 5-16 (citing MRFT Act art. 15).
\(^{137}\) Id. at SK 5-16 (citing MRFT Act art. 16, ¶ 1).
\(^{138}\) Id. at SK 5-17.
\(^{139}\) Id. (citing MRFT Act art. 66).
\(^{140}\) Id. at SK 5-16 (citing MRFT Act art. 68).
\(^{141}\) Id. at SK 1-9.
\(^{142}\) Id. at SK 5-11.
\(^{143}\) Id. at SK 5-12.
cally and internationally, and it may perceive antitrust laws which are more relaxed as the means of achieving these goals.

IV.

JAPAN

Modern-day Japanese antimonopoly law came into being towards the end of the Second World War in an effort to reconstruct the Japanese economy on the basis of economic democracy. Before the Second World War, the government had protected and fostered cartels and monopolies. Following the war, the Japanese economy was in a state of turmoil. Hence, the government focused its efforts on the prohibition of behavior it had encouraged previously, unless the behavior was specifically exempted by law. The government then enacted Japan's new antitrust policy: the Antimonopoly Act of 1947 (hereinafter the AMA). The Japanese government based the AMA on the U.S. antitrust laws, primarily the Sherman Act, the Clayton Act and the Federal Trade Commission Act. The AMA came to be known as "the economic constitution" of Japan.

A. The Antimonopoly Act

The original AMA imposed stringent controls over mergers and acquisitions, prohibited unreasonable differences in economic power among firms in the Japanese market, and contained severely narrow exemptions. In addition, the AMA held the maintenance of cartels to be per se illegal. The AMA also created the Fair Trade Commission (hereinafter the JFTC), modeled after the U.S. Federal Trade Commission, to enforce the newly-set standards. Unlike the United States, where both the Department of Justice and the Federal Trade Commission enforce antitrust laws and trade regulations, the JFTC has sole jurisdiction over enforcement of the AMA's provisions.

Initially, the JFTC strictly enforced the AMA. However, since the Japanese economy was in a state of disarray after the Second World War, the JFTC found it unrealistic to continue strict enforcement. After the first four to five years, the JFTC relaxed AMA enforcement. In 1953, the government amended the AMA. The government loosened the per se prohibition against cartels to a prohibition against substantial cartels, relaxed the provisions regulating mergers and acquisitions, and abolished the prohibition of undue difference in economic power.

145. Id. at 1.
146. MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 2 (1990).
147. Id.
149. Id.
150. MATSUSHITA, supra note 146, at 3.
151. Id.; see also IYORI & UESUGI, supra note 144, at 13-17.
In 1977, following more than a decade of relaxed antitrust enforcement, the government once again amended the AMA. The purpose of the 1977 amendments was to strengthen the Act.\(^{152}\) The government incorporated a provision to control monopolistic conditions in the market, as well as a report requirement used to justify increases in prices in an oligopolistic market.\(^{153}\) Since the 1977 amendments, the AMA has become the major piece of economic legislation in Japan; the Act plays a central role in the framework of Japan’s economic laws.\(^{154}\)

The current AMA regulates a broad range of business activities: (1) cartels are prohibited, subject to certain exceptions; (2) private monopolization and unreasonable restraints on trade are prohibited; (3) holding companies, stockholdings, interlocking directorates, and mergers & acquisition of business assets which may substantially restrain competition are subject to restrictions; (4) international agreements or contracts in restraint of trade are prohibited; and (5) unfair business practices are prohibited.\(^{155}\)

The JFTC is interested in placing more emphasis on the promotion of competition in the non-manufacturing sector of the economy. The JFTC is also broadening the scope of industries covered by the AMA, as well as promoting international enforcement of the AMA.\(^{156}\) To this end, the Japanese government has been engaged in bilateral and multilateral talks with various nations in an effort to minimize any conflicts in antitrust policy which may exist between them.\(^{157}\)

B. Monopolization

According to the AMA, three activities may constitute anticompetitive behavior: (1) private monopolization, (2) monopolistic situations, and (3) achievement of monopoly power through mergers and acquisitions. Private monopolization focuses on the particular activities of any individual enterprise. Regulation of monopolistic situations addresses the activities of a dominant entrepreneur in a specific field where there is little or no competition.\(^{158}\) Section 1 will address the private monopolization and monopolistic situations. Section 2 discusses the AMA’s approach to mergers and acquisitions.

1. Private Monopolization

Modeled after Section 2 of the Sherman Act, Section 2(5) of the AMA defines private monopolization as follows:

\(^{152}\) Matsushita, supra note 146, at 4.

\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Ariga, supra note 148, at JAP § 4.02 (citations omitted); see also Iyori & Uesugi, supra note 144, at 41; Matsushita, supra note 146, at 5.

\(^{156}\) Iyori & Uesugi, supra note 144, at 32-33.

\(^{157}\) Id. at 33.

\(^{158}\) Ariga, supra note 148, at JAP 9-1.
The term "private monopolization" as used in this Act shall mean such business activities, by which any entrepreneurs, individually, by combination or conspiracy with other entrepreneurs or in any other manner, exclude or control the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.\footnote{159} Section 3 of the AMA provides that, "[n]o entrepreneur shall affect private monopolization."\footnote{160} Section 2(5), in regulating private monopolization, addresses the specific conduct of a particular enterprise, rather than the market structure.\footnote{161}

A private monopolization violation has four elements: (i) exclusion or control of business activities of other firms, accomplished by or through business activities of an entrepreneur(s), which, (ii) contrary to the public interest, (iii) causes a substantial restraint of competition (iv) in any particular field of trade.

\textbf{a. Exclusion or Control of Business Activities of Other Firms}

Section 2(5) prohibits an enterprise from engaging in the control or exclusion of the business activities of others under certain circumstances. The 1972 case of \textit{Toyo Seikan} is a good example of a case involving both control and exclusion issues.\footnote{162} Toyo, a powerful can manufacturing company, acquired stock in four other can manufacturing companies. Toyo acquired 29\% of the stock in Hokkai, a competing can company. Toyo attempted to control the business activities of Hokkai. Since Toyo was a large shareholder, Hokkai applied for permission from Toyo to build a factory in a neighboring city in order to meet growing demand.\footnote{163} Toyo would only give its approval if Hokkai adhered to restrictions on the production of the cans in the new factory and allowed the chairman of Toyo to take over as chairman of Hokkai.\footnote{164}

The JFTC found that Toyo had engaged in control of Seikan and the other three acquired companies and held those actions constituted private monopolization.\footnote{165} The JFTC explained that Toyo used its ownership in order to exercise direct control over the business activities of Hokkai.\footnote{166} It is unclear on what grounds the JFTC found that Toyo exerted direct control over the other three acquired companies; one could read the case as holding that the mere acquisition of the stock is enough to give rise to private monopolization, and that the actual exercise of control following the acquisition of such stock is irrelevant.\footnote{167}

In addition to controlling other companies, Toyo also excluded entrepreneurs from its field of trade. The canned food producers purchased the majority of their cans from Toyo and other can manufacturers in the market. Some

\begin{footnotes}
\footnote{159} Id. (quoting Antimonopoly Act § 2(5)) (emphasis added).
\footnote{160} Id. at 47.
\footnote{161} \textit{ARIGA}, supra note 148, at JAP 8-3.
\footnote{162} \textit{MATSHITA}, supra note 145, at 24 (citing 19 Shinketsusha 87 (1972)).
\footnote{163} Id.
\footnote{164} Id.
\footnote{165} Id. at 25.
\footnote{166} Id.
\footnote{167} Id.
\end{footnotes}
canned food producers had decided to manufacture some of the cans necessary for their business themselves.\textsuperscript{168} In response to this decision, Toyo and its fellow can manufacturers refused to supply these producers with cans.\textsuperscript{169} As a result, the affected food producers were unable to produce all the cans necessary to fill their orders and were forced to stop their in-house manufacturing.\textsuperscript{170} The JFTC held that the manufacturers’ refusal to supply the producers with cans constituted ‘exclusion’ of the business activities of others and was in violation of the AMA as the actions constituted private monopolization.\textsuperscript{171}

Another case which illustrates an unlawful control of business activities of other firms is the 1955 decision of \textit{Noda Soy Sauce}.\textsuperscript{172} The Noda Soy Sauce Company controlled 37\% of the soy sauce market in Tokyo. Noda, using this market power, refused to sell its products to dealers who did not follow Noda’s prescribed high retail prices.\textsuperscript{173} The other soy sauce manufacturers in the market raised their prices as well.\textsuperscript{174} The JFTC held that Noda had engaged in private monopolization by controlling the pricing policies of its competitors. The JFTC stopped Noda from enforcing its resale price maintenance policy.\textsuperscript{175}

On appeal, Noda argued that it did not control the pricing activities of its three competitors. The Tokyo High Court disagreed, stating that, for the purposes of private monopolization, control was not limited to direct control, but also encompassed indirect control.\textsuperscript{176} The court found that, owing to a very strong brand image among consumers, other manufacturers did not have the power to challenge Noda’s pricing policy. As a result, the other manufacturers had no choice but to follow Noda’s pricing policies.\textsuperscript{177}

\textit{b. Public Interest and Substantial Restraint of Competition}

In \textit{Noda Soy Sauce}, the Tokyo High Court also determined whether Noda’s activities caused a substantial restraint on competition, contrary to the public interest. In dicta, the court stated that the “public interest” components of private monopolization and unreasonable restraint on trade are not necessary elements to prove a violation of the Act. The court did, however, find Noda’s price controls to be contrary to the public interest because Noda forced the retail price of soy sauce to rise by imposing its resale price maintenance restrictions on the other manufacturers.

Although there has long been a controversy over a definition of the phrase “contrary to the public interest,” the JFTC has refused to set out a particular

\begin{itemize}
\item[168.] Id. at 29.
\item[169.] Id.
\item[170.] Id.
\item[171.] Id.
\item[172.] Id. at 25 (citing Tokyo High Court Decision, December 25, 1954, 10 \textit{Kōminshū} 743).
\item[173.] Id. at 26.
\item[174.] Id.
\item[175.] Id.
\item[176.] Id.
\item[177.] Id. at 27.
\end{itemize}
definition to aid the courts and the enterprises affected by the act in understanding the scope of the phrase. However, the JFTC does realize there is a dispute. In a 1965 commentary, the JFTC explained that "[n]either the [J]FTC's decision nor court judgments so far rendered has put an end to the controversy on what is the 'public interest' referenced in the definitions."  

Currently, the JFTC and several legal scholars are of the opinion that "public interest" is equivalent to free competition in the economy, and therefore activities which harm free competition should be deemed to be contrary to the public interest. If these activities cause a substantial restraint of competition in a particular field of trade and are harmful to fair and free competition, they should be held to be in violation of the AMA.

The JFTC definition that the public interest is equivalent to free competition in the economy merges the public interest element with the substantial restraint of competition element. The AMA does not spell out what constitutes a "substantial restraint of competition." The Tokyo High Court, in Toho Subaru v. FTC, defined "substantial restraint of competition" as:

a situation where competition itself has decreased and some situation is present or is about to appear whereby a certain entrepreneur or a group of entrepreneurs can, according to its own will, manipulate price, quality, quantity or other various conditions, thereby controlling the market.

In other words, "substantial restraint on competition" is the "establishment, maintenance or strengthening of market control."  

c. Any Particular Field of Trade

As in South Korea, the AMA defines the phrase "any particular field of trade" in terms of product and geographic market. The phrase implies that a group of suppliers and customers establish a market. The market is marked by the product traded, as well as where the product is traded. The product market test determines whether a commodity is a substitute for another commodity through looking at cross-elasticity of demand and reasonable interchangeability of the commodities. Commodities include both products and services.

The geographic market test looks to the geographic area in which competition takes place among enterprises. In determining the geographic market for a particular industry, the JFTC considers the nature of the business, business conditions, and the product in question. As a result, the geographic market
for the manufacturing and wholesale industries is larger than that allowed to the retail industry.\(^{187}\)

2. Remedial Measures

The Act provides that "no company in Japan shall effect a merger if ‘the effect of a merger may be to substantially restrain competition in any particular field of trade’ or if ‘unfair business practices have been employed in the course of the merger.’"\(^{188}\) The Act also provides for penalties of up to three years confinement or a fine of up to five million yen (approximately twenty-three thousand dollars), or both.\(^{189}\) This fine is almost one-tenth of the fine imposed under the South Korean anti-trust provisions.\(^{190}\)

3. Monopolistic Situations

The Act’s regulation of “monopolistic situations” covers circumstances where there is a dominant entrepreneur in a specific field of business in which there is little or no competition.\(^{191}\) This particular regulation is very similar to the regulation of abuse by market-dominant businesses under South Korean anti-trust regulation.\(^{192}\)

The particular provisions governing monopolistic situations were incorporated into the AMA by the 1977 amendment. The Act defines monopolistic situations in terms of the market share enjoyed by one or more enterprises, as well as abusive conduct by such enterprises. This definition has two elements: (1) market structure, and (2) market performance.

a. Market Structure

Structurally, the AMA defines a monopolistic situation as a market where: (1) one enterprise has 50% or more market share, or where two enterprises together own 75% or more market share in a particular field of trade; (2) the aggregate total value of goods or services in that particular field which are supplied within Japan during the latest one year period exceeds 50 billion yen (approximately $227 million); and (3) the barriers to entry into that particular field are high. As in South Korea, the JFTC publishes a list of markets or particular fields of trade which qualify under this three prong test.\(^{193}\)

The JFTC calculates the aggregate total value of goods or services during the latest year by (1) taking the aggregate total value, (2) deducting (a) the price of any exported goods and (b) any taxes which are levied directly on goods or

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187. Id.
188. IVORI & UESUGI, supra note 144, at 85 (citing AMA § 7).
189. Id. at 51 (citing AMA §§ 39(1), 92).
190. See supra note 112 and accompanying text.
191. ARIGA, supra note 148, at JAP 9.01.
192. See supra notes 100-111 and accompanying text.
193. IVORI & UESUGI, supra note 144, at 71-74.
services sold, and (3) adding to that total, the price of any goods which are imported.\textsuperscript{194}

In determining the difficulty of entry in a particular field, the JFTC considers various elements, such as: (1) the amount of initial capital required for entry into the market; (2) the need for developed technology; (3) the availability and control of channels of distribution and raw material; (4) the development of product differentiation in that market; (5) economies of scale in both production and distribution; and (6) past performance of the market.\textsuperscript{195}

\textbf{b. Market Performance}

As in the South Korean antitrust provisions, there must be some evidence of abuse in order to violate the AMA's monopolistic situation prohibitions. This prohibition is encroached on if, for a considerable period of time, (1) the market's price structure is inflexible, and (2) there are profits or expenses (i.e., advertising and marketing) far in excess of standard levels in the industry.\textsuperscript{196}

Section 2(7)(iii) of the Act defines an inflexible price structure as a remarkable increase in the price of the particular goods or services, or a slight decrease therein, for a considerable period of time in light of the changes which occur in supply and demand or in the cost of production of such goods and services during such period of time.\textsuperscript{197} In other words, an infallible price structure is a situation where the price of goods and services do not react to changes in supply and demand or the cost of production. To determine whether a market qualifies under this requirement, the JFTC examines price movements in the particular market within a three to five year time span.\textsuperscript{198}

The JFTC also determines whether a particular enterprise has profits or expenditures far in excess of industry standards. In determining excessive profits, there are two sets of profit rates which can be used as the industry standards: (a) operating profits (total operating income - total operating cost or expenses) over total assets, or (b) recurring profits (total operating income - total operating costs - general and administrative costs) over net worth (total assets - total liabilities).\textsuperscript{199} The JFTC recognizes 12 designated classes of business; all fields of businesses fall into one of these categories. The JFTC uses the average profit

\textsuperscript{194} \textit{Id.} at 73. The exact formula for calculation of this requirement is as follows:
\begin{enumerate}
\item Aggregated total amount of shipments of "particular goods" and the "similar goods" or services of the same description; minus
\item those exported; plus
\item those imported; minus
\item the total amount of taxes levied directly on these goods or services.
\end{enumerate}
\textit{Id.} For the purposes of this calculation, "same goods" are defined as goods which have the same function and utility, such as digital and analogue wrist watches. "Particular goods" are defined as goods which have similar descriptions and are capable of being supplied without significant change to the supplier's business. \textit{Id.} at 72.

\textsuperscript{195} \textit{Id.} at 74.

\textsuperscript{196} \textsc{Matsushita, supra} note 146, at 30.

\textsuperscript{197} \textsc{Iyori & Uesugi, supra} note 144, at 74-75.

\textsuperscript{198} \textit{Id.} at 75.

\textsuperscript{199} \textit{Id.}
rate in these classes of business as the norm for calculating excessive profits.\textsuperscript{200} The JFTC considers profits in excess of 50\% above the normal profit rate as excessive profits.\textsuperscript{201}

In calculating excessive selling in general, excessive expenditures are described as a level of expenditure far exceeding one which is the standard for that field of business.\textsuperscript{202} This provision applies where the enterprise expands selling and other expenditures in a wasteful manner in order to lower its total profit to the respective threshold.\textsuperscript{203}

c. The Limits of Civil Remedial Measures

The AMA prevents the JFTC from exercising its jurisdiction over monopolistic situations when the remedial measures taken may reduce the scale of business to the extent that: "(a) the cost for supplying goods and services will rise sharply; (b) [the business'] financial position is undermined; [or] (c) the maintenance of international competition becomes difficult."\textsuperscript{204} In addition, the JFTC cannot take any remedial measures against a monopolistic situation when alternative methods are available.\textsuperscript{205} The measures employed by the JFTC to remedy monopolistic situations must be consistent with the smooth running of the business and preservation of the livelihoods of the employees of that business.\textsuperscript{206} The AMA also allows three months for parties to file an appeal with the Tokyo High Court from any compliance order issued by the JFTC in a monopolistic situation;\textsuperscript{207} the statute of limitations for an ordinary appeal is 30 days.

C. Mergers and Acquisitions

Chapter 4 of the AMA provides measures which prevent concentration in the market through the use of mergers and acquisitions.\textsuperscript{208} By controlling market restructuring, the AMA avoids excessive concentration of market power.\textsuperscript{209} The AMA is designed to accomplish this objective (1) by prohibiting holding companies and controlling the stockholding of large corporations and banks, and (2) by controlling mergers and acquisitions.\textsuperscript{210} In the last 50 years, Japan has blocked only one merger.

\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 76.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 76 (citing AMA § 8-4).
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 77.
\textsuperscript{207} Id. (citing the AMA § 77(1)).
\textsuperscript{208} MATUSHITA, supra note 146, at 33.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
1. Prohibition of Holding Companies

The Act flatly prohibits any company, including foreign companies, whose principal business is to control the business activities of a company or companies in Japan through the holding of stock, from operating in Japan. These companies are referred to as "holding companies." The AMA does not prohibit a company that controls another company by means of its stockholdings, as long as the controlling company continues to operate its principal business.

The reason behind this strict prohibition is that prior to the enactment of the AMA, Japan's economy was dominated by Zaibatsu, companies controlled by holding companies. This measure prevents concentration of market power before the merger and acquisition control stage; it is "a preventive measure of preventive measures."

2. Restrictions on Stockholding by Large Enterprises and Banks

The AMA sets a maximum limit on stock of other companies held by "giant companies," excepting financial institutions. A "giant company" is one that is capitalized at 10 billion yen or more (approximately $45 million), or has a net worth of 30 billion yen or more, whichever is greater. Such enterprises are prohibited from holding an amount of stock in another company in excess of its own capital value or net worth. For financial institutions, such as banks, securities firms and insurance enterprises, this limitation is any amount larger than 5% of the outstanding stock of the issuing company.

3. Mergers and Acquisitions

The AMA places restrictions on mergers and acquisitions of stock if the transaction will cause a substantial restraint on competition in a particular field of trade, or if unfair business practices have been employed in securing the merger.

Unlike private monopolization, the JFTC has set out quantitative guidelines around the use of the term "substantial restraint of competition" in the mergers and acquisitions context. If the market share of a post merger company is expected to exceed 25%, the JFTC will closely evaluate the merger. While
the JFTC does not consider such mergers as *per se* substantial restraints of competition, the 25% threshold triggers JFTC review.\textsuperscript{224}

The Act establishes a pre-merger notification system under which every company in Japan which intends to be involved in a merger, regardless of its corporate size, must provide the JFTC with notification in advance.\textsuperscript{225} Further, such a merger may not proceed until 30 days have lapsed from the date of notification.\textsuperscript{226} This notification requirement is identical to that set forth by South Korea’s antitrust legislation.\textsuperscript{227} Once again, it is unclear what recourse is available to the JFTC after the passage of the 30-day grace period.

As in South Korea, only a handful of mergers have been challenged since the enactment of the AMA. All the challenged mergers were approved after further review.\textsuperscript{228} Nevertheless, the JFTC has provided a set of guidelines which establish a “safe harbor” for mergers involving small enterprises and point out the cases the JFTC will examine with close scrutiny.\textsuperscript{229} For instance, the JFTC will not look into the substance of a proposed merger where the total asset value of the merging companies is 5 billion yen or less (approximately $23 million), but will examine whether the notification requirements have been complied with.\textsuperscript{230}

The JFTC will closely scrutinize a merger if: (1) the post-merger market share of the company reaches 25% of the relevant market; (2) following the merger, the company would be ranked first in the industry with a market share of 15% or more; or (3) the post-merger company would be ranked first in the industry with “a conspicuously large market share relative to the second and third ranked companies.”\textsuperscript{231}

4. Remedial Measures

Under Section 17-2 of the AMA, the JFTC may take “necessary measures” to eliminate any act in violation of the Act’s merger and acquisition provisions or any act evading such prohibitions or restrictions.\textsuperscript{232} The JFTC can bring an action to declare null and void any merger or formation in violation of the provisions of the Act.\textsuperscript{233} The Act declares any acquisition of stock in violation of its provisions as automatically null and void, unless such transfer has been in good faith.\textsuperscript{234} The Act also sets forth penal sanctions of up to 2 million yen (approximately $9,000), one year imprisonment, or both for violations of the Act’s

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\textbf{224.} & *Id.* \\
\textbf{225.} & *Id.* (citing AMA § 15(2)). \\
\textbf{226.} & *Id.* \\
\textbf{227.} & See supra notes 134-35 and accompanying text. \\
\textbf{228.} & MATSUSHITA, supra note 146, at 35-36. \\
\textbf{229.} & *Id.* \\
\textbf{230.} & *Id.* at 36. \\
\textbf{231.} & *Id.* \\
\textbf{232.} & *IvoiU & UESUGI, supra note 144, at 88. \\
\textbf{233.} & *Id.* (citing AMA § 18). \\
\textbf{234.} & *Id.* (citing Yokoi Sangyo Co. and 2 Others v. Shirokiya Co., 3 KTIS 537 (Tokyo High Court, 1955)).
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merger and acquisition provisions. However, there is no mention of the fate of an unchallenged, yet unlawful, combination. This gap also exists in the South Korean antitrust legislation. It seems that, so long as there is no court decision nullifying the merger, such mergers remain effective.

In addition to the aforementioned remedies, the AMA provides standing to bring suit for private parties injured as a result of a violation of the Act's provisions. This remedy also appears in South Korean antitrust legislation. The Act further requires parties engaged in private monopolization, unreasonable restraint of trade, or unfair business practices to indemnify the injured parties. Unlike the United States, where the law provides for treble damages and reasonable attorney's fees, damages here are limited to actual damages.

D. Conclusion

Japan's regulation of mergers and monopolies mirrors that of the United States to some degree, although it is vastly weaker in terms of enforcement. The similarities exist because Japanese antitrust laws were originally based on those of the United States. However, the JFTC thresholds which need to be met in order to regulate an industry or to challenge a particular merger are higher than those in place for U.S. agencies.

With the exception of the period between 1953 and 1970, the JFTC has been actively pursuing AMA compliance. Insofar as monopolization and mergers are concerned, this active pursuit has been directed more at monopolization than at mergers. While there is little case law in the area of mergers and acquisitions, there have been quite a number of cases dealing with private monopolization and monopolistic situations.

V. Comparative Analysis

A. South Korea

1. Monopolization

The South Korean government enacted the MRFT Act in order to combat anticompetitive behavior by the monopolists and oligopolists in the South Korean economy. Yet, the government left a lot of room in both the provisions and application of the MRFT Act for firms to manipulate the laws in their favor. The MRFT Act sets out very broad exceptions through its rationalization and strengthening of international competitiveness exceptions. In addition, the
Minister of Economic Planning has been less than active in attacking possible violations of the Act.

Furthermore, the MRFT Act's inapplicability to present monopolies and the government's strong interest in the development of Korean industries seem to be working in complete contradiction to each other. By allowing monopolies and oligopolies in Korean industries, notwithstanding the rarely enforced abuse of market-dominating position provisions of the Act, the government creates high barriers of entry that will prevent the growth of those industries in any noticeable fashion.

In the United States, on the other hand, the FTC and the DOJ have focused their attention on breaking existing monopolies. A company in violation of Section 2 of the Sherman Act has not only committed a felony, but can also be liable for fines of up to $1 million. Due to the agencies' active enforcement of the antitrust laws, these remedial measures serve as a very strong deterrent.242

In addition, American antitrust laws are aimed at prohibiting anticompetitive behavior in the market and are structured to meet this goal. South Korea's antitrust laws, however, are not structured to prohibit anticompetitive behavior. South Korea's laws provide for relatively high thresholds before triggering regulation of a market dominator's activities, and even then they still provide for a number of exceptions. In fact, the regulations require the firm to have annual gross sales of $38 million or more and have at least a 50% market share to fall under the jurisdiction of such laws.243

The United States' antitrust laws require a definition of the relevant market,244 a degree of market power,245 and a general intent to monopolize.246 However, if there is clear wrongful monopolistic conduct in the market, U.S. agencies are not restricted in their enforcement of the Sherman Act in the same manner as their South Korean counterparts.

This relaxed approach in South Korean antitrust regulations is reflective of the government's view regarding the impact of monopolies on the economy. The fact that South Korean laws do not affect existing monopolies lends support to the conclusion that the government does not view monopolies as a strong threat to free competition.247 Perhaps South Korea views most monopolies as vehicles of achieving its goals of domestic and international economic growth.

2. Mergers

The South Korean merger regulations have some similarities to those of the United States. Both laws have strict pre-merger notification requirements and a 30-day waiting period for the parties to the merger in order to allow the agencies

242. See supra notes 2-4, 78-82 and accompanying text.
243. See supra notes 109-111 and accompanying text.
244. See supra notes 42-46 and accompanying text.
245. See supra notes 6-15 and accompanying text.
246. See supra notes 3, 16-22 and accompanying text.
247. See supra note 142 and accompanying text.
to evaluate the transaction in question. In addition, both laws set a semi-low threshold for the mergers which will require the attention of the agencies. Finally, both laws set a number of exceptions to strict enforcement of the merger regulations.

The rationale underlying South Korea's merger regulations seems to be that mergers in general will help the growth of that country's economy. This is apparent in the government's non-aggressive approach to mergers and relatively low penalties for violating the anti-merger laws. The language of the exceptions set forth by the South Korean merger laws are broad enough so that there is ample room for mergers to qualify under one of the exceptions.

In contrast, merger laws in the United States are directed more towards possibilities of anticompetitive effects which may result from mergers. This does not mean that the FTC or the DOJ will challenge every merger that takes place. These agencies, at their own discretion, evaluate a number of elements, including positive effects which may come about as a result of a merger, in determining whether or not they will challenge the merger. Additionally, American firms do not have many broad antitrust law exceptions under which to qualify.

B. Japan

1. Monopolization

Given the Antimonopoly Act's goals of deterring anticompetitive activities and promoting free competition in the Japanese economy, the remedial measures available to the JFTC are not sufficient to deal with the issues the Act deems problematic. On the one hand, the private monopolization and monopolistic situations are deemed to be an evil in the Japanese economy. On the other hand, the penal sanctions for violation of the private monopolization provisions of the Act are lighter than those set out in the South Korean antitrust legislation. Furthermore, in regulating a monopolistic situation, the JFTC is constrained in how it can remedy the situation.

While the goals of the United States and Japan in prohibiting monopolistic behavior are similar, their means of achieving these goals are quite different. While Japan has modeled its laws after those of the United States, it has not provided the JFTC with the necessary remedial measures to enforce those laws. The JFTC cannot take any remedial measures against a monopolistic situation when other alternative methods are available. The measures employed by the JFTC must be consistent with the smooth running of the business and preserva-

248. See supra notes 62-64, 133-35 and accompanying text.
249. See supra notes 65-67, 109-11 and accompanying text.
250. See supra notes 69-71, 126-27 and accompanying text.
251. See supra notes 126-27 and accompanying text.
252. See supra notes 69-71 and accompanying text.
253. See supra note 155 and accompanying text.
254. See supra notes 188-90 and accompanying text.
tion of the livelihoods of the employees of that business. The restrictions on how the JFTC enforces the anti-monopoly laws would not hinder the agency’s work as much if the penalties exacted for the violation of these laws were more serious.255

Based on a comparison of the two countries’ approaches to monopolistic activities, the U.S antitrust laws seem to focus on the big picture—the economy as a whole or the relevant industry in which the firm in question operates. The Japanese laws, which weigh a number of factors including the welfare of the employees of such firms, seem to focus primarily on the impact of antitrust laws on the individual firm.

2. Mergers

Because of the way the JFTC has dealt with mergers thus far, Japan does not seem interested in restricting such transactions. In the past 20 years there have been only a handful of mergers challenged and none have been prohibited.256 As in the application of anti-monopoly regulations, even if a firm violates the merger provisions, the penalties are so low that it would seem worth while for many companies to at least try to engage in such activities.257

In contrast to the United States, the Japanese pre-merger notification requirement applies to all firms, regardless of their size or market share.258 However, any merger in which the total assets of the merging firms are less than $23 million will go unchallenged.259 The penalty for a violation of the merger laws by a $22 million company is a maximum of $90,000. Companies of this size probably consider $90,000 dollars as “pocket change,” since their assets together are at least valued at over two hundred times that amount.

The merger laws of the United States and Japan are similar in that they contain provisions which allow the initiation of private actions for violations of the merger laws.260 These laws differ in the area of treble damages. In the United States, the possibility that a private individual may sue for treble damages acts as a deterrent to companies considering mergers which may violate the merger laws. Because Japanese law excludes treble damages from private actions, Japanese companies are less likely to be deterred from violating merger laws.261

The JFTC’s approach to mergers shows a more relaxed policy than that of the United States. In the United States, the FTC and the DOJ consider mergers which may have an anticompetitive effect as transactions leading to the creation of illegal monopolies. Even though there exists a strong Japanese policy against the formation of illegal monopolies, the JFTC’s approach to such transactions

255. See supra notes 204-07 and accompanying text.
256. See supra note 228 and accompanying text.
257. See supra note 235 and accompanying text.
258. See supra notes 225-27 and accompanying text.
259. See supra note 230 and accompanying text.
260. See supra note 237 and accompanying text.
261. See supra notes 73-86, 239 and accompanying text.
indicates that the agency is not very concerned about the possible impact of mergers on the economy.

VI.
Conclusion

The antitrust measures of the United States, South Korea and Japan demonstrate the fundamental importance of two factors in the success of nations in antitrust regulation—effective measures and adequate enforcement. Other factors, such as trends in the economy, politics, and international implications, may help or hinder a government's efforts in achieving its objectives. Without effective measures and active enforcement, however, success will be almost impossible.

South Korea and Japan are concerned with the growth of their industries. Judging from the manner in which antitrust measures are enforced in those countries, lenient application of their antitrust laws are a means of achieving their objectives. Both countries initially modeled their antitrust laws after those of the United States. However, unlike in the United States, they have not placed a lot of weight on enforcing regulations which control monopolies and mergers. In contrast, the United States aims to achieve its goals of free competition in the market through aggressively enforcing its antitrust laws. Both the FTC and the DOJ are active in preventing violations of the antitrust laws, and, for the most part, they have been successful in helping the United States achieve its objectives.

The United States has been more successful than Japan and South Korea in implementing its antitrust measures. However, upon examining the policies behind the antitrust laws of South Korea and Japan and looking at the overall state of the economy of these countries since the enactment of their antitrust laws, one would be hard pressed not to acknowledge that they have also been successful. Their success, however, has not been in the form of implementing their antitrust measures. Rather, it has been in achieving the objectives behind their antitrust laws—the growth of their economies.