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### Private Enforcement of Antitrust Law in Japan: An Empirical Analysis

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This article assesses the role of private antitrust litigation in Japan through an empirical analysis. An attempt was made to collect data concerning all actions for damages and injunctive relief in the post-war era. Based on this data, the article gauges how much private antitrust litigation has contributed to the deterrence of antitrust violations, compared to public enforcement by the Japan Fair Trade Commission. It also evaluates to what extent private antitrust litigation has achieved compensation for those harmed by antitrust violations. The article includes findings on (1) the number of private antitrust actions, (2) the types of antitrust infringements invoked (bid-rigging, cartels other than bid-rigging, monopolization and unfair trade practices), (3) the success rate of antitrust litigation, (4) the magnitude of the damages awards and settlements, (5) the proportion of stand-alone versus follow-on cases, and (6) the kind of plaintiffs that have recovered damages.

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### INTRODUCTION

Private litigation was part of the enforcement arsenal from the very beginning of Japanese antitrust law. The treble damages provision advocated by the U.S. occupation authorities did not make it into the final draft<sup>1</sup>, but the Japanese Antimonopoly Act of 1947<sup>2</sup> nonetheless clearly spells out a right to damages for victims of antitrust infringements.<sup>3</sup> In addition, scholars and courts soon established that plaintiffs could also obtain damages based on the general tort provision of the Civil Code.<sup>4</sup>

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<sup>1</sup> Sensui & Nishimura, 'Genshi dokusenkinshihō no seitei katei to genkōhō he no shisa - kōtorii no soshiki, shihōseido, songaibaishō, keijiseido [The Enactment of the Original Antimonopoly Act and its Implications for the Current Antimonopoly Act - The JFTC's Organization, Judicial System, Damages and Criminal System]' (2008) 04-08 Competition Policy Research Center Report 164-167, available at <http://www.jftc.go.jp/cprc/english/cr-0408.pdf>, English summary at <http://www.jftc.go.jp/cprc/english/cr-0408abstract.pdf>; First, 'Antitrust in Japan: The Original Intent' (2000) 9 Pac. Rim L. & Pol'y J. 1, 49, 56.

<sup>2</sup> Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, as amended. [hereinafter Antimonopoly Act]

<sup>3</sup> Antimonopoly Act, Art. 25-26. Actions on this basis require a decision from the Japan Fair Trade Commission that is final and binding. See part 1, section (a).

<sup>4</sup> Minemura & Shōda, Shiteki dokusen kinshihō [The Antimonopoly Act], Tokyo, Nihon hyōron shinsha, 1956, 432; Yokota, 'Shiteki dokusen kinshi hō ihan no hōritsu kōi no kōryoku - shihōken to kōseitōrihikiinkai no kengen to no kankei [Validity of Juristic Acts that Violate the Antimonopoly Act - The Relationship Between the Judicial Power and the Authority of the Fair Trade Commission]' (1949) 1(8)

For decades, however, these provisions remained virtually unused.<sup>5</sup> Private enforcement of competition law was all but nonexistent. According to some observers, there has been a ‘dramatic change’ in this situation in recent years.<sup>6</sup> Private antitrust lawsuits, so we are told, are now an integral part of the Japanese enforcement landscape.<sup>7</sup> Others take a more sceptical view and maintain that private suits have produced little impact<sup>8</sup> and remain rare.<sup>9</sup>

These widely differing views are not based on thorough empirical research. In fact, there has been very little empirical quantitative research about Japanese private antitrust litigation. As a result, we do not know exactly how many private antitrust cases have been filed. We also lack data on the rate of success and the amounts recovered by these lawsuits. Hence, we have no basis to assess the contribution of private antitrust litigation to deterrence and compensation.

This article tries to fill that gap and put the debate about the role of private enforcement in Japan on more solid footing by providing and analyzing empirical data. An attempt was made to collect data for all actions for damages and injunctive relief based on alleged antitrust violations in the post-war era.

The picture that emerges from the more than 270 cases analysed for this article is not black or white. Private enforcement is not a monolith. There are various private enforcement mechanisms and many different areas in which they play a role. Overall, however, the data shows that the deterrent effect of private enforcement is still limited in Japan. The only area where it has really played a significant role is bid-rigging, where an original litigation mechanism allowed activist plaintiffs to obtain substantial recoveries on behalf of local governments and where public entities frequently seek and obtain damages. In areas other than bid-rigging, the deterrent effect of private enforcement has been much less significant. The contribution of private antitrust litigation to providing redress for those harmed by violations has also been quite

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HŌSŌ JIHŌ 262, 270-271 (1949); Imamura, *Dokusenkinshihō* [The Antimonopoly Act], Tokyo, Yūhikaku, 1961, 186. This scholarly view was espoused by the courts in *Satō v. Sekiyu renmei*, 43(11) MINSHŪ 1340, 1477 (Yamagata District Ct., 31 March 1981), *rev'd* 43(11) MINSHŪ 1539 (Sendai High Ct., 26 March 1985), *rev'd sub nom.* *Nihon sekiryū K.K., v. Satō* 43(11) MINSHŪ 1259 (Sup. Ct., 8 December 1989). Actions on the basis of tort can be brought regardless of any prior Fair Trade Commission decision.

<sup>5</sup> See part 3 (only five cases until 1971). See also, e.g., Ramseyer, ‘The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan’ (1985) 94 *Yale L.J.* 604.

<sup>6</sup> Ishida & Fujiyama, ‘Japan’, in Gotts (ed), *The Private Competition Enforcement Review*, 3d ed, London, Law Business Research, 2009, 129.

<sup>7</sup> Kozuka, ‘The Enforcement of the Competition Law in Japan: The Rise of Private Initiatives by Litigious Reformers’, in Wolff, Nottage & Anderson (eds), *Who Judges Japan?: Popular Participation in the Japanese Legal Process*, Cheltenham, Edward Elgar, forthcoming 2012 (arguing that the traditional view of antitrust enforcement in Japan, with the JFTC as sole enforcer, no longer holds).

<sup>8</sup> Ramseyer, ‘Toward a Theory of Jurisdictional Competition: The Case of the Japanese FTC’ (2005) 1 *J. Comp. L. & Econ.* 247, 254 (‘Fundamentally, *neither* private suits under the [Antimonopoly] Act nor private suits under the Civil Code much matter.’).

<sup>9</sup> Oda, *Japanese law*, 3d ed, Oxford University Press, 2009, 362 (‘...litigation for damages involving breach of the Anti-Monopoly Law has been rare.’).

limited. Although local governments and government agencies have recovered tens of billions of yen, businesses have recovered much less, and consumers virtually nothing.

Part 1 surveys the various forms of private antitrust enforcement in Japan. Part 2 explains which cases are covered by this study and how data were collected. Part 3 and part 4 analyze the number of private antitrust cases and the remarkable increase in cases during the past two decades. Part 5 examines the types of infringements for which cases have been brought. Part 6 gauges how successful private antitrust cases have been. Part 7 and part 8 assess the deterrent effect of private antitrust litigation. Part 9 evaluates the compensatory effect of private lawsuits. Finally, part 10 draws upon the findings in the preceding parts and gives an overall assessment of the role of private antitrust litigation in Japan.

## 1. PRIVATE ANTITRUST ENFORCEMENT IN ITS VARIOUS FORMS

Private antitrust enforcement in Japan can be categorized in five different forms: (a) regular damages actions, (b) damages actions brought as residents' lawsuits, (c) actions for injunctive relief, (d) actions invoking the sanction of voidness, and (e) derivative actions.

### (a) Damages actions

Damages actions can be filed either on the basis of the Antimonopoly Act (Article 25) or on the basis of the general tort provision of the Civil Code (Article 709). The first option is only available after the Japan Fair Trade Commission (JFTC) has rendered a final and binding decision.<sup>10</sup> Once such a decision is available, the infringer is strictly liable, i.e. plaintiffs need not prove negligence or intent on the part of the infringer.<sup>11</sup> These actions must be brought before the Tokyo High Court<sup>12</sup> and benefit from a special statute of limitations period that only starts to run after the JFTC's decision becomes final.<sup>13</sup>

The second option is to seek damages on the basis of the general tort provision of the Japanese Civil Code (Article 709). In such an action, the plaintiff can use the antitrust violation as proof of some of the elements of the tort.<sup>14</sup> Actions in tort can be brought regardless of any prior public enforcement action by the JFTC. Although there is no strict liability when plaintiffs sue on the basis of tort, in practice, meeting the burden of proof on negligence and intent is easily satisfied if the plaintiff can prove an antitrust violation. Hence, in practice, there is not much difference between actions on the basis

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<sup>10</sup> Antimonopoly Act, Art. 26(1).

<sup>11</sup> Antimonopoly Act, Art. 25(2).

<sup>12</sup> Antimonopoly Act, Art. 85.

<sup>13</sup> Antimonopoly Act, Art. 26(2).

<sup>14</sup> In most but not all cases proof of an antitrust violation is sufficient evidence of unlawful conduct (*kenri shingai* or *ihōsei*) and intent/negligence (*koji/kashitsu*). The plaintiff must then only prove the two remaining elements of the general tort, i.e. damage and causality. See Murakami & Yamada, *Dokusen kinshihō to sashitome songai baishō* [The Antimonopoly Act - Injunctive Relief and Damages Actions], 2d ed, Tokyo, Shōji hōmu, 2005, 84.

of the Antimonopoly Act and actions on the basis of tort. Plaintiffs therefore often prefer to sue on the basis of tort, even if they could sue on the basis of the Antimonopoly Act, *inter alia* because it allows them to sue in their local district court<sup>15</sup> rather than in the Tokyo High Court.

In some cases, plaintiffs have sued neither on the basis of the Antimonopoly Act nor on the general tort provision, but on the basis of the Civil Code's provisions regarding unjust enrichment.<sup>16</sup> In several cases involving bid-rigging for instance, plaintiffs have successfully argued that the contract with the bidder was invalid because it came about as a result of illegal bid-rigging.<sup>17</sup> Hence, the overcharge paid under the contract had no 'legal cause' and could be reclaimed from the bid-rigger as an unjust enrichment.

Finally, in a number of cases, antitrust violations served as a basis for a contractual damages claim. These cases were typically brought by distributors against their supplier, after their distribution contract had been terminated. The distributors then sought damages, alleging that the termination was unlawful because it was based on the distributor's non-compliance with an obligation that infringed antitrust law, such as an obligation not to sell below a certain resale price or to certain categories of customers.<sup>18</sup>

### **(b) Damages Actions Brought as Residents' Lawsuits**

From 1992 to 2002, a considerable number of damages actions were filed in the form of residents' lawsuits (*jūmin soshō*), a private antitrust enforcement mechanism that seems unique to Japan.<sup>19</sup> Residents' lawsuits are lawsuits brought by regular citizens on

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<sup>15</sup> Actions on the basis of Article 709 Civil Code can, among others, be brought in the district court of the place where the tort was committed (Minsohō [Code of Civil Procedure], Art. 5(9)).

<sup>16</sup> Minpō [Civil Code], Art. 703-704.

<sup>17</sup> See, e.g., Japan v. Dai nihon insatsu K.K. et al. 1734 HANREI JIHŌ 28 (Tokyo D. Ct., 31 March 2000), *aff'd* 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001), *aff'd* Nos. h13-o-757 and h13-ju-747 (Sup. Ct., 28 March 2002) (action on the basis of unjust enrichment brought by Japan's Social Insurance Agency against printing companies that had rigged bids for peel-off seals widely used in Japan to keep letters confidential). For a recent example resulting in the largest antitrust damages award in Japan's history, see Japan v. Kosumo sekiryu K.K. et al., No. h17-wa-26475 (Tokyo District Ct., 27 June 2011).

<sup>18</sup> See, e.g., K.K. Kosaka yakkyoku v. Taishō seiyaku K.K., 9 SHINKETSUSHŪ 162 (Tokyo High Ct., 19 February 1958) (action for damages by a distributor against a manufacturer of cosmetics after his contract had been suspended for violating a non-compete clause; case settled); K.K. Ferokkusu v. K.K. Aroinsu keshōhin, 1566 HANREI JIHŌ 85 (Osaka District Ct., 7 November 1995), *rev'd* 1612 HANREI JIHŌ 62 (Osaka High Ct., 28 March 1997) (action for damages by a distributor against a manufacturer of cosmetics after his contract had allegedly been terminated for selling below price; claim accepted but not on antitrust grounds); A. v. Oppen keshōhin K.K. v. 39 SHINKETSUSHŪ 581 (Osaka District Ct., 24 July 1992, *aff'd* 40 SHINKETSUSHŪ 667 (Osaka High Ct., 14 September 1993) (action for damages by a distributor against a manufacturer of cosmetics after his contract had been terminated for selling to a discount store, in violation of a door-to-door sales requirement; claim rejected).

<sup>19</sup> The residents' lawsuit mechanism was introduced in the Local Autonomy Act at the behest of the American occupation authorities and was inspired by the U.S. taxpayer lawsuits. However, in the U.S., taxpayer lawsuits are generally not used to enforce antitrust law. Residents' lawsuits also differ from *qui tam* actions in the U.S., as found in, *inter alia*, the False Claims Act (U.S.C. § 3730(b)(1) (2006)). In these lawsuits, a private person sues in the name of the U.S. Government but the recovery is shared between the government and the private person. By contrast, in a residents' lawsuit, the recovery goes entirely to the local government.

behalf of their local government, i.e. the prefecture, city, town or village they reside in.<sup>20</sup> They were never conceived as a tool for the enforcement of antitrust law, but as a way for citizens to prevent squandering of taxpayer money. For example, if a public official spends government money on lavish entertainment and *geishas*, and the local government itself fails to sue him for damages, the residents can bring an action on behalf of the local government.<sup>21</sup> In the nineties, activist plaintiffs, outraged by widespread bid-rigging for government contracts, used this mechanism to seek damages from companies that had engaged in bid-rigging for public works.<sup>22</sup> The residents, organized in local non-profit organizations called ‘Citizen Ombudsman’, first requested local governments to seek damages themselves.<sup>23</sup> As these requests were mostly turned down – often some local officials were involved in the bid-rigging – the residents took matters into their own hands and brought damages actions on behalf of their local government.

Although the initial actions were rejected by the courts on formal grounds, the residents persisted, ultimately resulting in an avalanche of damages awards in bid-rigging cases. Since the lawsuits are brought on behalf of the local government, any recovery goes into the budget of the local government. The local residents themselves do not receive anything but if their suit is successful, they can recover part of their attorney fees.<sup>24</sup> With so few incentives, it is not surprising that residents’ lawsuits are generally brought by ideologically motivated plaintiffs, acting as a ‘private attorney-general’ out of a sense of economic injustice. In addition, attorneys play an important role in bringing these suits. In some cases, they have worked on a contingency basis<sup>25</sup>, which is otherwise uncommon in Japan.

The surge in residents’ lawsuits came to an abrupt end in 2002, when a legislative amendment removed the possibility for residents to sue on behalf of their local government.<sup>26</sup> Residents are now barred from suing directly on behalf of the local

<sup>20</sup> Chihō jichi hō [Local Autonomy Act], Law No. 67 of 1947, Art. 242-2(1) (in its version prior to an amendment in 2002).

<sup>21</sup> See, for such a case, Mitsuyoshi Itō v. Teruo Morijima, 17 HANREI TAIMUZU 101, 103 (Sup. Ct., 5 September 1989) (holding that the expenses to welcome guests were excessive and therefore illegal), *aff’d* 1227 HANREI JIHŌ 42 (Nagoya High Ct., 17 July 1986).

<sup>22</sup> The first case was filed in the wake of the so-called Saitama Saturday Club scandal, which involved systematic bid-rigging by a group of sixty-six major construction companies that allocated contracts for public works in Saitama. Residents of Saitama Prefecture v. Kajima Kensetsu K.K., No. h4-gyōu-13, 28060884 (Urawa District Ct., 13 March 2000) (Lex/DB Database), *aff’d*, No. h12-gyōko-245, 25410184 (Tokyo High Ct., 26 April 2001) (Lex/DB Database), *aff’d* No. h13-gyōtsu-235 (Sup. Ct., 26 June 2003).

<sup>23</sup> Before being able to file suit, residents must request an audit (Local Autonomy Act, Arts. 242 and 242-2), which can result in a recommendation to sue.

<sup>24</sup> Chihō jichi hō [Local Autonomy Act], Law No. 67 of 1947, as amended, Art. 242-2(12). Prior to a 2002 amendment, this rule was laid down in Local Autonomy Act, Art. 242-2(7).

<sup>25</sup> See Residents of Uji City v. Uji City, 63(4) MINSHŪ 703 (Sup. Ct., 23 April 2009), English translation at [www.courts.go.jp/english/judgments/text/2009.04.23-2007.-Ju-.No.2069.html](http://www.courts.go.jp/english/judgments/text/2009.04.23-2007.-Ju-.No.2069.html) (mentioning an agreement between the plaintiffs and their attorneys that the attorneys would receive whatever would be successfully recovered from Uji City on the basis of the provision allowing for the recovery of attorney fees).

<sup>26</sup> Chihō jichi hō nado no ichibu wo kaisei suru hōritsu [Law Partially Amending the Local Autonomy Act], Law No. 4 of 2002, which entered into force on 1 September 2002.

government, although they can still seek a court judgment ordering the local government to seek damages.<sup>27</sup>

### (c) Injunctions

Injunctions directly based on antitrust law have only been possible since 2001, after an amendment to the Antimonopoly Act.<sup>28</sup> Prior to that amendment, some plaintiffs had tried to seek injunctive relief against antitrust infringements on the basis of contract and tort, but mostly without success.<sup>29</sup> Even now, the possibilities for obtaining injunctive relief are limited, as only a specific category of antitrust violations, namely unfair trade practices, can be enjoined. Moreover, plaintiffs face a fairly high threshold, because they must show that they suffer or are likely to suffer ‘extreme’ damage.<sup>30</sup>

### (d) Derivative Actions

Antitrust violations have also been alleged in a number of derivative suits brought under the Companies Act.<sup>31</sup> These suits were brought by disgruntled shareholders seeking damages on behalf of the company from directors and officers, alleging that they failed to prevent an antitrust violation from occurring or failed to seek leniency after becoming aware of the violation. In most cases, the alleged harm resulted from the fact that the company had to pay antitrust penalties, or that it made a payment to a customer in violation of antitrust law.

<sup>27</sup> Local Autonomy Act, as amended, Art. 242-2(1)(iv). For an example, see *Residents of Aichikawa Town v. Mayor of Aichikawa Town*, 1342 HANREI TAIMUZU 142 (Ōtsu District Ct., 1 July 2010).

<sup>28</sup> *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu* [Act to Partially Amend the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 76 of 2000, which entered into force on 1 April 2001.

<sup>29</sup> See, e.g., *K.K. Miyagi famirī kurabu v. Nihon koromubia K.K. et al*, 1110 HANREI JIHŌ 13 (Tokyo District Ct., 29 March 1984) (rejecting application for interim injunctive relief filed by a music record retailer against his supplier after his agreement was terminated because he had sold to record rental companies); *Shinshinshōji K.K. v. K.K. Edōin and Rī Japan K.K.*, 1490 HANREI JIHŌ 111 (Osaka District Ct., 21 June 1993) (rejecting application for interim injunctive relief filed based on tort, holding that the remedy for a tort is damages, not injunctive relief); *K.K. Fujiki honten v. Shiseidō Tokyo hanbai K.K.*, 1474 HANREI JIHŌ 25 (Tokyo District Ct., 27 September 1993), *rev'd* 1507 HANREI JIHŌ (Tokyo H. Ct., 14 September 1994), *aff'd* 1664 HANREI JIHŌ 3 (Sup. Ct., 18 December 1998) (rejecting application for interim relief by retailer against cosmetics supplier after contract termination); *Y.K. Egawakikaku v. Kaō keshōhin hanbai*, 1500 HANREI JIHŌ 3 (Tokyo District Ct., 18 July 1994), *rev'd* 1624 HANREI JIHŌ 55 (Tokyo High Ct., 31 July 1997), *aff'd* 1664 HANREI JIHŌ 14 (Sup. Ct., 18 December 1998) (rejecting application for injunctive relief by retailer against cosmetics supplier after contract termination); *K.K. Kawachiya v. Shiseidō Hanbai K.K.*, 47 SHINKETSUSHŪ 640 (Tokyo District Ct., 30 June 2000) (rejecting application for injunctive relief by discount shop against cosmetics supplier after contract termination). But see *X. v. Hiruzen rakunō nōgyō kyōdō kumiai*, Nos. h8-wa-1089 and h9-wa-1242 (Okayama District Ct., 13 April 2004), discussed in *Shiraishi, Dokkinhō jirei no kandokoro* [The Key Points of Competition Law Case Law], 2d ed, Tokyo, Yūhikaku, 2010, 184-188 (granting injunctive relief to plaintiff excluded from trade association’s farm); *K.K. Fujiki honten v. Makkusu fakutā K.K. et al.*, 49 SHINKETSUSHŪ 766 (Kobe District Ct., 17 September 2002) (finding that the termination violates the Antimonopoly Act and declaring that plaintiff is entitled to supplies).

<sup>30</sup> Antimonopoly Act, Art. 24.

<sup>31</sup> *Kaishahō* [Companies Act], Art. 847. Prior to 2005, the legal basis of these suits was *Shōhō* [Commercial Code], Art. 276.

Around a dozen such cases have been brought. The initial cases were mostly rejected by the courts.<sup>32</sup> Recently, however, several cases, all related to bid-rigging, have settled for non-negligible amounts.<sup>33</sup> Other cases are still pending.<sup>34</sup>

### (e) Voidness

Antitrust law can also be invoked in support of a claim or defense that a specific legal act is void under Article 90 of the Civil Code. According to Japanese case law, an act that violates antitrust law is not automatically void.<sup>35</sup> Instead, courts decide this on case-by-case basis, taking into account such factors as the seriousness of the violation, the aim of the specific antitrust rule that was violated and the need to protect legal certainty.<sup>36</sup>

<sup>32</sup> X et al. on behalf of Nomura shōken v. Y, 827 HANREI TAIMUZU 39 (Tokyo District Ct., 16 September 1993), *aff'd* 890 HANREI TAIMUZU 45 (Tokyo High Ct., 26 September 1995), *aff'd* 1046 HANREI TAIMUZU 92 (Sup. Ct., 7 July 2000) (claim rejected); X et al. on behalf of Nomura shōken v. Y, 976 HANREI TAIMUZU 277 (Tokyo District Ct., 14 May 1998), *aff'd* 1064 KINYŪ SHŌJI HANREI 21 (Tokyo High Ct., 27 January 1999); Asai et al. on behalf of Nikkō shōken K.K. v. Iwasaki et al., 43 SHINKETSUSHŪ 499 (Tokyo District Ct., 13 March 1997), *aff'd* 1058 HANREI TAIMUZU 251 (Tokyo High Ct., 23 February 1999) (rejecting derivative action because, although the company had violated the Antimonopoly Act by compensating the investment losses of a particularly important client, the directors had not been aware of this illegality and had therefore not been negligent); X et al. on behalf of Mitsubishi shōji v. Y., 51 SHINKETSUSHŪ 991 (Tokyo District Ct., 20 May 2004) (claim rejected); X et al. on behalf of Nihon shinpan K.K. v. Y, 1934 HANREI JIHŌ 121, No. h15-wa-1807 (Tokyo District Ct., 3 March 2005) (claim rejected because the directors did not violate the Antimonopoly Act). But see X on behalf of Hitachi seisakusho K.K. v. Y, 190 SHIRYŌBAN SHŌJI 233 (Tokyo District Ct., settled 21 December 1999) (directors paid 100 million yen to company to settle allegations that they unlawfully failed to prevent bid-rigging for sewage construction works).

<sup>33</sup> X on behalf of Mitsui zōsen K.K. [Mitsui Engineering & Shipbuilding Co., Ltd.] v. Y, unreported (Tokyo District Ct., settled 30 July 2010) (former directors paid 80 million yen to the company to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); Morioka et al. on behalf of Sumitomo kinzoku kōgyō K.K. [Sumitomo Metal Industries, Ltd.] v. Y, unreported (Osaka District Ct., settled 30 March 2010) (directors paid 230 million yen to the company to settle a variety of allegations, including failure to prevent bid-rigging for the construction of steel bridges and a cartel in the market for stainless steel plates); X et al. on behalf of Hitachi zōsen K.K. v. Y, unreported (Osaka District Ct., settled 22 December 2009) (directors paid 250 million yen to the company to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); X et al. on behalf of Kobe seikōjo K.K. [Kobe Steel K.K.] v. Y, unreported (Kobe District Ct., settled 17 February 2010) (directors paid 88 million yen to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); X et al. on behalf of K.K. Ōbayashigumi v. Y, unreported (Osaka District Ct., settled 5 June 2009) (directors paid 200 million yen to settle allegations that they were negligent in preventing bid-rigging for the construction of a subway line in Nagoya and several other projects); Miyake et al. on behalf of Goyō kensetsu K.K. [Penta-Ocean Construction] v. Suino et al, unreported (Tokyo District Ct., settled 30 May 2008) (directors paid 88 million yen to the company to settle allegations that they had failed to prevent bid-rigging, resulting in a penalty (surcharge) for the company, and made an unlawful political donation).

<sup>34</sup> Pending cases include damages actions filed by shareholders of Mitsubishi jūkōgyō K.K. [Mitsubishi Heavy Industries], IHI K.K., Sumitomoikai jūkōgyō K.K. (all relating to bid-rigging for the construction of steel bridges) and Sumitomo denki kōgyō K.K. [Sumitomo Electric Industries] (relating to a cartel in the market for fiber-optic cables).

<sup>35</sup> K.K. Miyagawa v. Gifu shōkō shinyōkumiai [Gifu Commercial and Industrial Credit Association], 31 MINSHŪ 449, 459 (Sup. Ct., 20 June 1977).

<sup>36</sup> Iyo tetsudō K.K. [Iyo Railways K.K.] v. Okudōgo onsen kankō basu K.K. [Okudōgo Hot Spring Tourist Bus], No. s46-wa-156, 27441751 (Matsuyama District Ct, 19 April 1976) (Lex/DB Database), *aff'd* 629 HANREI TAIMUZU 179 (Takamatsu High Ct., 8 April 1986), *aff'd on other grounds* 724 HANREI TAIMUZU 160 (Sup. Ct., 24 November 1989). But see Japan v. Dai nihon insatsu K.K. et al., 1734 HANREI JIHŌ 28, 46

## 2. SCOPE OF THIS STUDY AND METHODOLOGY

### (a) Scope

The aim of this study was to analyze all actions for damages, including those brought in the form of residents' lawsuits,<sup>37</sup> and all actions for injunctive relief based on alleged violations of antitrust law. In other words, the study covers the enforcement mechanisms described above under sections (a), (b) and (c). Damages claims were included regardless of whether they were filed by the plaintiff or as a counterclaim by the defendant.

By contrast, the study does not cover the enforcement mechanisms described under sections (d) and (e). In other words, the study does not include cases in which antitrust law was invoked to allege the voidness of a legal act or contractual clause, unless that allegation was accompanied by a claim for damages or injunctive relief. Neither does the study include the dozen or so derivative actions described in section (e) above.

In some bid-rigging cases, the courts made no explicit finding that there was a violation of the Antimonopoly Act but simply found 'illegal bid-rigging' and referred to the JFTC decision in which this bid-rigging was deemed a violation of the Antimonopoly Act.<sup>38</sup> Those cases are essentially based on a violation of antitrust law and were therefore included.

'Private' antitrust litigation in the context of this study denotes litigation based on private law, brought before the regular courts, as opposed to criminal cases brought by a prosecutor or administrative cases brought by the JFTC. This definition does not require plaintiffs to be only private individuals and companies. Public entities such as the State, local governments and public agencies engage in many transactions and when they become the victims of anticompetitive conduct such as bid-rigging they may seek redress. This has been particularly the case in Japan. Cases in which these entities sought redress before the civil courts are included in the database.

### (b) Methodology

For each case, the following data was collected: the filing date, the kind of case (regular damages action, residents' lawsuit or injunction), the type of antitrust infringement alleged, the kind of plaintiff, the outcome, any damages recovered and whether the case was a follow-on case or a stand-alone case.

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SHINKETSUSHŪ 695 (Tokyo District Ct., 31 March 2000), *aff'd* 1742 HANREI JIHŌ 96, 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001) (holding that a contract tainted by bid-rigging is invalid as a matter of course).

<sup>37</sup> The study includes all damages actions in the form of residents' lawsuits, but does not include actions by residents against local governments to obtain a court order obliging the local government to seek damages. Of course, if such a residents' action against the local government effectively results in a damages action by the local government, the latter action is covered by the study.

<sup>38</sup> See e.g., Japan v. Dai nihon insatsu K.K. et al. 1734 HANREI JIHŌ 28 (Tokyo District Ct., 31 March 2000), *aff'd* 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001), *aff'd* Nos. h13-o-757 and h13-ju-747 (Sup. Ct., 28 March 2002).



Cases and data were collected and cross-checked using various sources. These include (1) the JFTC's annual decision reporter (*shinketsushū*), (2) the JFTC's annual reports, (3) the JFTC's online database<sup>39</sup>, (4) the Lex/DB database and (5) the Westlaw Japan database. A number of cases from before 2000 were identified through (6) an inventory drawn up by two study groups.<sup>40</sup> Finally, additional cases were identified and data on settlements was obtained through (7) various law review articles, books, newspaper databases and websites of scholars<sup>41</sup> and some of the parties involved.<sup>42</sup>

Although a wide variety of sources were consulted, it cannot be guaranteed that *every* case has been identified. However, to the extent that some cases remained under the radar, their number is likely to be small and it is suggested that they are unlikely to dramatically change the picture that emerges from the data reported in this article.

This data-gathering effort is most meaningful with respect to antitrust damages actions that were based on the Japanese Civil Code. This is by far the most popular avenue for plaintiffs seeking damages in Japan but it is specifically in this area that data are lacking. By contrast, for damages actions based on the Antimonopoly Act and injunctions, it is much easier to collect data because information about these cases is regularly published by the JFTC. This is because courts in Japan had, until very recently, a duty to ask the JFTC's opinion on damages whenever an action for damages was filed on the basis of the Antimonopoly Act.<sup>43</sup> In addition, courts have a duty to notify the JFTC when an injunction suit is filed.<sup>44</sup> No such duty exists in relation to actions based on the Civil Code. In the JFTC's annual reports and decision reporters, *some* of those cases are mentioned, but not all. As the number of cases has increased in recent years, the annual reports of the JFTC are less and less exhaustive.

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<sup>39</sup> <http://snk.jftc.go.jp/JDSWeb/jds/dc/DC001.do>. This database contains mostly JFTC decisions and litigation concerning those decisions and few private cases.

<sup>40</sup> Higashide (ed), *Dokkinhō ihan kōi to minjiteki kyūsaiseido - 'Dokusenkinshihō ihan kōi ni kakaru minjiteki kyūsaiseido kenkyūkai' hōkoku* [Antitrust Violations and Civil Remedies - The Report of the 'Research Group on The Civil Remedy System for Antitrust Violations'], Tokyo, Shōji hōmu kenkyūkai, 2000, 131-142; Higashide, *Dokkinhō ihan to minji soshō - sashitome seikyū songai baishō seido* [Antitrust Violations and Civil Litigation - Injunctions and Damages Actions], Tokyo, Shōji hōmu kenkyūkai, 2001, 110-151; Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30.

<sup>41</sup> These included <http://shiraishitadashi.jp/list/case.html> (listing legally significant JFTC decisions and court judgments, including those rendered in private cases).

<sup>42</sup> These included <http://www.ombudsman.jp/dangou/> (providing information about a large number of residents' lawsuits).

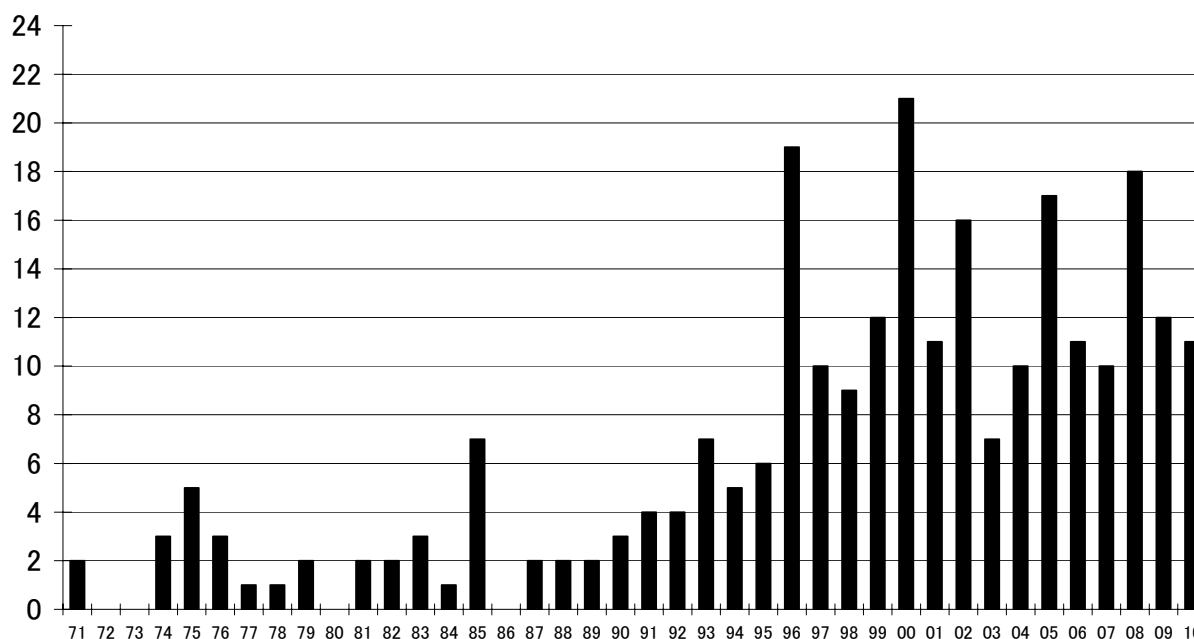
<sup>43</sup> Antimonopoly Act, Art. 84(1). A 2009 amendment changed this duty into an option (*Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu* [Act to Partially Amend the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 51 of 2009).

<sup>44</sup> Antimonopoly Act, Art. 83-3(1).

### 3. THE NUMBER OF CASES IN THE POST-WAR ERA<sup>45</sup>

In the first twenty-four years of the Antimonopoly Act's existence, from 1947 until 1970, there were only five private lawsuits.<sup>46</sup> It was not until the economically turbulent seventies, which sparked renewed attention for antitrust law in general, that the number of filings started to rise (Graph 1).

Graph 1 - Cases Filed per Year Since 1971



Among the cases that made up the first small wave of cases in the mid-seventies were three notorious cases brought by consumers against a cartel of oil companies<sup>47</sup>, and a

<sup>45</sup> The following three rules were used when counting the number of filed cases. First, cases brought in different courts, but by the same plaintiff and related to the same antitrust violation were treated as one. Hence, the thirty five cases (now reduced to twelve) cases filed by Independent Administrative Corporation Japan Highway, successor of all debts and liabilities of Japan Highway Public Corporation, in 2008 were treated as one case. Second, if cases were initially filed separately but then joined, they were treated as one case. Third, if a plaintiff filed suit and the case was dismissed for a technical reason, and subsequently the same plaintiff filed the same action against the same defendant in a new case, those two cases were treated as one case.

<sup>46</sup> K.K. Shirokiya v. Yokoi sangyō K.K. et al., 35 HANREI TAIMUZU 36 (Tokyo High Ct., 1 December 1953) (claim for injunctive relief filed in 1953; rejected because no violation of the Antimonopoly Act); Tokushige v. Ukai et al., 8(8) KAMIN 1452 (Tokyo High Ct., 5 August 1957) (claim filed in 1953 seeking dissolution of cooperative that allegedly engaged in monopolistic conduct; claim accepted but not on antitrust grounds); Meiji kōzai K.K. v. Tokyo tsūshō K.K., 14(7) KAMIN 1322 (Tokyo District Ct., 5 July 1963) (claim filed in 1961 to have property returned after transfer that allegedly violated antitrust law; claim rejected); K.K. Kosaka yakkyoku v. Taishō seiyaku K.K., 9 SHINKETSUSHŪ 162 (Tokyo High Ct., 19 February 1958) (damages action filed in 1956 on the basis of Article 25 of the Antimonopoly Act; settled); Shige Katō v. Tokkyo sponji surippā kyōkai soshiki et al., 17 SHINKETSUSHŪ 269 (Tokyo High Ct., 24 November 1958) (damages action filed in 1958 on the basis of Article 25 of the Antimonopoly Act; claim rejected).

<sup>47</sup> Kai v. Nihon sekiryū K.K., 41(5) MINSHŪ 879 (Tokyo High Ct., 17 July 1981), *aff'd* 41(5) MINSHŪ 785 (Sup. Ct., 2 July 1987); Satō v. Sekiryū renmei, 43(11) MINSHŪ 1340 and 997 HANREIJIHŌ 18 (Yamagata District Ct., 31 March 1981), *rev'd* 43 MINSHŪ 1539 and 1147 HANREIJIHŌ 19 (Sendai High Ct., 26 March 1985), *rev'd sub*

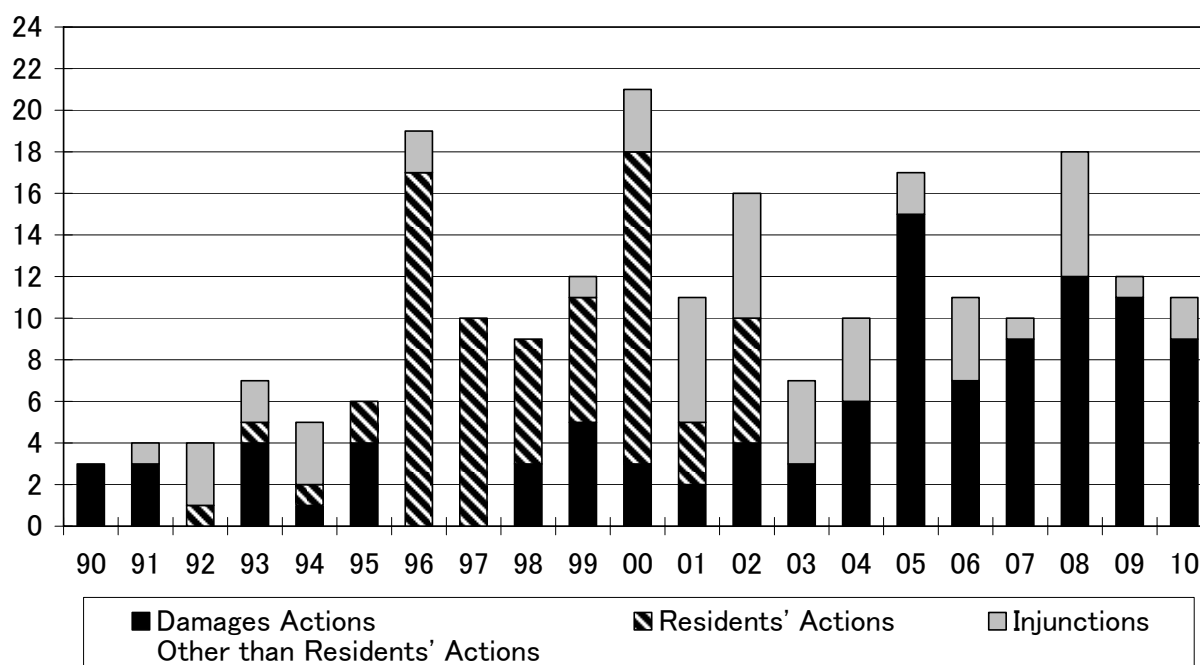
number of lawsuits by victims of a pyramid scheme, who were suing on the basis of ‘deceptive customer inducement’. This is an unfair trade practice in Japan and hence prohibited by the Antimonopoly Act, although in many countries such conduct would probably fall outside the scope of antitrust law.

In the eighties, as antitrust law again faded to the background in Japan, the number of case filings remained small. But the two decades that followed saw a veritable surge in case filings. It is this explosion in the number of cases in the past two decades that has led some observers to conclude that private enforcement is now fully part of Japan’s enforcement mix. The next section takes a closer look at this increase in the past two decades.

#### 4. A CLOSER LOOK AT THE NUMBERS IN THE LAST TWO DECADES

At the macro-level, the sharp increase in the number of private antitrust lawsuits during the past two decades must be seen against the background of a general trend towards more litigation in Japan. Although litigation levels were long notoriously low, the country took a ‘turn to litigation’ in the nineties.<sup>48</sup> From 1986 to 2001, Japan’s general civil litigation rate increased by 29 percent.<sup>49</sup> Hence, to some extent, the increase in antitrust cases is simply a reflection of a broader trend – a rising tide lifts all boats. The specific increase in the antitrust field is nonetheless much sharper than the increase in litigation generally.

Graph 2 - Cases Filed Between 1990 and 2010 by Type



*nom.* Nihon sekiyu K.K., v. Satō 43(11) MINSHŪ 1259 (Sup. Ct., 2<sup>nd</sup> P.B., 8 December 1989); Noriko Miyazaki v. Nihon sekiyu K.K., 28 SHINKETSUSHŪ 188 (Tokyo High Ct., settled 2 July 1981).

<sup>48</sup> Ginsburg & Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ (2006) 35 J. Legal Stud. 31-59.

<sup>49</sup> Ginsburg & Hoetker, *id.*, 56.

If we break down the cases in different categories and look at the evolution in each category, it becomes clear that residents' lawsuits<sup>50</sup> and suits for injunctive relief<sup>51</sup> have been the key drivers of the increase in filings (Graph 2).

The first residents' lawsuit was filed in 1992, sparked by outrage over widespread bid-rigging in Saitama Prefecture and the JFTC's decision not to refer the case to the prosecutor's office for criminal charges.<sup>52</sup> More suits followed and, in 1996, a coordinated series of lawsuits was initiated throughout the country against companies that had rigged bids for the installation of equipment in sewage and tap water systems. This series of lawsuits explains the spike in cases in 1996. In 2000, another wave of lawsuits followed, this time in the wake of bid-rigging for the construction of waste incineration plants throughout Japan.

In 2002, the steady stream of residents' lawsuits came to an abrupt end, as the law enabling these lawsuits was changed and residents were stripped of their right to bring lawsuits on behalf of their local government.<sup>53</sup> But instead of local residents suing on behalf of their local government, the local governments themselves increasingly started suing for damages, up to a point where, at present, it has almost become standard practice for public entities to seek damages if bid-rigging is uncovered. Two factors contributed to this development. First, the success of the residents' lawsuits and some high-profile cases<sup>54</sup> had demonstrated the feasibility of recovering taxpayer money from bid-riggers. The residents' lawsuits therefore served as a catalyst for damages actions. Second, local governments were put under pressure to seek damages by the same non-profit organizations that had been the driving force behind the residents' lawsuits. Although these local activists no longer had the power to sue on behalf of the local government, they could still apply for a court order obliging the local government to seek damages.<sup>55</sup>

As a result of the increasing number of damages actions by local governments and public agencies, the number of regular damages actions, coloured black in the graph, has increased, especially since 2002.

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<sup>50</sup> See part 1, section (b), for a discussion of these lawsuits.

<sup>51</sup> See part 1, section (c). The residents' lawsuits against local government under the revised Local Autonomy Act are not included in the graph. See n 37.

<sup>52</sup> Residents of Saitama Prefecture v. Kajima kensetsu K.K., No. h4-gyōu-13, 28060884 (Urawa District Ct., 13 March 2000) (Lex/DB Database), *aff'd* No. h12-gyōko-245, 25410184 (Tokyo High Ct., 26 April 2001) (Lex/DB Database), *aff'd* No. h13-gyōtsu-235 (Sup. Ct., 26 June 2003).

<sup>53</sup> See part 1, section (b).

<sup>54</sup> E.g., Tokyo Metropolitan Prefecture v. Aichi tokei denki K.K. et al., No. h10-wa-1 (Tokyo High Ct., settled 22 June 2002 and 4 October 2002) (resulting in a recovery of over two billion yen from companies that had rigged bids for the supply of water meters).

<sup>55</sup> Local Autonomy Act, Art. 242-2(1) (in its version after the 2002 amendment). See, e.g., Shimin ombuzuman Yamagata Prefecture kaigi et al. v. Governor of Yamagata Prefecture et al., No. h18-gyōu-2 (Yamagata District Ct., 10 March 2009), *aff'd* No. h21-gyōko-13 (Sendai High Ct., 12 March 2010) (ordering the Governor of Yamagata Prefecture to seek 260 million yen in damages from companies that rigged bids for the construction of steel bridges).

A second major driver of the increase in filings is the increase in cases seeking injunctive relief. Prior to 2001, there was no legal basis for plaintiffs to seek injunctive relief against antitrust infringements as such. Plaintiffs did seek injunctive relief on the basis of contract or tort, invoking antitrust violations in support of their claim, but the number of cases was small. An amendment to the Antimonopoly Act<sup>56</sup>, which entered into force in 2001, made it possible to seek injunctive relief directly on the basis of antitrust law and resulted in more cases being filed, contributing to the rise in antitrust filings in the 2000s.<sup>57</sup>

## 5. TYPES OF ANTITRUST VIOLATIONS

Japanese substantive competition law prohibits three types of conduct: (1) unreasonable restraints of trade,<sup>58</sup> (2) private monopolization,<sup>59</sup> and (3) unfair trade practices.<sup>60</sup> The first two of these three categories have a clear parallel in EU and U.S. antitrust law. The prohibition on unreasonable restraints of trade is comparable to Section 1 of the Sherman Act and Article 101 of the Treaty on the Functioning of the European Union, although in Japan it only covers horizontal agreements, not vertical agreements.<sup>61</sup> The prohibition on private monopolization corresponds to Section 2 of the Sherman Act and Article 102 of the Treaty on the Functioning of the European Union.

The prohibition on unfair trade practices is, from a European or U.S. perspective, somewhat more peculiar. In Japan, it is an umbrella term for several types of anticompetitive conduct, listed in the Antimonopoly Act<sup>62</sup> and further specified in a notice issued by the Japan Fair Trade Commission.<sup>63</sup> The list includes vertical price fixing, tie-in sales, refusals to deal, selling at unjustly low prices and discriminatory pricing. It also contains some practices that would probably not be considered part of antitrust law in other jurisdictions.<sup>64</sup> ‘Abuse of a superior bargaining position’, for instance, is one of the unfair trade practices.<sup>65</sup> Although the term is similar to the EU’s

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<sup>56</sup> See part 1, section (c).

<sup>57</sup> The injunction cases prior to 2001 were filed prior to the amendment of the Antimonopoly Act and sought an injunction on a different basis.

<sup>58</sup> Antimonopoly Act, Art. 2(6) and Art. 3, last part of the first sentence.

<sup>59</sup> Antimonopoly Act, Art. 2(5) and Art. 3, first part of the first sentence.

<sup>60</sup> Antimonopoly Act, Art. 2(9) and Art. 19.

<sup>61</sup> K.K. Asahi shimbunsha et al. v. JFTC, 2 HANREI JIHŌ 8 (Tokyo High Ct., 9 March 1953) (holding that companies must be in a competitive relationship for the prohibition on unreasonable restraints of trade to apply). But see Japan v. Toppan mūa et al., 840 HANREI TAIMUZU 81, 88 (Tokyo High Ct., 14 December 1993) (expressing doubts in *obiter dictum* as to the validity of this view).

<sup>62</sup> Antimonopoly Act, Art. 2(9).

<sup>63</sup> Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of 18 June 1982, as amended in 2009), at [http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/unfairtradepractices.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/unfairtradepractices.pdf). In addition, there are also notices prohibiting certain conduct in specific business sectors, such as large-scale retailing and the newspaper business.

<sup>64</sup> Obviously, such incongruities in substantive antitrust law make comparisons of private enforcement levels between jurisdictions more difficult, since an ‘antitrust case’ in one jurisdiction, may not be considered an antitrust case in another jurisdiction.

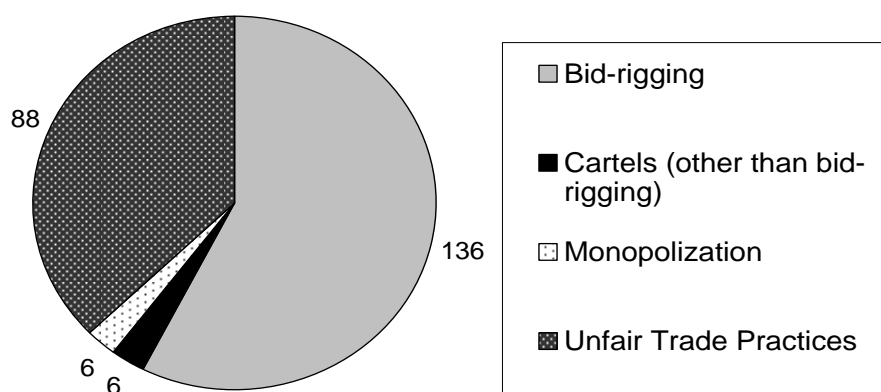
<sup>65</sup> Antimonopoly Act, Arts. 2(9)(v) and 2(9)(vi)(e).

prohibition on abuse of a dominant position, in fact, it is an entirely different concept. The infringement does not require a dominant position on the market. Instead, what matters is the infringer's bargaining position relative to its business partner. Hence, the number two player in a market can perfectly engage in an 'abuse of a superior bargaining position'.

The cases in the database were categorized on the basis of these three main prohibitions but with a further refinement. Given the importance of bid-rigging cases in Japan, the category "unreasonable restraints of trade", i.e. the ban on horizontal anticompetitive agreements, was divided into two subcategories: cases alleging bid-rigging and cases alleging horizontal restraints other than bid-rigging. All thirty-seven actions for injunctive relief filed on the basis of the Antimonopoly Act related to unfair trade practices for the simple reason that the Antimonopoly Act only allows injunctions for those kinds of infringements. Accordingly, we shall focus on the types of infringements invoked in damages actions and the handful of injunction suits filed prior to 2001.

Graph 3 clearly shows the preponderance of bid-rigging cases. Cases challenging cartels other than bid-rigging are virtually absent. Only six cases have been filed in the post-war history. Scholars have identified various factors to try to explain this low number, including the lack of an opt-out class action mechanism<sup>66</sup> and a reluctance on the part of Japanese companies to sue business partners.<sup>67</sup> Another factor is probably the fact that public enforcers – the JFTC and public prosecutors – have uncovered far more bid-rigging cases than other cartels, and private litigation is often brought in the wake of public enforcement.<sup>68</sup>

Graph 3 - Types of Infringements in Damages Actions



<sup>66</sup> See, e.g., Ramseyer, 'The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan' (1985) 94 Yale L.J. 631.

<sup>67</sup> See, e.g., Iyori & Uesugi, *The Antimonopoly Laws and Policies of Japan*, New York, Federal Legal Publications, 1994, 239.

<sup>68</sup> See part 6.

In relation to monopolization, the conclusions are less straightforward because some monopolization cases may have been filed as an unfair trade practices case. For instance, a monopolist's refusal to deal could be challenged as private monopolization but also as an unfair trade practice, since refusals to deal are one of the types of unfair trade practices.

## 6. SUCCESS RATE

Initially, plaintiffs mainly lost or, at best, obtained settlements.<sup>69</sup> Prior to 1990, there were only two final judgments holding in favour of antitrust plaintiffs.<sup>70</sup> The situation started to change in the nineties. One of the decisions heralding this change was a 1990 decision in the *Toshiba Elevator Case*<sup>71</sup>, affirmed on appeal in 1993<sup>72</sup>. The court held that Toshiba Elevator's refusal to supply spare parts to anyone who did not rely on Toshiba for the servicing of its elevators amounted to illegal tying, and awarded damages to the plaintiffs. From 1990 onwards, favourable decisions gradually became more frequent and in the 2000s, plaintiffs, especially local governments in bid-rigging cases, regularly obtained favourable judgments or settlements.

In total, around 27 percent of the antitrust cases surveyed were successful or partially successful. 'Successful or partially successful' was defined as a win or partial win on the merits of the antitrust claim. Around 36 percent of cases settled and the remaining 37 percent of all cases were unsuccessful, i.e. did not result in a win or partial win on the merits.

The success rate was much lower for actions seeking injunctive relief than for damages actions. Out of the twenty-seven injunction cases with a final outcome that were filed based on the injunction system introduced in 2001<sup>73</sup>, nineteen had a negative outcome for plaintiffs and eight were settled. Not a single injunction case under the new system has ended in a final favourable judgment for plaintiffs.<sup>74</sup> Many of these cases failed because plaintiffs were unable to establish that an unfair trade practice had occurred or

<sup>69</sup> Information on settlements was obtained through analysis of the JFTC's reporter (which publishes extracts of the settlement record (*wakaichōsho*)), newspaper articles, the websites of the parties involved and settlements mentioned in Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30.

<sup>70</sup> *Tomobe v. Shinakawa shinyō kumiai*, 1165 HANREI JIHŌ 119, 548 HANREI TAIMUZU 273 (Tokyo District Ct., 25 October 1984) (awarding 800,000 yen to plaintiff because loan contract was void, among others because it violated the Antimonopoly Act); *Izumikyo et al. v. K.K. Shirokō*, 959 HANREI JIHŌ 17 (Osaka District Ct., 29 February 1980) (awarding 26.6 million yen in unfair trade practice case).

<sup>71</sup> *Kōsei denki Y.K. et al. v. Tōshiba shōkōki sābisu K.K.*, 1365 HANREI JIHŌ 91 (Osaka District Ct., 30 July 1990).

<sup>72</sup> *Kōsei denki Y.K. et al. v. Tōshiba erebēta tekunosu K.K.*, 1479 HANREI JIHŌ 21, 40 SHINKETSUSHŪ 651 (Osaka High Ct., 30 July 1993).

<sup>73</sup> See part 1, section (c).

<sup>74</sup> But see *X K.K. v. Y K.K.*, No. h22-yo-20125, 2011 WLJP CS03306001 (Tokyo District Ct., 30 March 2011) (Westlaw Japan) (granting a provisional injunction, but decision not yet final).

was imminent<sup>75</sup>, which is one of the substantive requirements to obtain injunctive relief.<sup>76</sup>

## 7. DETERRENT EFFECT: FOLLOW-ON VERSUS STAND-ALONE

When considering whether to violate antitrust law or not, companies are likely to take into account, *inter alia*, the chance that they may be caught and the size of the sanction if they get caught.<sup>77</sup> Private enforcement has the capacity to impact on both factors. It can increase the probability of detection as well as the magnitude of the penalty and, in doing so, contribute to deterrence. However, only stand-alone cases increase the probability of detection as follow-on cases are brought after the JFTC has already uncovered the conduct.

In Japan, there have been few successful stand-alone cases and, hence, the role of private enforcement in detecting anticompetitive conduct has been limited. Out of all the damages actions that ended in a damages award or settlement, more than 78 percent were filed after a prior investigation by the JFTC or the public prosecutor. Not surprisingly, the stand-alone cases – 22 percent of the total number of successful damages actions – mostly related to private monopolization and unfair trade practices, conduct that is more easily detectable than price-fixing and bid-rigging.

All actions seeking injunctive relief were stand-alone cases, probably because of the nature of injunctive relief. As in most jurisdictions, it usually takes several years for the public authorities to investigate, prosecute and adjudicate a case. By that stage, it is normally too late for an injunction to be effective. Although all injunction cases were stand-alone cases, it is unlikely that they contributed significantly to the detection of antitrust violations, as most cases were dismissed by the courts.<sup>78</sup>

In summary, based on the low number of successful stand-alone cases, it seems that private antitrust litigation has not assisted greatly in detecting antitrust violations.

## 8. DETERRENT EFFECT: MAGNITUDE OF THE RECOVERY

Private damages actions also contribute to deterrence of antitrust violations by imposing financial sanctions in the form of damages. The magnitude of the damages recovered through private lawsuits is therefore an important element in determining the deterrent effect of private enforcement. Further, by comparing the amounts of damages recovered through private litigation with the penalties imposed through public enforcement, we can develop a basic snapshot of the relative importance of private lawsuits in enforcing antitrust law.

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<sup>75</sup> See, e.g. *Yamato unyu K.K. v. Yūbin jigyō K.K.*, 1203 HANREI TAIMUZU 81 (Tokyo District Ct., 19 January 2006), *aff'd sub nom. Yamato unyu K.K. v. Nihon yūsei kōsha*, 54 SHINKETSUSHŪ 699 (Tokyo High Ct., 28 November 2007), *aff'd* 55 SHINKETSUSHŪ 1023 (Sup. Ct., 17 February 2009); *Sekino shōji K.K. et al. v. Za tōkai et al.*, 1151 HANREI TAIMUZU 285 (Tokyo District Ct., 31 March 2004).

<sup>76</sup> See part 1, section c.

<sup>77</sup> Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 J. Political Econ. 176-177.

<sup>78</sup> See part 6 (success rate of cases seeking injunctive relief very low).



In the first forty years of the Antimonopoly Act, from 1947 up until the end of the eighties, there were no significant damages awards or settlements.<sup>79</sup> From 1989 onwards, damages were awarded in several cases, but generally only for very modest amounts. The only plaintiff able to secure a major recovery was the U.S. Government. In 1989, it recovered 4.7 billion yen (34 million USD at the time) through a settlement with Japanese construction companies that had rigged bids for works at the U.S. Navy's base in Yokosuka.<sup>80</sup>

From 1999 onwards, private damages suits became more significant in monetary terms. By that time, some of the residents' lawsuits had started to bear fruit. These actions often resulted in large damages awards, simply because of the scale of the construction projects. The damages were often estimated conservatively by courts – typically between 5 and 10 percent of the contract price – but given the enormous size of some of the construction projects, this nonetheless led to significant damages awards. Thus, a series of judgments awarded damages running into several billions of yen to local governments who had overpaid for the construction of waste incineration plants.<sup>81</sup> Many of these suits became final after Supreme Court appeals were dismissed in 2009. This explains why the aggregate damages in 2009, as shown in graph 4, exceeded twenty billion yen, an all-time high.

The figures in graph 4 are based on the damages awarded in final judgments (excluding interest) and amounts recovered through settlements.<sup>82</sup> Since there were a number of settlements for which data were unobtainable, the figures in the graph somewhat

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<sup>79</sup> The two largest recoveries in that period were *Izumikyō et al. v. K.K. Shirokō*, 959 HANREI JIHŌ 17 (Osaka District Ct., 29 February 1980) (26.6 million yen awarded to victims of a pyramid scheme based on, among others, finding of an unfair trade practices) and *Noriko Miyazaki v. Nihon sekiyu K.K.*, 28 SHINKETSUSHŪ 188, at 195 (Tokyo High Ct., settled 2 July 1981) (Tokyo High Ct., 2 July 1981) (settlement payment of nine million yen in oil cartel case).

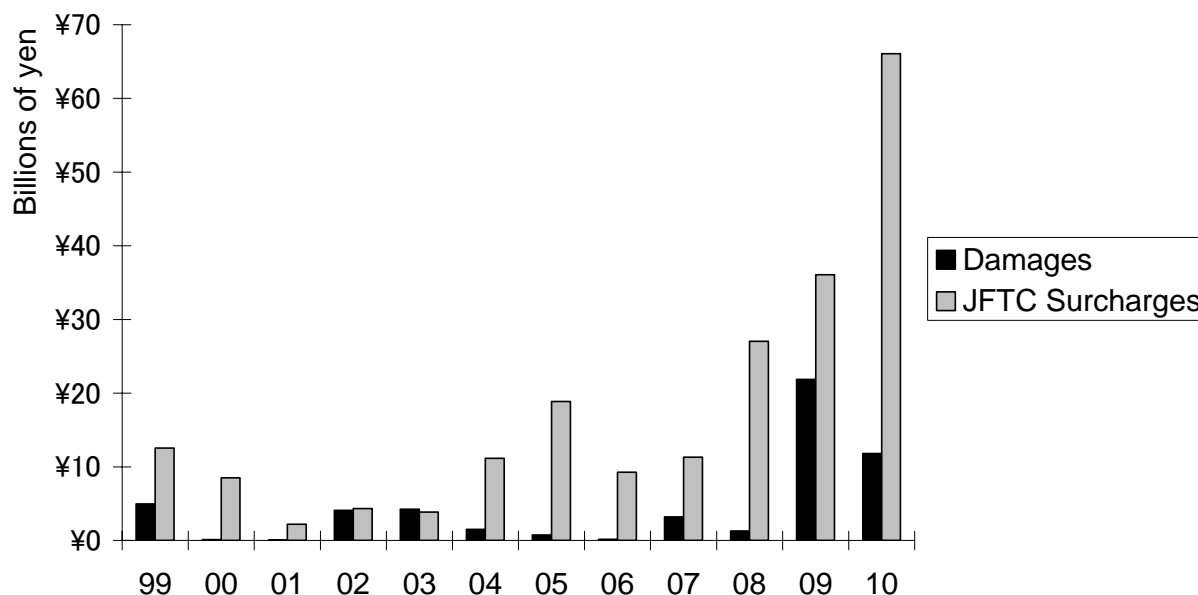
<sup>80</sup> *Iyori & Uesugi, The Antimonopoly Laws and Policies of Japan*, New York, Federal Legal Publications, 1994, 92. The United States initiated proceedings to obtain a provisional attachment against one of the companies that did not settle. These proceedings were ultimately settled as well. *U.S.A. v. Hosaka kensetsu K.K.*, 829 HANREI TAIMUZU 289 (Yokohama District Ct., Kawasaki Branch, 17 March 1994), *appealed* No. h6-ne-1295 (Tokyo High Ct., settled 8 September 1999).

<sup>81</sup> See, e.g., *Residents of the Tokyo Metropolitan Area v. K.K. Takuma et al.*, No. h12-gyōu-185, 2007 WLJP CA03208020 (Tokyo District Ct., 20 March 2007) (Westlaw Japan), *aff'd* Nos. h19-gyōko-119 and h19-gyōko-151, 2009 WLJP CA05126001 (Tokyo High Ct., 12 May 2009) (Westlaw Japan), *aff'd* Nos. h21-gyōtsu-245 and h21-gyōhi-310 (Sup. Ct., 10 December 2009) (resulting in a recovery of 4.4 billion yen, to which a settlement with the other defendants added 5.3 billion yen); *Residents of Yokohama City v. JFE Engineering K.K. et al.*, No. h12-gyōko-34, 2006 WLJP CA06219003 (Yokohama District Ct., 21 June 2006) (Westlaw Japan), *aff'd* No. h18-gyōko-191 and h18-gyōko-240, 2008 WLJP CA03189005 (Tokyo High Ct., 18 March 2008) (Westlaw Japan), *aff'd* unreported (Sup. Ct., 23 April 2009) (resulting in a recovery of three billion yen).

<sup>82</sup> Information on settlements was obtained through the JFTC's reporter, newspaper articles, the websites of parties and amounts mentioned in *Matsushita & Chiteki Zaisan Kenkyūsho* [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30. We excluded the settlement between Intel and AMD, which resulted in an extremely large recovery for AMD of 1.25 billion dollar. This settlement ended two cases brought by AMD against Intel before the Japanese courts, but it settled many other cases as well, including the litigation brought by AMD against Intel in U.S. District Court in Delaware. Hence, the settlement amount is many times the amount claimed before the Tokyo courts. Since the amount of the claim in the Delaware case is unknown, it is impossible to apportion the settlement money to each case.

underestimate the total recovery for plaintiffs. The cases were assigned to the year in which the settlement was concluded or the year in which the final judgment was rendered.<sup>83</sup>

Graph 4 - Public v. Private: Comparison of Damages and JFTC Surcharges



On the public enforcement side, the figures in graph 4 represent the penalties imposed on infringers by the JFTC, i.e. the so-called surcharges that are calculated as a percentage of the firm's sales of the relevant product. Antitrust violations can also be criminally prosecuted in Japan. Although only the most flagrant violations are prosecuted and few cases are brought – typically one per year – criminal sanctions are likely to have a significant deterrent effect as well, although this cannot be quantified in this context.

The comparison with the penalties imposed by the JFTC demonstrates that, in some years, the damages awarded were relatively significant. In 2002 and 2003, the damages awarded were at approximately the same level as the penalties. Hence, the development of private enforcement contributed to deterrence by increasing the overall level of the expected sanction and, in some years, its potential deterrent effect was equal to that of the JFTC's penalties. In recent years, those penalties have greatly increased and dwarfed the overall level of damages awards, as the JFTC has increased its enforcement and a 2005 amendment increased the level of penalties.<sup>84</sup> However, the aggregate amount of

<sup>83</sup> If the settlement was spread over several years, for instance because some defendants settled earlier than others, or if there was a settlement for some defendants and a judgment for others, the year of the final settlement or judgment was taken as the relevant year.

<sup>84</sup> Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu [Act to Partially Amend the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 35 of 2005; no English translation of this amendment is available but an English translation of the consolidated version of the Antimonopoly Act is available at [http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/amended\\_ama09.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/amended_ama09.pdf) (version as of January 2012).

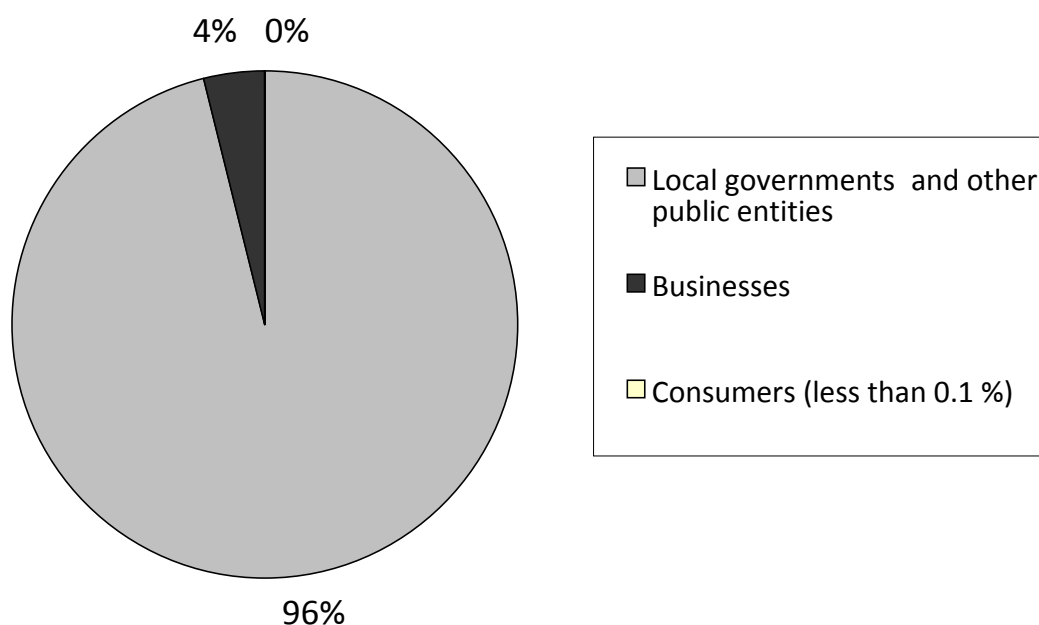
damages awarded in 2009 was still significant. Hence, private enforcement clearly mattered in terms of monetary deterrence, although, as we will see in the next section, almost all of these monetary sanctions were imposed in bid-rigging cases, brought by public entities.

## 9. COMPENSATORY EFFECT

Apart from its contribution to enhancing deterrence, private antitrust litigation is also, or – depending on one’s viewpoint – primarily a means of redress for those harmed by antitrust violations: consumers, businesses and also public entities, such as local governments or government agencies that have overpaid for goods or services they procured. In Japan, the latter group has been the beneficiary of the lion’s share of antitrust damage recoveries, as shown by graph 5.

Of the approximately sixty billion yen recovered by plaintiffs through final damages awards and known settlements<sup>85</sup>, 96 percent went to public entities. All of these recoveries related to bid-rigging. The public entities that recovered damages include local governments, government agencies and the United States, which has recovered substantial amounts for bid-rigging for works at its military bases in Japan.

Graph 5 - Recovery by Type of Plaintiff



<sup>85</sup> For some minor settlements, data was not available, so the actual amount is higher, but not by much. In addition, there have been some significant judgments and settlements recently (including a 8.4 billion yen damages award rendered by the Tokyo High Court in a case brought by Japan against oil companies that rigged bids for the delivery of jet fuel), but these have not become final yet and were therefore not included.

Only 4 percent of the total recovery went to businesses.<sup>86</sup> The recovery for consumers was less than 0.1 percent. Indeed, there have been only six damages actions brought by consumers. In four of those cases, the consumers recovered nothing<sup>87</sup> and in the other two cases, they settled for minor amounts.<sup>88</sup>

## 10. ASSESSMENT: THE ROLE OF PRIVATE ANTITRUST LITIGATION IN JAPAN

Private antitrust litigation has evolved from virtual non-existence to a level where around a dozen new cases are filed each year.<sup>89</sup> Through these cases, antitrust plaintiffs have recovered tens of billions of yen in damages (hundreds of millions of dollars or euros).<sup>90</sup> In some years, the total amount of damages recovered was equal to the penalties imposed by the JFTC.<sup>91</sup> Clearly, private antitrust litigation has grown in importance and scope. This study has charted this remarkable evolution and analyzed to what extent various forms of private antitrust litigation, such as damages actions, residents' lawsuits and actions for injunctive relief, have been successful in increasing deterrence and providing compensation.<sup>92</sup> The results greatly varied depending on the mechanism used and the type of anticompetitive conduct at issue.

It is difficult to encapsulate this multicoloured experience in a single catchphrase but if an overall assessment nonetheless has to be made, the conclusion would have to be that private antitrust litigation in Japan still remains of limited significance in deterring antitrust violations and providing compensation to those harmed.

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<sup>86</sup> The largest component of the aggregate amount recovered by businesses is a recent settlement between Usen K.K. and Kyanshisutemu K.K. for two billion yen (USEN K.K. v. K.K. Kyanshisutemu, 55 SHINKETSUSHŪ 1029 (Tokyo District Ct., 10 December 2008), *appealed* unreported (Tokyo High Ct., settled 29 July 2010).

<sup>87</sup> Ōkawa v. Matsushita Denki Sangyō K.K., 863 HANREI JIHŌ 20 (Tokyo High Ct., 19 September 1977); Kai v. Nihon sekiryū K.K., 41(5) MINSHŪ 879 (Tokyo High Ct., 17 July 1981), *aff'd* 41(5) MINSHŪ 785 (Sup. Ct., 2 July 1987); Satō v. Sekiryū renmei, 43(11) MINSHŪ 1340 (Yamagata District Ct., 31 March 1981), *rev'd* 43(11) MINSHŪ 1539 (Sendai High Ct., 26 March 1985), *rev'd sub nom.* Nihon sekiryū K.K., v. Satō 43(11) MINSHŪ 1259 (Sup. Ct., 8 December 1989); X v. Y., unreported (Chiba District Ct., Matsudo Branch, settled 5 November 1996), described in Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 24 (settlement but without any monetary payment). Arguably, there is one other case: X v. Arueko K.K., 52 SHINKETSUSHŪ 902 (Okayama District Ct., 21 December 2005), *aff'd* 53 SHINKETSUSHŪ 1059 (Hiroshima High Ct., Okayama Branch, 21 December 2006) (consumers seeking an injunction to obtain a wider choice of companies responsible for cleaning septic tanks also sought damages, although the damages claim was only very indirectly based on a violation of antitrust law).

<sup>88</sup> Noriko Miyazaki v. Nihon sekiryū K.K., 28 SHINKETSUSHŪ 188, at 195 (Tokyo High Ct., settled 2 July 1981) (nine million yen settlement); Tanaka et al. v. Kyoto jōhō jidōsha kyōkai et al., 545 HANREI TAIMUZU 100, 103 (Kyoto District Ct., settled 30 November 1984) (payment of 109,490 yen to consumers).

<sup>89</sup> See part 3 (chart with number of filings per year) and part 4 (chart with number of filings per year from 1990 to 2010).

<sup>90</sup> See part 8 (chart with amounts recovered per year).

<sup>91</sup> See *id.* (JFTC penalties and damages at approximately the same level in 2002 and 2003).

<sup>92</sup> This article has focused on private antitrust litigation's contribution to deterrence and compensation. Private antitrust litigation may also contribute to the development of antitrust law but the assessment of that contribution has been left for another day.

First, the successful cases and large damages award have been very much concentrated in one area: bid-rigging. In other areas, private lawsuits have done little to deter violations and have rarely compensated victims. The JFTC regularly uncovers price-fixing cartels, but no private actions have followed<sup>93</sup>, nor have any major stand-alone actions been brought with respect to price-fixing. Likewise, cases challenging monopolistic conduct have also been relatively scarce and have rarely resulted in substantial recoveries.<sup>94</sup>

Second, most antitrust damages actions have been follow-on cases. Those cases did not contribute to the detection of violations but merely increased the sanction on infringers by imposing damages. Although, from a deterrence point of view, such an additional sanction is probably warranted because of Japan's relatively low level of public penalties,<sup>95</sup> it nonetheless means that private antitrust litigation has not played a significant role in detecting violations that public enforcers overlooked or had no resources to pursue.

Third, the main users and beneficiaries of private antitrust litigation have been local governments and government entities. By contrast, businesses have been much less successful in obtaining damages and consumers have recovered virtually nothing. Hence, private litigation has, somewhat paradoxically, mainly resulted in compensation for public entities, not private plaintiffs.

Admittedly, in assessing the role of private antitrust litigation in Japan, much depends on the eye of the beholder. Measured against American standards, the level of private antitrust litigation in Japan is insignificant. While around a dozen cases are filed each year in Japan, up to a thousand cases are filed in the U.S.<sup>96</sup> In a single recent class action in the U.S.<sup>97</sup> plaintiffs recovered a multiple of what Japanese plaintiffs have recovered in the entire post-war period.<sup>98</sup>

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<sup>93</sup> See note 47 for the rare exception, a case brought in the seventies.

<sup>94</sup> Two rare exceptions are *Nihon ei emu di K.K. [AMD Japan Co. Ltd.] v. Intel K.K.*, Nos. h17-wa-4 and h17-wa-13151 (Tokyo High Ct., settled 11 November 2009); *USEN K.K. v. K.K. Kyanshisutemu*, 55 SHINKETSUSHŪ 1029 (Tokyo District Ct., 10 December 2008), *appealed* unreported (Tokyo High Ct., settled 29 July 2010).

<sup>95</sup> The surcharges that the JFTC can impose range from 1 percent to 10 percent of the infringer's sales amount in the specific product or service to which the infringement relates (Antimonopoly Act, Art. 7-2(1)). The exact rate depends on the type of violation (cartels attract higher sanctions than certain types of monopolization and unfair trade practices) and type of infringer (small enterprises, among others, benefit from a lower rate). Criminal sanctions are also available but are rarely imposed.

<sup>96</sup> Sourcebook of Criminal Justice Statistics Online, Table 5.41.2010 <http://www.albany.edu/sourcebook/pdf/t5412010.pdf> (listing the number of antitrust cases filed in U.S. District Courts and indicating yearly filings of 1287 (2008), 792 (2009) and 523 (2010) in federal court alone). The U.S. economy and population is almost three times as large as Japan's but even if we account for this difference, the contrast remains enormous.

<sup>97</sup> *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (class action resulting in settlement of over 3.3 billion dollars).

<sup>98</sup> Until present, plaintiffs in Japan recovered an estimated 60 billion yen (around 790 million dollars) through final judgments and settlements.

By contrast, compared to many jurisdictions in Europe, Japan's level of private antitrust litigation record looks rather normal and perhaps even surprisingly robust for a country with few lawyers<sup>99</sup> and few lawsuits per capita.<sup>100</sup> The almost 200 damages actions brought before Japanese courts compare rather well with the 104 damages actions identified for the whole of the European Union in a 2004 study,<sup>101</sup> although that tally was underinclusive and obscures the fact that actions for injunctive relief play a much greater role than damages actions in many EU jurisdictions.<sup>102</sup> A study of private antitrust litigation in the UK, which covered not just damages actions but all kinds of competition law cases, found ninety antitrust cases in which judgments had been rendered in the period up to 2004<sup>103</sup> and an additional twenty-seven cases from 2005 until 2008.<sup>104</sup> Private enforcement in Japan appears to be at a similar level of development and practice with over 200 antitrust damages and injunction cases in which judgments were rendered, but with a population and economy that is more than twice as large as the UK's. Ultimately, however, these comparisons corroborate the overall conclusion that, as in most European jurisdictions, private antitrust litigation does not, as yet, play a crucial role in deterring antitrust violations and compensating consumers and businesses harmed by those violations.

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<sup>99</sup> Japan has 23 lawyers per 100,000 inhabitants. The average for the EU is 120. By contrast, the U.S. has around 390 lawyers per 100,000 inhabitants. For Japan: own calculation, based on the following data: population of 125.77 million (October 2010) and 30,000 lawyers. For the EU: see European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2010 (Data 2008): Efficiency and Quality of Justice* (Council of Europe, 2010), p. 237. For the U.S.: own calculation, based on the following data: population of 307 million (July 2009) and 1.2 million lawyers (ABA data, 2010).

<sup>100</sup> Wollschläger, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Culture in the Light of Judicial Statistics', in Baum (ed), *Japan: Economic Success and Legal System*, Berlin, Walter de Gruyter, 1997, at 95.

<sup>101</sup> Waelbroeck, et al., 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report' (2004) 100-101. Often, this study is cited as finding only sixty cases. However, that is the number of judged cases identified and mentioned in the initial paragraph of the report. On pages 100-101 of the report, a more complete picture is given. The table on those pages shows 104 damages actions in total.

<sup>102</sup> See, e.g., for Germany: Peyer, *Myths and Untold Stories – Private Antitrust Enforcement in Germany*, 48, 50, 72 (U. of East Anglia – Centre for Competition Pol'y Working Paper, Paper No. 10-12, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1672695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695) ('injunctions are widely and successfully used in antitrust cases in Germany').

<sup>103</sup> Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004: Part 1', (2006) 27(5) *Eur. Competition L. Rev.* 244.

<sup>104</sup> Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases 2005-2008 – Part I', (2009) *Global Competition Litig. Rev.* 95.