The Saitama Saturday Club Case: Political Meddling, Public Opinion, and Antitrust Enforcement in Japan at a Turning Point

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I. INTRODUCTION

Sometimes cases that are seen as a failure contribute more to the development of the law than those that appear to be successful. The Saitama Saturday Club case, which unfolded in the early nineties, is a good example. It pitted Japan's antitrust enforcement agency against the country's mighty construction industry. For years, the construction companies had rigged thousands of bids in Saitama Prefecture, in clear violation of Japan's *Dokusen kinshi-hō* (Antimonopoly Act).[1] Yet they escaped relatively unpunished, as the Japan Fair Trade Commission decided not to bring criminal charges and instead handled the case with an administrative penalty.

But this docile treatment triggered a public backlash. Angry citizens sued the construction companies for damages, an unprecedented move that would subsequently be replicated in over eighty other cases throughout Japan. More broadly, the case heightened public awareness of the pernicious nature of bid-rigging and galvanized popular support for more robust antitrust enforcement. In turn, this support enabled the Japan

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1 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu*, Law No. 54/1947; Engl. transl. available from *http://www.jftc.go.jp*.

Fair Trade Commission to move against entrenched interests and gradually step up enforcement in the years that followed, an evolution that continues to this day. In this sense, the Saitama Saturday Club case constituted a turning point for antitrust enforcement in Japan.

Part I of this chapter tells the story of the Saitama Saturday Club case. It describes (1) the bid-rigging scheme that lay at the basis of the case, (2) the Japan Fair Trade Commission's response, (3) the public outcry and the bribery scandal that followed, and (4) the damages action filed by local Saitama citizens. Part II discusses the broader significance of the case. It explains (1) how the Saitama case triggered a boom in antitrust damages actions against bid-riggers. Next, it shows that, (2) while the Saitama case illustrates the difficulties long faced by the Japan Fair Trade Commission in enforcing antitrust law in Japan, it also (3) marked a turning point toward more vigorous enforcement of competition law. Finally, a short conclusion closes this chapter.

II. THE SAITAMA SATURDAY CLUB CASE

1. Bid-Rigging in Saitama Prefecture

Officially, the Saitama Saturday Club's aim was to "foster friendship" among its members,[2] executives from most of Japan's large construction companies. Perhaps it did, but it was also the forum where the executives rigged the bids for virtually all public works in Saitama Prefecture, the densely populated region immediately north of Tokyo.[3] The club had been created in 1972 by Kajima Construction,[4] one of Japan's five construction giants, and its membership had risen to sixty-six companies by 1991, the year in which the bid-rigging scheme was uncovered by the Japan Fair Trade Commission.[5]

As was customary throughout Japan at the time, Saitama Prefecture used a system of designated competitive bidding (*shimei kyōsō nyūsatsu*) to procure most public works.[6] This meant that for each construction project, the prefecture designated a limited number of companies – typically ten – that were invited to tender. The company with the lowest bid would then be awarded the contract. In virtually all cases, the construction companies invited to tender all belonged to the Saturday Club, since it grouped almost all major construction companies in Japan. Rather than competing among each other, the

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2 Art. 3 of the Articles of Association of the Saitama Saturday Club, cited in T. TAJIMA/H. YAMAGUCHI, *Dokyumento Saitama doyō-kai dangō* [Document: Bid-Rigging by the Saitama Saturday Club] (Tokyo 1995) 26.

3 Saitama Prefecture has over 7 million inhabitants and is the fourth most densely populated prefecture of Japan, after Tokyo, Osaka, and Kanagawa.

4 TAJIMA/YAMAGUCHI, *supra* note 2, 255.

5 JAPAN FAIR TRADE COMMISSION, Recommendation Decision Heisei 4 (kan) no. 16, 3 June 1992, in: Shinketsu-shū 39 (1992–93) 81.

6 *Ibid.*, 81.

companies decided in the club who would get the project and at what price, based on a system of sealed envelopes submitted by the companies at the beginning of each year, indicating the kind of works they were interested in and their areas of expertise.[7]

To smooth out imbalances, the companies whose wishes had not been granted would receive "relief" by being hired as a sub-contractor or by working in a joint venture with the company that was preselected as winner by the club.[8] In this way, the Saturday Club rigged the bids for thousands of public works: dams, sewage works, museums, roads, public swimming pools, theaters, etc.[9]

2. The Japan Fair Trade Commission's Response

It is not known exactly how the Japan Fair Trade Commission became aware of the bid-rigging. At the time, Japan did not yet have a leniency system, but some have suggested that certain club members tipped off the Commission because they were disgruntled with the fact that the largest construction companies were getting most of the projects.[10] Or perhaps the Commission had somehow become aware of the "bid-rigging song" that one of the club's members had composed at the occasion of the club's fifteenth anniversary.[11] In any event, in May 1991, the Commission raided the offices of the sixty-six companies represented in the club and got hold of truckloads of evidence, including the envelopes submitted each year by the members to indicate which projects they were interested in.

The Saitama case seemed an ideal target for the Japan Fair Trade Commission's most powerful weapon: criminal prosecution.[12] Although criminal penalties had been on the books since the enactment of Japan's Antimonopoly Act in 1947, they had rarely been sought.[13] But a year prior to the Saitama investigation, the Commission had announced a

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7 *Ibid.*, 82 (in the decision these envelopes are referred to as PR pamphlets (*PR chirashi*)).

8 *Ibid.*, 82.

9 In 1990 alone, Saitama Prefecture put out 2200 works to tender using the designated bidding process. See Y. OKAMURA/Y. TANABE, *Kajima kensetsu (kabu) ta rokujūgo-sha ni yoru dokusen kinshi-hō ihan jiken ni tsuite* [The Case of the Violation of the Antimonopoly Act by Kajima Construction K.K. and 65 Other Companies], in: Kōsei Torihiki 503 (1992) 62.

10 TAJIMA/YAMAGUCHI, *supra* note 2, 35.

11 *Ibid.*, 33.

12 Art. 89 Antimonopoly Act (providing criminal penalties for individuals), Art. 95 Antimonopoly Act (providing criminal penalties for legal persons). Both provisions have been amended since the time of the Saitama Saturday Club case, primarily to increase the upper limit of the penalties.

13 Only two criminal cases had been brought in the period between 1952 and 1990: Tokyo High Court, 26 September 1980, in: Hanrei Taimuzu 434 (1981) 89–129; Engl. transl.: J.M. RAMSEYER, The Oil Cartel Criminal Cases: Translations and Postscript, in: Law in Japan 15 (1982) 57; Tokyo High Court, 26 September 1980, in: Hanrei Taimuzu 434 (1981) 130–164; Engl. transl.: J.M. RAMSEYER, The Oil Cartel Criminal Cases: Translations and Postscript, in: Law in Japan 15 (1982), 66, *affirmed in part and reversed in part*, Supreme Court, 24 February 1984, Keishū 38, 1287.

major change of policy. Spurred on by American complaints that lax antitrust enforcement was hampering American access to the Japanese market,[14] the Commission had declared that it would aggressively target two types of cases: (1) those involving pernicious infringements such as cartels and bid-rigging that have a wide impact on people's lives, and (2) those involving repeat offenders, i.e., companies that had already been punished administratively in the past but committed an infringement again.[15]

Since the Commission had announced this policy, it had brought only one case, against a cartel in the relatively small market for plastic wrap used in the food industry.[16] The defense raised by the accused in that case was that they were being sacrificed as scapegoats to placate the US government.[17]

If a plastic wrap cartel was sufficient to trigger criminal prosecution, then certainly years of bid-rigging for public works at the expense of taxpayers should be, too, commentators thought.[18] In addition, several of the construction companies involved in the Saturday Club, including the club's lead company, Kajima Construction, were repeat offenders.[19] Hence, the case seemed to fit both categories of cases for which the Commission had announced its new approach of aggressive criminal prosecution.

Initially, things were certainly moving in the direction of criminal prosecution. The Japan Fair Trade Commission has the exclusive right of initiative for criminal prosecutions,[20] but it has to work in tandem with the Prosecutor's Office.[21] It is the Commission that files the accusation (*kokuhatsu*) with the prosecutor, but it is the prosecutor who then formally brings the criminal case before the court (*kiso*). The prosecutor can decide not to bring the criminal case, for instance because the evidence is weak, but in that case

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14 See U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE, Joint Report (28 June 1990), page IV-4, available from *http://www.trade.gov/eastasia/market-opening/SII%20Joint%20Report.pdf*, last retrieved on 23 October 2013.

15 JAPAN FAIR TRADE COMMISSION, *Keiji kokuhatsu ni kansuru kōsei torihiki i'in-kai no hōshin* [Policy on Criminal Accusation Regarding Violations of the Antimonopoly Act] (20 July 1990). This policy was amended in 2005 and renamed: JAPAN FAIR TRADE COMMISSION, *Dokusen kinshi-hō ihan ni taisuru keiji kokuhatsu oyobi hansoku jiken no chōsa ni kansuru kōsei torihiki i'in-kai no hōshin* [Policy on Criminal Accusation and Investigation of Violations of the Antimonopoly Act] (7 October 2005), to exempt successful leniency applicants from criminal prosecution, and amended again in 2009.

16 The size of the market for industry-use food wrap was around 30 billion yen. Tokyo High Court, 21 May 1993, in: Hanrei Taimuzu 828 (1994) 113, 121. The size of the market of public works ordered by Saitama Prefecture was many times larger.

17 *Ibid*., 120.

18 "*Naze dangō kokuhatsu wo miokuru no ka (shasetsu)* [Why Give Up on Criminal Prosecution for Bid-Rigging? (Editorial)]," Asahi Shinbun, 19 April 1992, 2.

19 See, e.g., JAPAN FAIR TRADE COMMISSION, Surcharge Order Shōwa 63 (nō) no. 84, 8 December 1988, in: Shinketsu-shū 35 (1988–89) 76–77 (surcharge order against Kajima Kensetsu K.K. for bid-rigging at the US Navy base in Yokosuka).

20 Art. 96 (1) Antimonopoly Act.

21 Art. 74 Antimonopoly Act (Art. 73 at the time of the Saitama case).

he or she has to report this to the Prime Minister.[22] To avoid such a situation, in practice the Japan Fair Trade Commission and the prosecutor consult each other and decide together whether or not to prosecute a case criminally.

Such consultation also took place in the Saitama case. But just when everyone was expecting criminal charges to be brought, the case took a sudden twist. The Japan Fair Trade Commission ultimately did not file any criminal accusation and instead decided to handle the case only administratively. It ordered the companies to cease their bid-rigging[23] and imposed an administrative penalty.[24]

In Japan, the administrative penalty is a so-called surcharge, meaning it is calculated as a fixed percentage of the turnover that relates to the infringement. At the time, the applicable surcharge rate was 1.5 percent (currently it is 10 percent).[25] In practice, this meant that each construction company had to pay 1.5 percent of the turnover it had derived from the construction projects for which bid-rigging had been established. In total this resulted in a fine of one billion yen (around eight million dollars at the time), spread over forty-three of the sixty-six companies involved in the Saitama Saturday Club. For instance, Kajima Construction, which attracted the highest fine, had constructed a dam, worked on a land reclamation project, and refurbished a bridge for Saitama Prefecture. Accordingly, it paid 1.5 percent of the turnover related to those projects, which amounted to a fine of a meager 128 million yen (around 1 million dollars at the time).[26]

Although the Club had been in existence for many years, the Commission's decision only found an infringement for the period from 1988 to 1991, and calculated the penalty based on the turnover in that period.[27] The companies that had not been awarded any works in that period had no turnover, and so did not have to pay any surcharges. This explains why only forty-three out of the sixty-six companies of the club were actually fined.

The Commission had delineated the relevant product market as "the market for public works ordered by Saitama Prefecture through designated bidding procedures in

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22 Art. 74 (3) Antimonopoly Act (Art. 73 (2) at the time of the Saitama case).

23 JAPAN FAIR TRADE COMMISSION, Recommendation Decision Heisei 4 (kan) no. 16, 3 June 1992, in: Shinketsu-shū 39 (1992–93) 69.

24 JAPAN FAIR TRADE COMMISSION, Surcharge Order Heisei 4 (nō) nos. 161–203, 18 September 1992, in: Shinketsu-shū 39 (1992–93) 363–370.

25 Art. 7-2 (1) Antimonopoly Act. At the time of the Saitama case, the surcharge rate had just been increased to 6% but since the facts predated that change, the Japan Fair Trade Commission had to apply the old 1.5% rate. See JAPAN FAIR TRADE COMMISSION, Surcharge Order Heisei 4 (nō) no. 161, 18 September 1992, in: Shinketsu-shū 39 (1992–93) 369.

26 JAPAN FAIR TRADE COMMISSION, Surcharge Order Heisei 4 (nō) nos. 161–203, 18 September 1992, in: Shinketsu-shū 39 (1992–93) 363–370.

27 At present, the period for which a surcharge can be imposed is limited by law to three years (Art. 7-2 (1) Antimonopoly Act), but at the time it was not. Hence, the Japan Fair Trade Commission could, in principle, have calculated the surcharge over a longer period.

which several members of the Saitama Saturday Club had been designated."[28] Although there were indications that the Saturday Club also rigged the bidding process for public works ordered by local villages, towns, and cities, this market was not included in the decision, and only a warning was given in this respect.[29]

3. Public Outrage and Conviction for Bribery

The Japan Fair Trade Commission's decision not to seek criminal sanctions elicited immediate and harsh criticism from the media and public opinion.[30] Although the administrative penalty was the second-highest on record at the time,[31] popular perception was that the construction companies had gotten away lightly.

Indeed, the administrative penalty, which corresponded to 1.5 percent of the relevant turnover, probably took away only a fraction of the extra profits that the construction companies had derived from the bid-rigging.[32] Criminal sanctions would not have made much difference in monetary terms, because the maximum penalty for corporations was a trifling five million yen (around 40,000 dollars) at the time. However, they carry much greater stigma than administrative sanctions and could also have punished the individual decision-makers with fines and imprisonment.

Hence, the question on everyone's mind was: why did the Japan Fair Trade Commission not bring criminal charges? The Commission's explanation was technical: a lack of

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28 JAPAN FAIR TRADE COMMISSION, Recommendation Decision Heisei 4 (kan) no. 16, 3 June 1992, in: Shinketsu-shū 39 (1992–93) 82.

29 OKAMURA/TANABE, *supra* note 9, 64–65.

30 See, e.g., "Tokyo Will Not Fine Building Firms," New York Times, 16 May 1992 (calling the Commission decision a "decision that elicited immediate and harsh criticism in Japan"); "*Naze dangō kokuhatsu wo miokuru no ka (shasetsu)* [Why Give Up on Criminal Prosecution for Bid-Rigging? (Editorial)," Asahi Shinbun, 19 April 1992, 2; "*Kensei-kai to, mochitsumotaretsu dangō giwaku shinsa no sa naka ni ema kōnyū – Saitama doyō-kai* [Saitama Saturday Club: Buying Prayer Tablets in the Midst of an Investigation on Suspicion of Bid-Rigging, Intertwined with Prefectural Politics]," Mainichi Shinbun, 16 May 1992, 26; T. KOGA, *Kaisetsu – Dokkin-hō no bannin, kadai wa omoku – Saitama doyō-kai no kensetsu dangō* [Commentary – Daunting Task for Antitrust Watchdog – Bid-Rigging for Construction Works by the Saitama Saturday Club], Mainichi Shinbun, 16 May 1992, 3; N. SAITŌ/M. MORIMOTO, *Saitama no dangō kokuhatsu miokuri – dokkin-hō unyō kyōka ni gyakkō – koshikudake kōtori ni tsuyomaru hihan (kaisetsu)* [No Criminal Prosecution in Saitama Bid-Rigging Case – Setback for Strengthened Antitrust Enforcement – Criticism Against Fair Trade Commission's Retreat Intensifies], Yomiuri Shinbun, 16 May 1992, 17; K. KAMEMOTO, *Kōkyō kōji to nyūsatsu/keiyaku no tekiseika – nyūsatsu dangō no haijo to bōshi o mezashite* [Public Works and Bidding/Ensuring Fairness for Contracts – Towards the Exclusion and Prevention of Bid-rigging], in: Referensu 632 (September 2003) 14.

31 The highest penalty at the time was JAPAN FAIR TRADE COMMISSION, Surcharge Order Heisei 3 (nō) nos. 21–29, 18 March 1991, in: Shinketsu-shū 37 (1990–91) 178–181 (6.6 billion fine for a cement cartel).

32 See part II, section 3, "Higher Penalties."

evidence to establish individual criminal liability, exacerbated by the unprecedented size of the case.[33] Indeed, under Japanese antitrust law, although both individuals and corporations can be subject to criminal sanctions, corporate criminal liability presupposes individual criminal liability.[34] Hence, for each corporation, the prosecution would have to establish which specific individuals were responsible for the bid-rigging.

However, the media suggested that the real reason was less honorable.[35] Rumors circulated that there had been behind-the-scenes pressure on the Commission by the so-called construction tribe (*kensetsu-zoku*), a group of politicians from the ruling party with close ties to the construction industry. Their leverage over the Commission supposedly stemmed from the fact that a bill was pending in parliament to increase the maximum level of criminal penalties for antitrust violations. As mentioned, these were very low, and therefore the Commission had drafted a bill to increase penalties twentyfold.[36] Accordingly, the press suggested that a deal had been struck: the politicians belonging to the construction tribe would allow the bill to pass and, in return, the Commission would deal leniently with the Saitama constructors. "Baseless rumors," had been the Commission Chairman's response to these allegations, insisting no pressure had been exerted.[37]

Yet two years later, evidence of exactly such pressure surfaced. In a separate investigation,[38] prosecutors stumbled upon evidence that Kajima Construction, the lead company of the Saturday Club, had passed a sizeable sum of money to Kishirō Nakamura, a Member of the House of Representatives for the ruling Liberal Democratic Party and future Minister of Construction. In return, his mission had been to pressure the Japan Fair Trade Commission into dropping the criminal charges against the Saitama construction companies.

Nakamura was subsequently arrested and tried on bribery charges. The trial brought to light the full extent of the pressure brought to bear on the Commission. Nakamura had met the Japan Fair Trade Commission's Chairman three times.[39] The first two times, Nakamura had come to the Chairman's office on unannounced business, and had inces-

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33 "*Hōtō nukezu 'zannen' kensetsu dangō kokuhatsu dannen de Umezawa Setsuo – kōtori i'inchō* [The Ultimate Weapon Not Used in Construction Bid-Rigging – Giving Up on Criminal Prosecution 'Regrettable' Says JFTC Chairman Umezawa Setsuo]", Asahi Shinbun, 16 May 1992, 31.

34 Art. 95 (1) Antimonopoly Act.

35 See, e.g., "*Shasetsu – Kokuhatsu ha naze miokurareta no ka – Saitama ken kensetsu dangō* [Editorial – Why Was No Criminal Prosecution Filed? – Bid-Rigging in Saitama Prefecture]", Mainichi Shinbun, 17 May 1992, 5.

36 JAPAN FAIR TRADE COMMISSION, *Nenji hōkoku heisei 4 nendo* [Annual Report 1992], Part 2, Chapter 1, Section 1, Sub-section 1, available from *http://www.jftc.go.jp/info/nenpou/h04/top_h04.html*, last retrieved on 23 October 2013 (describing the drafting process).

37 *Ibid.*

38 An investigation into tax evasion and corruption involving political heavyweight Shin Kanemaru and Japan's construction industry, the so-called *zenekon* scandal.

39 Tokyo District Court, 1 October 1997, in: Hanrei Taimuzu 962 (1998) 62, 76–77.

santly pressed him – "Won't you drop the criminal case?" "Why can't you drop the criminal case?" – adding threats that the Commission's relationship with the ruling Liberal Democratic Party would become very awkward indeed if the Chairman ignored the request.[40] Each time, the Chairman had held steadfast, and, after a heated back-and-forth exchange, Nakamura had angrily left the Chairman's office.[41] But the third time, it had been the Chairman who had gone to Nakamura's office to tell him that the Prosecutor's Office was extremely interested in the amendment to increase the criminal antitrust penalties and that he would make sure no criminal charges would be brought in the Saitama Saturday Club case.[42]

Had the Commission Chairman succumbed to Nakamura's pressure and struck a deal? Did the Commission shirk from bringing a criminal case because of political meddling? In spite of the damning evidence that surfaced in the trial of Nakamura, the question remains shrouded in controversy. The Chairman's own explanation for the third encounter was rather ingenious. Since no criminal prosecution would be brought anyway because of lack of evidence, he decided to use this foregone conclusion as a bargaining chip to get something else the Commission badly wanted, namely passage of the amendment to the Antimonopoly Act. This way he could avoid a worst-case scenario, where there would be neither criminal prosecution nor any increase in the level of antitrust penalties.[43] This hypothesis finds support in a recent account of the events by one of the prosecutors, detached to the Japan Fair Trade Commission at the time, and closely involved in the case. According to this account, the prosecution was dropped not because of political pressure but because of a misalignment between the Japan Fair Trade Commission, which had investigated the case with a focus on corporate liability, and the Prosecutor's Office, which was mainly concerned about individual criminal liability and felt the evidence was insufficient in this respect.[44]

The trial of Nakamura did not put the issue to rest because, ultimately, whether Nakamura's efforts to pressure the Japan Fair Trade Commission were successful or not was not considered crucial for the trial. What mattered was whether he had received money and exerted pressure on an independent agency that was supposed to make its decisions without political interference. The court found that he had. Hence, it convicted Nakamura for having accepted a bribe in return for the unlawful exertion of influence (*assen shūwai*)[45] and sentenced him to one and a half years in prison.[46]

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40 Tokyo High Court, 25 April 2001, in: Hanrei Taimuzu 1068 (2001) 248, 262.
41 Tokyo District Court, 1 October 1997, in: Hanrei Taimuzu 962 (1998) 62, 76.
42 Tokyo District Court, 1 October 1997, in: Hanrei Taimuzu 962 (1998) 62, 77; Tokyo High Court, 25 April 2001, in: Hanrei Taimuzu 1068 (2001) 248, 262.
43 Tokyo District Court, 1 October 1997, in: Hanrei Taimuzu 962 (1998), 62, 76–77.
44 N. GŌHARA, *Kensatsu ga abunai* [The Prosecutor's Office in Crisis] (Tokyo 2010) 87, 100–101.
45 Art. 197-4 *Keihō* [Penal Code].

4. The Damages Action by Local Saitama Residents

Outrage over the Japan Fair Trade Commission's decision not to seek criminal sanctions was particularly acute in Saitama Prefecture, especially after it became clear that even the prefecture's long-time governor had been implicated in the scandal.[47] If the Japan Fair Trade Commission failed to bring criminal charges, local residents in Saitama reasoned that at least the prefecture should bring a damages claim and recover the taxpayer money that had been wasted on inflated bids. But the authorities had no appetite for litigation: "It is difficult to see how we have suffered damage," said the vice-governor of Saitama Prefecture.[48] He argued that the prefecture had set a ceiling price for each bid, and since the bids, rigged as they may have been, had remained under that ceiling, the prefecture suffered no loss.

Unconvinced by this odd reasoning, the residents decided to take matters into their own hands. Using a novel litigation strategy, they initiated a so-called residents' lawsuit (*jūmin soshō*), based on a provision in Japan's Local Autonomy Act.[49] These lawsuits were originally conceived as a means for local citizens to challenge fiscal malfeasance by public officials. For example, if a public official spends taxpayer 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.[50] The residents themselves are not entitled to damages, but if their action is successful, they can recover their attorney fees.[51] The mechanism had never been designed with antitrust infringements in mind, but the Saitama residents argued that there was no reason why it couldn't be used for such cases: if the prefectural government failed to exercise its claim against the bid-riggers, it was negligent in its duty to recover public money and, hence, it was wasting taxpayer money. Accordingly, the residents argued that they could bring a claim on behalf of the local government.

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46 Tokyo District Court, 1 October 1997, in: Hanrei Taimuzu 962 (1998) 62, 107, affirmed by Tokyo High Court, 25 April 2001, in: Hanrei Taimuzu 1068 (2001) 248, 276, affirmed by Supreme Court, 14 January 2003, in: Hanrei Taimuzu 1113 (2003) 132–133.

47 "A Deal too Many," The Economist, 23 May 1992, 82.

48 "*'Songai hassei kangaenikui' kyū Saitama doyōkai dangō songai baishō soshō de Saitama fuku-chiji* [Saitama Saturday Club Damages Action: 'Difficult to See the Damage' Says Saitama Vice-Governor]," Asahi Shinbun, 18 August 1992.

49 Art. 242-2 (1) *Chihō jichi-hō* [Local Autonomy Act], Law No. 67 of 1947 (in its version prior to a 2002 amendment). A translation of the law as it was on the books in 1999 is available from *http://nippon.zaidan.info/seikabutsu/1999/00168/contents/092.htm*, last retrieved on 23 October 2013.

50 See, for such a case, Supreme Court, 5 September 1989, in: Hanrei Taimuzu 717 (1990) 101, 103 (holding that the expenses to welcome guests were excessive and therefore illegal), affirming Nagoya High Court, 17 July 1986, in: Hanrei Jihō 1227 (1987) 37, 42.

51 Art. 242-2 (12) Local Autonomy Act (at the time of the Saitama lawsuit, this rule was laid down in Art. 242-2 (7) Local Autonomy Act).

In August 1992, a mere two months after the Japan Fair Trade Commission's administrative decision finding an infringement, and even before the Commission had imposed a fine, the residents had their court papers ready and filed suit. At the first hearing in the case, the residents' team of five lawyers faced an army of more than 150 lawyers on the defendants' side, representing the sixty-six construction companies whose joint liability the residents sought.[52] The local district court's courtroom was filled to the brim, with many lawyers on the defendants' side having to stand in the zone reserved for spectators.[53]

Initially, things got off to a good start for the residents, as they managed to obtain documents from the Japan Fair Trade Commission in support of their claim,[54] in accordance with guidelines that the Commission had issued to facilitate damages actions.[55]

But the residents would soon find out that Japanese courts can be quite inhospitable to activist plaintiffs.[56] A key procedural hurdle for residents' lawsuits is that they must be preceded by an audit request to the local government, asking the local government to file a claim for damages itself.[57] Only if that audit request is rejected can the residents file their lawsuit. Sure enough, the residents had filed an audit request and, unsurprisingly, the local government's audit committee had summarily rejected it. The problem was that this audit request has to be brought within one year of the unlawful act that is being challenged, unless there is a proper reason for the delay.[58]

The residents' position was that they were not challenging an unlawful *act*, but the local government's ongoing negligence in recovering the damages resulting from the bid-rigging. Hence, they argued, the one-year time period did not apply.[59] Had the local government's negligence ceased to exist, the local residents would not have had to sue in the first place.

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52 H. YAMAGUCHI, *Kōkyō nyūsatsu dangō to songai baishō seikyū – Saitama doyō-kai dangō jiken jūmin soshō* [Bid-Rigging for Public Works and Damages Actions – The Residents' Lawsuit in the Saitama Saturday Club Case], in: Jiyū To Seigi 45 (4) (1994) 81.

53 *Ibid.*, 81.

54 *Ibid.*, 83.

55 JAPAN FAIR TRADE COMMISSION, *Dokusen kinshi-hō ihan kōi ni kakaru songai baishō seikyū soshō ni kansuru shiryō no teikyō ni tsuite* [Concerning the provision of documents relating to damages actions concerning violations of the Antimonopoly Act] (15 May 1991), amended in 2005 and 2009.

56 See, e.g., J.M. RAMSEYER/E.B. RASMUSEN, Why Are Japanese Judges So Conservative in Politically Charged Cases?, in: American Political Science Review 95 (June 2001) 331–344 (this study does not, however, assess judges' tendencies in residents' lawsuits).

57 Art. 242 (1) Local Autonomy Act (the audit request is filed with the local government's audit board).

58 Art. 242 (2) Local Autonomy Act.

59 Urawa District Court, 13 March 2000, in: Hanrei Chihō Jichi 211 (2001) 20, 22; Tokyo High Court, 26 April 2001, 25410184 (Lex/DB Database).

But the local District Court saw things differently.[60] It held that the unlawful conduct being challenged by the residents was not just the negligence of the local government to seek damages, but the underlying contract that was tainted by bid-rigging.[61] Hence, the one-year time period had started running at the time the contracts between Saitama Prefecture and the bid-riggers had been concluded. Of course, the contracts were concluded years before the bid-rigging came to light, and so under this interpretation, the residents' efforts were doomed to failure, not only in this case but also in any future cases.

In the alternative, the residents had argued that the court should at least accept that a "proper reason" existed for the delay, which would allow the court to disregard the one-year rule. Indeed, the bid-riggers had purposefully kept their unlawful behavior hidden, so the local residents simply had no means of knowing about the unlawful conduct.

But on this aspect, too, the District Court adopted a strict approach.[62] Even though the Japan Fair Trade Commission had only issued its administrative decision finding an infringement in May 1992, the court held that, based on newspaper articles that had appeared in January, it had already been clear that bid-rigging took place. According to the court, it did not matter that, at that time, the construction companies were still vehemently denying any wrongdoing, nor that the Commission had not yet concluded its investigation. Based on the evidence discussed in the newspapers, the residents should have realized that the construction companies only had a weak defense.[63] Therefore, the residents could have initiated proceedings in January, when the newspaper articles appeared. Instead, they filed five months later. The District Court held that this was too late, and it declared the claim inadmissible (*kyakka*).

The residents appealed to the Tokyo High Court but to no avail,[64] and the Supreme Court declined to review the case.[65] In the end, after a court battle that had lasted over ten years, the residents ended up empty-handed, except for the bill for the court costs, which they had to pay under the "loser pays" principle of Japan's Code of Civil Procedure.[66]

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60 Urawa District Court, 13 March 2000, in: Hanrei Chihō Jichi 211 (2001) 20–29.

61 *Ibid.*, 22.

62 *Ibid.*, 23–29.

63 *Ibid.*, 28.

64 Tokyo High Court, 26 April 2001, Heisei 12 (gyō-ko) no. 245, 25410184 (Lex/DB Database).

65 Supreme Court, 26 June 2003, Heisei 13 (gyō-tsu) no. 235, referenced in JAPAN FAIR TRADE COMMISSION, *Nenji hōkoku heisei 15 nendo* [Annual Report 2003], part 2, chapter 3, section 7, sub-section 5, available from *http://www.jftc.go.jp/info/nenpou/h15/15top00001.html*, last retrieved on 23 October 2013.

66 Art. 61 *Minji soshō-hō* [Code of Civil Procedure], which is applicable to residents' lawsuits pursuant to Art. 7 *Gyōsei jiken soshō-hō* [Administrative Case Litigation Act], Law No. 139/1962. Court costs under this provision do not include attorney fees.

III. THE SIGNIFICANCE OF THE CASE

1. The Beginning of a Surge in Damages Actions

Until the early 1990s, damages actions on the basis of antitrust violations had been extremely rare in Japan.[67] Although bid-rigging in public procurement was rampant, no Japanese government agency or local government ever bothered to seek damages from the infringers.

To explain this, many commentators blamed a set of institutional features that set Japan apart from the American legal system, where damages actions are a mainstay of antitrust enforcement. The "usual suspects" included the lack of punitive damages and class actions, limited discovery, and a high standard of proof.[68] While these factors were undoubtedly important, they alone do not tell the full story. Indeed, in the case of bid-rigging for public works, punitive damages and class actions are not a necessary condition for a damages claim to be worthwhile, as the amounts involved tend to be large and the damage is not scattered but concentrated in the entity that ordered the works. Likewise, the standard of proof and the lack of US-style discovery may present somewhat of an obstacle, but it is alleviated by the existence of the administrative decision by the Japan Fair Trade Commission finding an infringement. Although such a decision does not bind the court, it creates a *de facto* presumption that an antitrust violation took place.[69] Yet even in cases where the Commission had found an infringement, no damages actions were forthcoming.

That other factors were at play is also shown by the fact that, while Japanese government bodies never sought damages for bid-rigging in Japan, the US government did, and with success. After the Japan Fair Trade Commission uncovered bid-rigging for construction works at the American naval base in Yokosuka, the US government threatened to sue the bid-riggers and obtained a settlement of 4.7 billion yen (around 33 million dollars).[70]

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67 S. VANDE WALLE, Private Antitrust Litigation in the European Union and Japan – A Comparative Perspective (Antwerpen 2013) 131 (figure 6.1).

68 See, e.g., J.M. RAMSEYER, The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan, in: Yale Law Journal 94 (1985) 631–632 (among others, the lack of class actions and limited discovery); H. FIRST, Antitrust Enforcement in Japan, in: Antitrust Law Journal 64 (1995) 147 (the burden of proof); M. MATSUSHITA, The Antimonopoly Law of Japan, in: Graham/Richardson (eds.), Global Competition Policy (Washington DC 1997) 116 (proof of the causal link); U. SCHAEDE, Cooperative Capitalism: Self-Regulation, Trade Associations, and the Antimonopoly Law in Japan (New York 2000) 110 (among others, punitive damages, lack of class actions, high burden of proof).

69 Supreme Court, 8 December 1989, in: Minshū 43, 1266; Engl. transl.: S. VANDE WALLE, Collective Actions by Indirect Purchasers – Lessons From the Japanese Oil Cartel Cases, in: Wrbka/Van Uytsel et al. (eds.), Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests? (Cambridge 2012) 327–338.

70 H. IYORI/A. UESUGI, The Antimonopoly Laws and Policies of Japan (New York 1994) 92.

In fact, there were other reasons why public bodies in Japan were reluctant to sue for damages. Chief among those was the fact that many of those bodies actually tolerated and sometimes even encouraged bid-rigging. Indeed, in several cases, the procuring agency has been found to have helped organize the bid-rigging.[71] One of the factors facilitating such government complicity was *amakudari* or "descent from heaven," the practice of senior public officials retiring at private firms. The practice was, and to a certain extent still is, rampant in the construction industry and facilitated bid-rigging in at least two ways.[72] First, the prospect of a lucrative post-retirement landing spot made public officials prone to collusion with the construction companies. Second, once hired by the construction companies, these former public officials were often instrumental in obtaining the ceiling price set by the government body organizing the tender, which in turn allowed the construction companies to crank up their bid as close as possible to the ceiling price and thereby maximize illegal profits. Politicians supervising the bureaucracy, from their part, failed to exercise their supervisory role because the construction industry constituted one of the key sources of political donations.

Given the complicity of government officials in bid-rigging, it was no surprise that lawsuits were not being filed. Indeed, a lawsuit for damages would probably be hugely embarrassing for government bodies, as the construction companies could "air the dirty laundry" in their defense.[73]

The genius of the residents' lawsuit mechanism was that it allowed regular citizens to bypass the inertia of local governments, by allowing them to sue on behalf of the local government. The Saitama residents were the first to attempt this bold move and although their damages claim was rejected on procedural grounds, the lawsuit showed the way and became the first in a long series of similar lawsuits.

Indeed, in the years following the Saitama action, residents throughout Japan brought over sixty different damages actions for bid-rigging of various kinds,[74] and around a dozen actions to obtain a court order forcing the local government to seek damages.[75] In 1995 and 1996, for instance, residents in various prefectures initiated proceedings

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71 See, e.g., JAPAN FAIR TRADE COMMISSION, Recommendation Decision Heisei 11 (kan) no. 25, 20 December 1999, in: Shinketsu-shū 46 (1999–2000) 352 (involvement of top officials found in bid-rigging for supply of oil to the Japan Defense Agency).

72 See B. WOODALL, Japan Under Construction: Corruption, Politics and Public Works (Berkeley 1996) 40–41, 46–47, 68–74.

73 See, e.g., Tokyo High Court, 30 August 2011, Heisei 20 (wa) no. 6, 2011 WLJP CA08309006 (Westlaw Japan) (defendants arguing that the agency soliciting bids took the initiative in the bid-rigging and hence that the agency is not a victim entitled to damages or, at the very least, that it was contributorily negligent).

74 VANDE WALLE, *supra* note 67, 132 (figure 6.2).

75 As explained below, a 2002 amendment to the Local Autonomy Act made it impossible for the residents to seek damages directly. Instead, they could seek a court order forcing the local government to seek damages.

against companies that had rigged bids for the installation of equipment in sewage and tap water systems. In 2000, they sought very substantial damages from companies that had rigged bids for the construction of waste incineration plants.[76]

Although zealously filing claims throughout Japan, the residents faced one enormous problem: initially they almost always lost. The main stumbling block was the one-year time limit within which they had to bring the audit request that must precede the damages action. Just as in the Saitama case, courts were initially unforgiving in their calculation of this one-year time limit. Many courts held, like the Saitama District Court, that the one-year time period starts to run on the date on which the local government enters into the contract with the bid-rigging construction company.[77] Other courts, adopting a slightly more flexible interpretation, held that the starting point should be the day on which the local government pays the contract price to the bid-rigging company.[78] These interpretations made any further prospects for residents' lawsuits look bleak, as bid-rigging is often uncovered months or years after the contract is entered into and the contract price paid. It then takes months or years for the Japan Fair Trade Commission to investigate the case and reach a decision.

The residents persisted, however, and consistently appealed all unfavorable judgments. Ultimately, the Supreme Court accepted one of their cases for review. In that case, brought by residents of Toyama Prefecture against companies that rigged bids for the installation of digital water monitoring equipment, the Supreme Court held that the one-year time limit does not apply to cases where the local government is negligent in seeking damages.[79] As long as the government's negligence in exercising a damages claim continues to exist, the residents have the right to sue on behalf of that local government.

This Supreme Court judgment was a major breakthrough for the residents and opened the way for a string of favorable judgments and settlements, resulting in some of the largest antitrust damages recoveries on record. In 2000, for instance, residents of the Tokyo Metropolitan Area sued three companies that had constructed garbage incinerators for the city. The suit led to a recovery of 9.7 billion yen (97 million dollars) in damages, making it the largest antitrust recovery in Japanese history.[80]

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76 See, e.g., Yokohama District Court, 21 June 2006, Heisei 12 (gyō-ko) no. 34, 2006 WLJP CA06219003 (Westlaw Japan), affirmed by Tokyo High Court, 18 March 2008, Heisei 18 (gyō-ko) no. 191, Heisei 18 (gyō-ko) no. 240, 2008 WLJP CA03189005 (Westlaw Japan) (residents' lawsuit on behalf of Yokohama City resulting in recovery of three billion yen).

77 Tsu District Court, 20 August 1998, Heisei 8 (gyō-u) no. 3, 28050305 (Lex/DB Database).

78 Nara District Court, 20 October 1999, in: Shinketsu-shū 46 (1999–2000) 615, modified Osaka High Court, 8 March 2001, in: Shinketsu-shū 47 (2000–01) 748.

79 Supreme Court, 2 July 2002, in: Shinketsu-shū 49 (2002–03) 713 and Minshū 56, 1049, translation available from *http://www.courts.go.jp/english/judgments/text/2002.7.2-1998-Gyo-Hi-No.51.html*, last retrieved on 23 October 2013.

80 Tokyo District Court, 20 March 2007, Heisei 12 (gyō-u) no. 185, 2007 WLJP CA03208020 (Westlaw Japan), affirmed by Tokyo High Court, 12 May 2009, Heisei 19 (gyō-ko) no. 119,

Ironically, in 2002, the very year in which the Supreme Court issued its favorable ruling on the one-year time limit, the Japanese government had legislation enacted to curtail the residents' lawsuit mechanism. Apparently, the mayors and civil servants had complained that the "burden of being named in these lawsuits" had become unbearable.[81] The statutory amendment removed the possibility for residents to sue on behalf of the local government. Instead, a two-step process was put in place. Residents now have to sue the local government, instead of the bid-riggers, and the court can then order the local government to seek damages from the bid-riggers.[82]

Since 2002, around a dozen such cases have been brought. In addition, local governments and government agencies are now increasingly suing for damages themselves. Indeed, the residents' lawsuits showed that the recovery of damages was feasible, and increased pressure on local governments and government agencies to hold infringers accountable for the harm they inflict. Many such cases have been brought in recent years.

This way, the damages action by the Saitama residents and its progeny have reshaped the antitrust enforcement landscape in Japan. Until the Saitama case, no Japanese government agency had ever sought damages for bid-rigging. Now it is standard practice.

2. An Illustration of the Difficulties Facing Japan's Antitrust Enforcement Agency

On paper, the Japan Fair Trade Commission had been entirely independent since it was established in 1947.[83] Modeled after the US Federal Trade Commission, its Commissioners are appointed for a fixed term and cannot be removed from office,[84] except in exceptional cases such as criminal conduct.[85] Obviously, the executive or legislative branch cannot remove Commissioners because it disagrees with their decisions or policies. But the lesson of the Saitama case is that, when operating in a political setting that is openly hostile towards antitrust enforcement, guarantees on paper matter little. Ultimately, even the most independent of agencies depends on the legislature for its powers and budget and, hence, it can become the target of political meddling and arm-twisting.

Heisei 19 (gyō-ko) no. 151, 2009 WLJP CA05126001 (Westlaw Japan) (affirming the 4.4 billion yen damages with respect to defendant Kubota; two other defendants settled the proceedings on appeal for 5.3 billion yen).

81 J. MARSHALL, Freedom of Information, Legal Mobilization, and the Taxpayer Suit Boom in Japan, USJP Occasional Paper 04-06 (2004) 36. See also J. TAKAHASHI, *Gyōsei kanshi no buki ni – shuchō/shokuin aite no jūmin soshō ga kyūzō – jichi-tai konwaku* [Towards a Weapon to Inspect the Administration – Surge in Residents' Lawsuits Against Heads of Local Governments and Staff – Local Governments Distressed], Asahi Shinbun, 23 July 1998, 4.

82 Art. 242-2 (1) Local Autonomy Act.

83 Art. 28 Antimonopoly Act.

84 Art. 31 Antimonopoly Act. *Compare* 15 U.S.C. § 41 (FTC Commissioners can only be removed for "inefficiency, neglect of duty, or malfeasance in office").

85 Art. 31 (iv) Antimonopoly Act (removal possible if Commissioner is sentenced to imprisonment).

This danger becomes all the more acute if that legislature is consistently dominated by a single political party, as was the case in Japan. At the time of the Saitama case in 1992, the Liberal Democratic Party had continuously been part of the ruling coalition from 1955 onward. Hence, it wielded significant power and the Commission had little leeway to go against the party's political preferences.[86] Indeed, at times, the Commission had even been threatened with abolition.[87]

Interestingly, the scandal surrounding the Saitama Saturday Club case was one of the scandals that contributed to the ruling Liberal Democratic Party's defeat in the 1993 elections, leading to the first government coalition without the party since 1955. In that sense, the legal guarantees did matter after all, as they provided part of the legal framework that allowed for the prosecution of those scandals.[88]

3. The Start of More Vigorous Public Enforcement

While the case illustrates the difficulties facing antitrust enforcement in Japan, it also marks a turning point. From the early nineties onward, antitrust enforcement in Japan became more vigorous. In part, this was the result of pressure from abroad, especially from the United States, which saw lax antitrust enforcement as one of the prime reasons why American companies were failing to penetrate the Japanese market, thereby causing a growing trade imbalance. But external pressure alone was insufficient to strengthen the legitimacy of the Japan Fair Trade Commission. Too many vested interests in Japanese politics and society were resisting stronger antitrust enforcement.

It was a change in thinking within Japan itself that ultimately enabled the Commission to overcome those vested interests. In this respect, the Saitama case played a pivotal role because it galvanized public support for more robust antitrust enforcement. Indeed, the lenient way in which the Saitama construction companies were treated elicited harsh criticism in all major newspapers and made it plain to see for everyone in Japanese society that antitrust enforcement was deficient.[89] In addition, the case heightened awareness that taxpayer money was being wasted because of bid-rigging. This concern certainly

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86 See H. HIRABAYASHI, *Kōsei torihiki i'in-kai no shokken kōshi no dokuritsu-sei ni tsuite* [Concerning the Independence of the Japan Fair Trade Commission's Exercise of Authority], in: Tsukuba Rō Jānaru [Tsukuba Law Journal] 3 (2008) 67–97 (giving an overview of instances in which the Japan Fair Trade Commission's independence was threatened).

87 M.L. BEEMAN, Public Policy and Economic Competition in Japan – Change and Continuity in Antimonopoly Policy, 1973–1995 (London 2002) 20, 174 (referring to the attempts of Prime Minister Kishi to abolish the Japan Fair Trade Commission in the late fifties).

88 Tokyo High Court, 25 April 2001, in: Hanrei Taimuzu 1068 (2001) 248, 272 (invoking Art. 28 of the Antimonopoly Act, which guarantees the Commission's independence, as one of the legal provisions justifying the finding of unlawfulness of Nakamura's contact with the Japan Fair Trade Commission).

89 See part I, section 3, particularly note 30.

struck a chord in the post-bubble Japan of the early nineties, at a time when construction accounted for almost 20 percent of GDP and the government was spending massive amounts on public works in an attempt to revive the stagnating economy. Efforts to strengthen antitrust enforcement had been initiated prior to the Saitama case but were fiercely resisted by politicians. However, after the public outcry over the Saitama case, even the starkest opponents of antitrust law could no longer afford to vote down legislative proposals to strengthen enforcement.

In sum, with both external pressure from the US and internal public support converging, the scene was set for a period of increased antitrust enforcement. In what follows, we discuss four ways in which this increase materialized.

a) Criminal Cases After the Saitama Case

First, criminal enforcement against bid-rigging finally became a reality. In February 1993, less than a year after the Commission's announcement that it would not seek criminal prosecution in the Saitama case, criminal charges were brought against Japan's largest printing company and three other companies. The companies had colluded on bids to produce peel-off seals for Japan's Social Insurance Agency. Thereafter, the Commission continued filing criminal cases at a pace of about one case every two years. Thus, cases were filed in 1995 (bid-rigging, sewage equipment), 1997 (bid-rigging, water meters I), 1999 (market-sharing agreement, ductile pipes), 1999 (bid-rigging, jet fuel), 2003 (bid-rigging, water meters II), 2005 (bid-rigging, steel bridges), 2006 (bid-rigging, construction of excreta disposal facilities), 2007 (bid-rigging, subway construction), 2007 (bid-rigging, road planning), 2008 (price cartel, galvanized steel), and 2012 (price cartel, bearings).

Hence, in hindsight and contrary to what some had predicted,[90] the failure to bring criminal charges in the Saitama case was not the death knell for criminal prosecutions. On the contrary, if the Japan Fair Trade Commission did not bring criminal charges because the evidence was insufficient to secure a criminal conviction, it probably made a wise decision. The recent collapse in the UK of a criminal prosecution for price-fixing against four executives of British Airways and the ensuing criticism are a stark reminder of the negative effect a failed criminal case can have.[91] By contrast, the Japan Fair Trade Commission and the Prosecutor's Office have accumulated an excellent track record in

90 "*Hōtō nukezu 'zannen' kensetsu dangō kokuhatsu dannen de Umezawa Setsuo – kōtori i'inchō* [The Ultimate Weapon Not Used in Construction Bid-Rigging – Giving Up on Criminal Prosecution 'Regrettable' Says JFTC Chairman Umezawa Setsuo]," Asahi Shinbun, 16 May 1992, 31 (newspaper editorial predicting that "Future accusations are also impossible with this").

91 OFFICE OF FAIR TRADING, Press Release – OFT Withdraws Criminal Proceeding Against Current and Former BA Executives, 10 May 2010, available from *http://www.oft.gov.uk/news-and-updates/press/2010/47-10*, last retrieved on 23 October 2013.

their criminal prosecutions, securing guilty verdicts in all cases brought since the Saitama case.

This is not to say that criminal prosecutions in Japan have been wholly without problems. The Japan Fair Trade Commission has the exclusive right to initiate a criminal case, but it is an administrative agency and hence it does not have the same investigatory powers and expertise as the Prosecutor's Office in collecting evidence for a criminal trial. This may explain why, in the Saitama case, the evidence gathered by the Japan Fair Trade Commission was deemed insufficient by the Prosecutor's Office to initiate criminal proceedings.[92] In addition, for a long time, there were doubts about the constitutionality of the enforcement process because the Commission's investigatory powers were not subject to the due process standards for criminal cases.[93] For instance, the Commission could conduct a dawn raid without a court-issued search warrant,[94] and it was questionable whether evidence obtained in such a raid could subsequently be used in criminal proceedings. A 2005 amendment to the Antimonopoly Act has tried to remedy these problems. Although the Commission's investigatory powers for administrative cases were left intact, there is now also a separate unit within the Commission that can investigate cases with a view to criminal prosecution. It has far-reaching investigatory powers, but subject to the due process standards for criminal cases.[95] Because of these procedural safeguards, the Commission's criminal investigation unit can cooperate freely with the Prosecutor's Office at an early stage, since there are no longer any fears that the sharing of evidence would make the criminal procedure unconstitutional.[96] So far, however, the amendment has not resulted in any noticeable increase in criminal filings.

b) Higher Penalties

Second, in the years that followed the Saitama case, sanctions for antitrust infringements dramatically increased. Shortly after the case, the maximum criminal penalty for corporations was increased from 5 million yen to 100 million yen, a twentyfold increase.[97] In 2002, the maximum fine was raised once again, this time to 500 million yen.[98] Prison sentences for individuals were raised from a maximum of three years to five years in 2009.[99]

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92 *See* part 1, section 3 (misalignment between evidence gathered by Japan Fair Trade Commission and evidence expected by the Prosecutor's Office).

93 T. SHIRAISHI, *Dokusen kinshi-hō* [Competition Law of Japan] (2nd ed.,Tokyo 2009) 450–452, 456–460.

94 Art. 47 (1) (iv) Antimonopoly Act (Art. 46 (1) (iv) at the time of the Saitama case).

95 Arts. 101–118 Antimonopoly Act.

96 T. SHIRAISHI, *Dokkin-hō kōgi* [An Introduction to the Competition Law of Japan] (6th ed., Tokyo 2012) 232.

97 Law No. 107/1992 (December 1992).

98 Arts. 89 and 95 Antimonopoly Act.

99 Art. 89 Antimonopoly Act.

Administrative penalties, too, were strengthened. The construction companies involved in the Saturday Club case had to pay a surcharge calculated as 1.5 percent of the turnover derived from the rigged bids, but in subsequent cases a surcharge rate of 6 percent was applied and, in 2005, the rate was increased to 10 percent, which is the rate that still applies today.[100] This is of course a significant change and brings the administrative penalty much closer to the actual profits derived from the unlawful conduct. Indeed, a study found that cartels in Japan lead to a price increase (overcharge) of 16.5 percent on average,[101] a percentage that is remarkably similar to cartel overcharges in other developed countries.[102] Japanese policymakers and scholars, however, often use a more conservative 8 percent overcharge as a benchmark because the same study that arrived at the 16.5 percent average found that in a very large majority of cases (90 percent), the overcharge was *at least* 8 percent.[103]

c) A More Competitive Bidding System

Third, in the wake of the Saitama case, the bidding method used by local governments throughout Japan came under scrutiny. The system of designated competitive bidding (*shimei kyōsō nyūsatsu*), whereby the local government designates a number of companies that are allowed to bid, was blamed for having facilitated bid-rigging in the Saitama case.[104] In response to this criticism, the government changed the default bidding method from designated competitive bidding to open competitive bidding (*ippan kyōsō nyūsatsu*).[105] This system, in which any qualified company may submit a bid, tends to lead to a larger number of bidders and increases the possibility that an outsider shows up and underbids a predetermined winner. Hence, it makes bid-rigging more difficult.

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100 Art. 7-2 (1) Antimonopoly Act.

101 JAPAN FAIR TRADE COMMISSION, *Dokusen kinshi-hō kaisei (an) no kangaekata* [Approach to the Amendment of the Antimonopoly Act] (Tokyo, 19 May 2004), 5–8, available from *http://www.jftc.go.jp*, also reproduced in S. SUWAZONO, *Heisei 17 nen kaisei dokusen kinshi-hō* [The Antimonopoly Act After the 2005 Amendment] (Tokyo 2005) 225–227.

102 See, e.g., OXERA/A. KOMNINOS, Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts – Study Prepared for the European Commission, 90, available from *http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf*, last retrieved on 23 October 2013 (finding an average overcharge of 20% based on a dataset collected by Connor and Lande covering mostly US, Canadian, and international cartels).

103 JAPAN FAIR TRADE COMMISSION, *Dokusen kinshi-hō kaisei (an) no kangaekata* [Approach to the Amendment of the Antimonopoly Act] (Tokyo, 19 May 2004), 6, available from *http://www.jftc.go.jp,* also reproduced in S. SUWAZONO, *Heisei 17 nen kaisei dokusen-kinshi-hō* [The Antimonopoly Act After the 2005 Amendment] (Tokyo 2005) 227.

104 TAJIMA/YAMAGUCHI, *supra* note 2, 124.

105 Art. 29-3 (1) *Kaikei-hō* [Accounting Act], Law No. 35/1947 (applicable to procurement by national government agencies); Art. 234 (2) Local Autonomy Act (applicable to procurement by local governments).

In addition, legislation was enacted to deter government officials from aiding bid-rigging.[106] It allows the Japan Fair Trade Commission to request remedial action on the part of procuring agencies[107] and, since 2007, provides for criminal sanctions against government officials that are involved in bid-rigging.[108]

d) Stricter Guidelines on Public Bidding

Fourth, shortly after the Saitama case, the Japan Fair Trade Commission was able to revise the weak guidelines it had issued in 1984[109] on public bidding. These had come into existence at a time when the Commission was still very much constrained by political forces opposing strict enforcement, especially in areas that affected the powerful construction industry. Hence, the guidelines had been extremely lenient. But in the wake of the Saitama scandal, the Commission managed to issue much more stringent guidelines, which are still in force today.[110]

IV. CONCLUSION

If the above story shows anything, it is that the construction companies involved in the Saitama Saturday Club got off relatively unpunished. They had violated Japan's Anti-monopoly Act for years and rigged thousands of bids. Yet they escaped criminal prosecution and only paid an administrative penalty. That penalty was one of the largest penalties on record at the time, but still a trifle in comparison with the extra profits likely made thanks to the bid-rigging. Angry citizens had tried to obtain damages from the construction companies, but after a decade-long court battle their case was finally dismissed on procedural grounds.

Hence, in terms of sanctions, the case was a failure. Yet in spite of this, or perhaps precisely because of it, it marked a turning point in the enforcement of Japanese antitrust law. The damages action by the Saitama residents inspired residents throughout Japan to launch similar actions in an attempt to hold bid-riggers accountable. Many of these lawsuits were eventually successful and ultimately helped set a trend for local governments and government agencies to systematically seek damages after bid-rigging is uncovered.

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106 *Nyūsatsu dangō tō kanyo kōi no haijo oyobi bōshi narabi ni shokuin ni yoru nyūsatsu tō no kōsei o gaisubeki kōi no shobatsu ni kansuru hōritsu* [Act on Elimination and Prevention of Involvement in Bid-Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc.], Law No. 101/2002; engl. transl.: *http://www.jftc.go.jp* (hereinafter: Involvement Prevention Act).

107 Art. 3 Involvement Prevention Act.

108 Art. 8 Involvement Prevention Act.

109 JAPAN FAIR TRADE COMMISSION, Guidelines Concerning Activities of Trade Associations in the Construction Industry in Relation to Public Works (21 February 1984).

110 JAPAN FAIR TRADE COMMISSION, Guidelines Concerning the Activities of Firms and Trade Associations in Relation to Public Bids (5 July 1994), available from *http://www.jftc.go.jp.*

Hence, the Saitama case and its progeny had a profound influence on private antitrust enforcement in Japan.

The case also heightened awareness of the importance of robust antitrust enforcement. This shift in public opinion, combined with pressure from the US, enabled the Japan Fair Trade Commission to engage in more vigorous enforcement, a trend which continuous to this day.

But the developments in the wake of the Saitama case also teach us something else about antitrust law in Japan: change is slow and uneven. The Saitama case and the ensuing bribery scandal were front-page news and reverberated through society. But even seminal cases only result in incremental changes to established practices. Sanctions are now higher, and the Japan Fair Trade Commission has stepped up its enforcement efforts. But bid-rigging is still widespread, as evidenced by the continuous flow of new cases detected by the Japan Fair Trade Commission. Moreover, some of the companies involved in recent cases are the very same companies that were involved in the Saitama case.

Even for Nakamura, the lawmaker who had pressured the Japan Fair Trade Commission not to bring criminal charges, the Saitama case ultimately did not change that much. After his conviction, he sat out his prison sentence and then was released on parole in 2004. He promptly stood for re-election, and voters in his native Ibaraki Prefecture swiftly re-elected him into the House of Representatives in 2005, where he is still serving at present.

SUMMARY

This article tells the story of the Saitama Saturday Club case and how it changed antitrust enforcement in Japan. Although often cited as an example of failed antitrust enforcement, the case actually had a lasting and positive impact in many unexpected ways. It opposed Japan's antitrust enforcement agency to the country's mighty construction industry. For years, the construction companies had rigged bids for public works in Saitama Prefecture. Although these practices clearly violated Japan's Antimonopoly Act, they went largely unpunished. Indeed, when the Japan Fair Trade Commission finally uncovered the violation, it decided not to bring criminal charges and instead handled the case with a trifling administrative penalty. But this docile treatment triggered a public backlash. Angry citizens sued the construction companies for damages, an unprecedented move that would subsequently be replicated in over eighty other cases throughout Japan. More broadly, the case heightened public awareness of the evils of bid-rigging and galvanized popular support for more robust antitrust enforcement. In turn, this support enabled the Japan Fair Trade Commission to move against entrenched interests and gradually step up enforcement, an evolution that continues to this day. In this sense, the Saitama Saturday Club case constituted a turning point for antitrust enforcement in Japan.

ZUSAMMENFASSUNG

Dieser Beitrag beschäftigt sich mit dem „Saitama Saturday Club"-Fall und damit, wie dieser zu einem Wandel in der Durchsetzung des Wettbewerbsrechts in Japan geführt hat. Auch wenn der Fall häufig als Beispiel für die unzureichende Durchsetzung des Wettbewerbsrechts angeführt wird, so hatte er auf diese doch einen nachhaltig positiven Einfluss, wenn auch auf unerwartete Art und Weise. Er konfrontierte die japanische Wettbewerbsbehörde mit der mächtigen Bauindustrie. Jahrelang hatten die Bauunternehmen sich bei Ausschreibungen für staatliche Bauvorhaben in der Präfektur Saitama untereinander abgesprochen. Obwohl diese Praktiken eindeutig gegen das Antimonopolgesetz verstoßen, blieben sie weitestgehend ohne Konsequenzen. Als die Japan Fair Trade Commission die Verstöße letztlich aufdeckte, entschied sie sich gegen ein strafrechtliches Vorgehen und belegte die Unternehmen mit einer geringen Geldbuße. Dieses nachgiebige Vorgehen löste eine öffentliche Protestreaktion aus. Verärgerte Bürger verklagten die Bauunternehmen auf Zahlung von Schadensersatz, ein Verfahren ohne Präzedenzfall, das sich in mehr als achtzig weiteren Fällen in ganz Japan wiederholte. Letztlich erhöhte der Fall damit das Bewusstsein in der Bevölkerung für die negativen Auswirkungen von Submissionsabsprachen und sorgte für eine breitere öffentliche Unterstützung für ein rigideres Vorgehen bei der Durchsetzung des Kartellrechts. Die Japan Fair Trade Commission konnte sich vor diesem Hintergrund die starke Bastion der Unternehmen angreifen und die Durchsetzung des Kartellrechts Schritt für Schritt ausbauen, eine Entwicklung, die sich bis zum heutigen Tag fortsetzt. So gesehen stellt der „Saitama Saturday Club"-Fall einen Wendepunkt in der Durchsetzung des Katellrechts in Japan dar.

(Die Redaktion)