A primary objective of this paper is to propose an explanation of the factors driving this deeper, transformative transition in public antitrust enforcement. In connection with this discussion we provide an overview of Japan's fight against price-fixing and bidrigging cartels, as cartel control and its importance for the economy has been one of the drivers behind the strengthening of Japanese antitrust enforcement in a wider sense. The discussion is pitched so as to familiarize uninitiated readers with some of the basic elements of the Japanese anti-cartel regime. The structure of the paper is as follows. In Part 1 we present our historical and contextual interpretation of the exogenous and endogenous factors whose interaction prepared the ground for institutional change in Japanese antitrust. In Part 2 we review the mechanics of Japan's system of cartel control. Given the prominent role of collusive bidding in Japan we devote a separate Part 3 to the special regime that applies in Japan in cases where public sector purchasers have been complicit in bidrigging schemes. Part 4 turns to a more forward-looking discussion animated by new legislation in Japan that will re-define the structure of administrative proceedings and judicial appeals in antitrust cases. Concluding remarks are put forward in Part 5.

1. History and context

1.1. Momentum for institutional change: the SII talks and Japan's antitrust renaissance

As documented by others[1], the enforcement of Japan's Antimonopoly Act (the 'AMA') began with a bang in the late 1940s, but the bang gave way to a long whimper, with only a few short episodes where the AMA showed signs of life, notably around 1960 and in the 1970s when high-profile cases were won by the JFTC and when the AMA was amended and reinforced[2]. The twilight of Japanese antitrust in the 1950s may be linked to a variety of factors, including: internal resistance to an alien form of business regulation – draconian and possibly retributive from the Japanese perspective;[3] geopolitical considerations such as the Korean conflict in

---

1 See, e.g., Harry First, "Antitrust Enforcement in Japan", 64 *Antitrust Law Journal* 144 (1995). More recently, see Simon Vande Walle, "Competition and competition law in Japan: between scepticism and embrace", in Michael W. Dowdle, John Gillespie and Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013), pp. 123-143; Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Cheltenham: Edward Elgar, 2014), pp. 10-16.

2 In each instance, renewed interest in antitrust, and thus government support, can be traced to inflationary pressures or price spikes. Starting around 1960 the JFTC became more active and investigated more cases. More notably, however, the JFTC reacted decisively against a cartel in the petroleum sector in the 1970s when the oil crisis of 1973 rocked the economy. Public outrage provided conditions favourable to antitrust action against Japan's major oil companies, and the JFTC seized its opportunity. But legally this was an ambiguous case in light of years of regular contacts between the oil companies and the Ministry of International Trade and Industry (MITI). In 1971, MITI had issued administrative guidance to the companies regarding their market prices on various occasions; later, the oil companies defended against accusations of collusion by claiming they had acted according to MITI's instructions. The Supreme Court of Japan ultimately held that while state compulsion may exonerate collusive conduct in principle, on the facts the oil companies had failed to substantiate their defence. In particular, in 1973 the companies had met many times to decide on the timing and amount of price increases, with the understanding that they would then secure MITI's consent to these arrangements. With MITI's permission the companies did in fact follow through on their intentions. The Supreme Court's judgment is discussed in Part II of this paper. See also Michael Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy*, 1973-1995 (Abingdon: Routledge, 2002), pp. 47-51.

The JFTC's decisive intervention in the *Oil Cartel* case set the stage for significant amendments to the AMA in 1977, when 'surcharges' were introduced for the first time. These surcharges, inspired by certain features of German antitrust law, were limited in magnitude – i.e., 2% of sales – but novel and symbolic of an attitudinal change. They were not conceived as punitive fines but as a non-discretionary mechanism causing wrongdoers to disgorge (a portion of) ill-gotten gains. The low rate of the surcharge may also have been seen in conjunction with the likelihood of stigmatizing reputation effects in cases of violation, a sanction which commentators sometimes portrayed as carrying extra weight in a society such as Japan, where social pressure plays a large role in shaping incentives. (Following amendments in 1991 and 2005, the current top rate of the surcharge is 10%, and there seems to be some anxiety now about whether the surcharge has been transformed into a punitive measure; given the significant average cartel overcharge rates across industries, typically estimated by economists to be well above 10%, there is reason to doubt this contention.) For the political background to the 1977 amendments, see Beeman, *Public Policy*, cited above, at 69-92.

3 The perspective of the occupying forces in the period immediately following World War II was that the dismantling of over-sized mega-conglomerate corporate groups (*zaibatsu*) and the introduction of competition law disciplines were necessary instruments to attain the goal of 'economic democratization'. See, e.g., Mitsuo Matsushita, *International Trade and Competition Law in Japan* (Oxford: Oxford University Press, 1993), pp. 77-78. The economic democratization plan also called for reforms in agrarian land ownership and improved labour laws and worker protection standards.

1950 and the Cold War, which led to a dramatic shift in U.S. foreign policy on the ground that an industrially strong manufacturing base in East Asia would serve as a crucial source of supply for military operations in the region; Japan's reclaimed independence and legislative sovereignty in 1952, which allowed the Diet (*Kokkai*) to dilute the AMA (e.g., by eliminating a provision that prohibited cartels *per se*) and eliminate its most far-reaching de-concentration measures; and Japan's famous government-backed and sector-driven industrial policy, in this case antithetical to any meaningful notion of a 'competition culture'.[4] To modern eyes the idea of an unofficially condoned 'cartel archipelago' may shock the conscience, but in a context in which Japan's productivity, GDP and standard of living rose steadily and 'miraculously' in the post-War period, it wouldn't have shocked to ask *who needs antitrust?*, or even to regard strong business performance and strong antitrust regulation as mutually incompatible.[5]

For reasons of space, and because authoritative accounts already exist[6], we will skip over the first few decades of Japan's experiences with competition law and policy. However, in order to lay a contextual foundation for the increasing interest in and application of antitrust law in the last two decades, it is necessary to recall the origins of this new trajectory, and accordingly we begin with what appears in hindsight to be a key historical period, i.e., from 1989 through the early 1990s. This period coincides with a remarkable episode in international economic relations between Japan and the United States, known as the *Structural Impediments Initiative* ('SII'). The SII trade talks between the two countries were economically and politically motivated, and driven by the growing trade imbalance whereby Japanese exports thrived in US markets while Japanese markets were perceived to be barricaded and impregnable.[7] Under pressure from the U.S., Japan agreed in 1989 to participate in the SII, and each country drew up a list of grievances regarding the other.[8] The final report from the talks, in which the JFTC had participated, was delivered to President George Bush Sr. and Prime Minister Toshiki Kaifu on 28 June 1990. Despite the apparent reciprocal nature of the talks and reciprocal commitments, no one failed to understand that the SII was about Japanese, not American, economic reform.[9]

---

4 The idea of competitive markets as an organising principle for the Japanese economy certainly did not resonate with Japan's historical experience. When the Edo (Tokugawa) period gave way to the opening of Japan in 1868, "[t]he urgent task for the new [Meiji] government was to catch up with the West in industrial and military strength as soon as possible, and, for this purpose, the government took a strong role in developing the economy in various ways, for example, through the operation of government factories in industrial sectors such as iron and steel, and tight regimentation of industries by way of trade associations under government mandate. In short, economic development was achieved under strong government control and influence in which the guiding principle was not 'competition'." Matsushita, ibid. at 76. The active role of the State in commerce can be understood as a reflection of the ethical values common in Japan at that time, when individualism was frowned upon and a paternalist social order was regarded as consistent with Confucian concepts of virtue, hierarchy and harmonious relations. State involvement in the economy was dramatically intensified in the 1930s in conjunction with nationalism and the Government's imperialist agenda, and Japan wrapped itself in a blanket of cartels. Competition was officially displaced by 'control associations', i.e., industry-wide trade associations approved by the State. See, e.g., William Lockwood, *The Economic Development of Japan: Growth and Structural Change, 1868-1938* (Princeton: Princeton University Press, 1954), at 508.

5 Cf. Akinori Uesugi, "How Japan is Tackling Enforcement Activities Against Cartels", 13 *George Mason Law Review* 349-364 (2005), at 355. The decline in antitrust enforcement in the 1950s and the dominant (re)ascendance of industrial policy reflected the dynamic of post-War Japanese politics: the Liberal Democratic Party (LDP) had little incentive to support antitrust or to reduce the number and scope of antitrust exemptions when its own political base consisted of protected industries. See Yoichiro Hamabe, "Changing Antimonopoly Policy in the Japanese Legal System – An International Perspective", 28 *The International Lawyer* 903, 906 (1994). Indeed, by offering an apparent refuge from antitrust regulation in the 1950s and 1960s, the LDP and government ministries may have drawn industry closer and thereby deepened the roots of Japan's 'iron triangle' ecosystem of politicians, bureaucrats and business interests – by no means an intended consequence of the AMA. See Vande Walle, "Competition and competition law", cited above note 1, at pp. 130 and 140, with references.

6 See Vande Walle, "Competition and competition law", cited above note 1; Tony Freyer, *Antitrust and Global Capitalism, 1930-2004* (Cambridge: Cambridge University Press, 2006), pp. 160-244; Beeman, *Public Policy and Economic Competition in Japan*, cited above note 2; H. Stephen Harris, Jr., "Competition Law and Patent Protection in Japan: A Half-Century of Progress, A New Millenium of Challenges", 16 *Columbia Journal of Asian Law* 71-139 (2002), at 89-102; John O. Haley, *Antitrust in Germany and Japan: The First Fifty Years, 1947-1998* (Seattle: University of Washington Press, 2001); First, "Antitrust Enforcement in Japan", cited above note 1; Matsushita, *International Trade and Competition Law in Japan*, cited above, pp. 76-86; Alex Seita and Jiro Tamura, 'The Historical Background of Japan's Anti-Monopoly Law (1994) *University of Illinois Law Review* 115-186; Hiroshi Iyori and Akinori Uesugi, *The Antimonopoly Laws and Policies of Japan* (New York: Federal Legal Publications, 1994); Kozo Yamamura, "The Development of Anti-monopoly Policy in Japan: The Erosion of Japanese Anti-monopoly Policy, 1947-67", 2 *Studies in Law and Economic Development*, 1-22 (1967).

7 Steel, textiles, consumer products and automobiles exported from Japan were among the products that drew the most public attention in the U.S.

8 For details concerning the SII negotiation process, see Leonard Schoppa, *Bargaining with Japan*, Columbia University Press, 1997, chapter 8.

9 See, e.g., Mitsuo Matsushita, "The Structural Impediments Initiative: An Example of Bilateral Trade Negotiations", 12 *Michigan Journal of International Law* 436-449 (1991). The two negotiating sides bargained in order to determine the shape of the resulting recommendations in the shadow of tough action by a U.S. Congress concerned by the American trade deficit. As Matsushita explains at p. 440, "noncompliance on the part of the Japanese government would [have invited] a strong reaction by the U.S. Congress in the form of a retaliatory bill or a request to the Executive Branch to invoke Super 301 [i.e., unilateral

There were six principal points of concern on the American list, some of which overlapped with each other to a certain extent. These were: (i) savings and investment imbalances; (ii) application by Japanese exporters of higher prices for their goods on foreign markets while keeping domestic prices low; (iii) land use restrictions that maintained high property values; (iv) over-regulation of distribution, including restrictions on discounts and advertising, and restrictions on retail stores exceeding a certain size, such as supermarkets, which might purchase more foreign products compared to smaller retailers if regulatory obstacles were removed; (v) the *keiretsu* business-network model common in Japanese industry, which was thought to raise entry barriers due to long-term relational contracting practices; and (vi) other exclusionary business practices. According to the Americans, these features combined to make market access hopeless for U.S. companies aspiring to compete on Japanese markets. Some observers commenting on the SII discussions pointed out that many of the concerns raised by the U.S. stemmed from distorted perceptions, fallacies and occasionally hypocritical allegations.[10] We put most of this discussion to one side, as it is not directly relevant to our analysis of cartel regulation. Nevertheless, one important criticism lodged against Japan was substantially justified: particularly in connection with the sixth point, Japan was not doing enough to punish and prevent exclusionary business practices, and greater efforts were needed to ensure effective enforcement of the AMA.[11]

The weakness of antitrust enforcement in Japan was not merely detrimental to would-be new entrants based in the U.S. but also had adverse consequences for Japan itself. Whereas the usual justifications for vigorous antitrust enforcement carried little weight in earlier times as the country's economic engine raced ahead of most other industrialized countries, when the engine stalled the damage done to consumers and industrial purchasers as a result of anticompetitive practices became more evident and drew more public attention. Japan's economic decline, which took hold in the early 1990s and which we consider below, began to be felt just as the SII talks were getting underway. This puts an interesting perspective on the fact that the U.S. demanded more robust, transparent and formally-grounded antitrust enforcement in Japan, and the fact that Japan acceded to this demand, for example by increasing the JFTC's staff size by 20%,[12] by amending the AMA and raising the level of surcharges (*kachōkin*, i.e., administrative fines),[13] and by stepping up criminal enforcement activity.[14] It is difficult to conclude with certainty that the SII talks were really decisive in causing

---

trade retaliation measures outside the GATT framework, at a time when the GATT's institutions and enforcement were still relatively weak]". Since compliance was driven by a credible threat of sanctions, Matsushita described the SII report as amounting, in substance, to a binding international agreement. See also ibid., at 446.

10 See Gary Saxonhouse, "Japan, SII and the International Harmonization of Domestic Economic Practices", 12 *Michigan Journal of International Law* 450-469 (1991).

11 John Owen Haley argued that the U.S. perception of a cartelized Japanese economy (facilitated by *keiretsu* networks) did not stand up to scrutiny. His line of reasoning was that high prices resulting from collusion should have attracted significant entry by U.S. firms as trade barriers receded through successive GATT rounds. The lack of significant new entry suggested to Haley that U.S. products must have been too expensive, once transport costs and other normal trade costs were added, to be competitive in Japanese markets. See John O. Haley, "Japanese Antitrust Enforcement: Implications for United States Trade", 18 *Northern Kentucky Law Review* 335-366 (1991), for example at 357-360. Haley was probably right about exaggerated perceptions in the U.S., although one may wonder about the contention that limited market entry furnishes proof of the relative inefficiency of U.S. firms (undoubtedly it was the case in some sectors, but not all; where it was not the case there may have been artificial non-tariff barriers in the private sphere or public sphere or both). In any case, even if Haley's arguments are fully accepted it does not follow that reforms designed to improve Japan's antitrust system were unnecessary.

12 See Saxonhouse, "International Harmonization", cited above note 10, at 467; Beeman, *Public Policy*, cited above note 2, at 38 (Figure 3.3); Hamabe, "Changing Antimonopoly Policy", cited above note 5, at 913 (number of staff employed in the JFTC's Investigation Bureau rose from 129 in 1989 to 186 in 1993). Fortunately for these additional investigators the JFTC's budget was also expanded. Increases in the JFTC's overall staff and investigative personnel in particular have been made periodically since those days, and the total staff is now composed of about 800 employees, including around 380 who work in the Investigation Bureau. See Harry First and Tadashi Shiraishi, 'Japan: The Competition Law System and the Country's Norms', in Eleanor Fox and Michael Trebilcock, eds., *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: Oxford University Press, 2013), pp. 232-265, at p. 252 (roughly the size of comparable agencies in EU and U.S.); Toshiyuki Nambu, 'Recent Developments of the Anti-Monopoly Act (Japanese competition law) and its enforcement', slide presentation, 11 December 2012, Hong Kong, slide no. 3 (staff levels rising steadily from FY 2002 to FY 2008, then reaching a plateau of around 800 from FY 2008 to FY 2012); Naohiko Komuro, 'Evaluating Competition Policy in Japan', slide presentation, 13 February 2012, APEC Competition Policy and Law Group, slide no. 16 (number of employees in the JFTC's Investigation Bureau growing from 219 in FY 2002 to 382 in FY 2011).

13 In 1991, the Japanese Diet amended the AMA to raise the maximum surcharge to 6% of the operating profit generated by the relevant product over the period of the infringement (subject to a three-year retroactivity cap). The 6% maximum rate was ultimately acceptable on the Japanese side because it was thought to be consistent with average profits and thus avoided any punitive character; it fell short of U.S. demands for a surcharge of at least 10% of sales value or twice the illegal gain. See Beeman, *Public Policy*, cited above note 2, at 141-143. In 1991 the JFTC also adopted guidelines setting forth its enforcement policy with regard to, *inter alia*, collective boycotts, exclusive dealing, cross-shareholdings, resale price maintenance, rebates and the abuse of dominance by retailers. Furthermore, at the behest of the U.S. negotiators, the JFTC polished up its rusty criminal indictment power and started to make use of it again in the early 1990s. Since that time the JFTC has referred several criminal cases to the public prosecutor, although most cases referred concern bidrigging (*dangō*) as opposed to classic cartels with private victims (final consumers in Japan).

14 In 1991, the JFTC criminally indicted several firms and individuals in the wrapping materials sector for cartel behaviour. The criminal action (with suspended