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Harry First
NYU School of Law, harry.first@nyu.edu

Tadashi Shiraishi
University of Tokyo - Graduate Schools of Law and Politics, tsx@j.u-tokyo.ac.jp

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<ct>Concentrated Power: The Paradox of Antitrust in Japan</>

<ca>Harry First and Tadashi Shiraishi*</>

<a>I. Introduction</>

In his essay about the Antimonopoly Law in the 1963 edition of Law in Japan, Yoshio Kanazawa observed that enforcement of Japan's Antimonopoly Act¹ "is anemic today" and, although the Act could be resuscitated, "there is, of course, no immediate prospect of this happening."² Kanazawa pointed to the "negative attitude toward the underlying philosophy" of the law exhibited by recently appointed commissioners of the Fair Trade Commission

* Charles L. Denison Professor of Law, New York University School of Law and Professor of Law, University of Tokyo Graduate Schools for Law and Politics. The authors thank Nagashima, Ohno & Tsunematsu for its kind support for the organization of the Seattle Conference. Research support for Harry First was provided by a research grant from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law. Research support for Tadashi Shiraishi was provided by the Ministry of Education, Science, Sports and Culture, Grant-in-Aid for Encouragement of Young Scientists (B), 13720032, 2001-2002.

¹ Shiteki dokusen no kinshi oyobi k<mac>osei torihiki no kakuho ni kansuru h<mac>oritsu [Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade] (Law No. 54 of 1947, as amended] (hereinafter "Antimonopoly Act"). Many sources abbreviate the Act as "Antimonopoly Act," probably taking account of the fact that "Private Monopolization" appears first in the title. For a detailed analysis of the legislative history, see John O. Haley, Antitrust in Germany and Japan: The First Half-Century, 1947-1998 (Seattle: University of Washington Press, 2001), 3-63; Harry First, "Antitrust in Japan: The Original Intent," Pacific Rim Law & Policy Journal, 9 (2000): 1.

² Yoshio Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in Arthur Taylor von Mehren, ed., Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass.: Harvard University Press, 1963), 480, 506. Makoto Yazawa, a commentator at the conference at which the essay was discussed, stated that the Fair Trade Commission "has ceased active enforcement of the antimonopoly laws," although it does publish "an annual report indicating the extent to which competition is restricted in certain industries." (491 n. *.)

(JFTC),³ to the many exemptions from the Antimonopoly Act that had followed its adoption in 1947,⁴ and to the growth of what has come to be called administrative guidance by the ministries, particularly the Ministry of International Trade and Industry (MITI).⁵ He concluded by wondering whether the Antimonopoly Act "serves a useful function in the social and economic environment of Japan." Although he hoped that the JFTC would "revitalize itself and assume a positive role in the administration of the law," he also thought that the Antimonopoly Act should be better fit to its "social environment" so that it would "permit restrictive practices when they demonstrably benefit the Japanese economy or society as a whole."⁶

Kanazawa's account of antitrust in Japan was written only sixteen years after the enactment of the Antimonopoly Act. We write some forty years after Kanazawa, fifty-five years after the statute's enactment. Much has changed in that time. There have been substantial legislative changes in the Act, strengthening its provisions rather than narrowing them. There has been substantial scholarly attention paid to the Act,

³ See Yoshio Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in Arthur Taylor von Mehren, ed., Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass.: Harvard University Press, 1963), 480, 491.

⁴ See Yoshio Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in Arthur Taylor von Mehren, ed., Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass.: Harvard University Press, 1963), 480, 496-505.

⁵ See Yoshio Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in Arthur Taylor von Mehren, ed., Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass.: Harvard University Press, 1963), 480, 501.

⁶ Yoshio Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power," in Arthur Taylor von Mehren, ed., Law in Japan: The Legal Order in a Changing Society (Cambridge, Mass.: Harvard University Press, 1963), 480, 501.

both in Japan and elsewhere, exploring the importance and effect of antitrust enforcement in Japan. The policies behind the Act have even come to be embraced by government policy makers. In the late 1980s and early 1990s increased antitrust enforcement was seen as important in Japan and elsewhere as a way of curing U.S.-Japan trade problems and opening Japan's markets. In the early 2000s antitrust enforcement has come to be seen in Japan as a way to improve the operation of a sluggish and over-regulated economy. Even the Prime Minister has pronounced on the importance of strong antitrust enforcement.⁷

And yet, doubts remain about antitrust in Japan, similar to those doubts expressed by Kanazawa. These doubts are not addressed to the utility of antitrust in today's economy in Japan. They are more addressed to the perceived lack of antitrust enforcement by the JFTC. As one Commissioner expressed it, the JFTC is often viewed as "a watch dog that does not bite."⁸ Indeed, the very acknowledgement that the JFTC needs to be strengthened is an indication that it is perceived as too weak to be an effective enforcer of the antitrust laws.

The actual record of antitrust enforcement in Japan is, of course, more complicated than can be expressed in a political catch-phrase. Unlike the record when Kanazawa wrote, enforcement has turned out to be not quite anemic, nor has the JFTC been without bite. Nevertheless, it would also be difficult to characterize the Commission's enforcement record as robust.

⁷ In his first parliamentary policy speech on May 7, 2001, Prime Minister Koizumi said: "We will strengthen the structure of the Fair Trade Commission, which should serve as the guardian of the market, thereby establishing competition policies appropriate for the 21st century." BNA Antitrust & Trade Regulation Report, 80 (May 18, 2001): 473.

⁸ Shogo Itoda, "Competition in Japan's Telecommunications Sector: Challenges for the Japan Fair Commission"(Oct. 11, 2001), 1, available at (<http://www.jftc.go.jp/e-page/speech/011011speech.pdf>).

There are many reasons for the relatively weak performance of the Commission over time, including Japan's often negative view of the utility of antitrust as economic policy and the position of the JFTC in relation to other government ministries. One area that has been overlooked as an explanation for weak antitrust enforcement in Japan, however, is the very concentration of enforcement authority in the JFTC. The Antimonopoly Act follows the model of concentrating enforcement in an apparently powerful single administrative government agency and, as a result, only a small number of private litigants invoke antitrust protections. This concentration, we believe, has actually led to weaker antitrust enforcement than might otherwise have occurred in Japan. It is, we think, the paradox of antitrust in Japan.

Our essay proceeds as follows. We begin with a description of Japan's antitrust enforcement system, with a particular focus on the current position and activities of the JFTC. We then compare that to the antitrust enforcement system that has evolved in the United States. Our review of the U.S. system is not so much to detail that system as to provide the contrast of a system where enforcement is much more deconcentrated and enforcers operate in a networked environment rather than a hierarchical one. We conclude with three suggestions for opening up antitrust enforcement in Japan: increase the networking of the JFTC and other ministries with regard to competition matters; strengthen the support structure for private litigation; and have the JFTC participate fully in the growing internationalization of antitrust enforcement.

<a>II. Concentrated Antitrust Enforcement: Japan</>

A. The Basic Structure of Japan's Antitrust Enforcement⁹

<c>1. JFTC</c>

<d>a. General Organization</d>

The Antimonopoly Act prescribes not only the substantive rules, but also the organization of the JFTC. The JFTC consists of one Chairperson and four Commissioners (art. 29), with the General Secretariat attached to the Commission (art. 35).¹⁰ The Commission is guaranteed independence (art. 28) and the Prime Minister has the authority to appoint its members (art. 29). Although, from 2001 to 2003, the JFTC was formally placed under the jurisdiction of the Ministry of Public Management, Home Affairs, Posts and Telecommunications (MPHPT), it is now formally placed under the jurisdiction of the Cabinet Office.¹¹ The officials of the General Secretariat, antitrust professionals led by the Secretary General, have substantial involvement in antitrust policy making, although it is the Commission itself that has the legal power to authorize them to act (arts. 27 and 34).

<d>b. JFTC Procedures</d>

The JFTC can compulsorily investigate to determine whether the Antimonopoly Act has been violated (art. 46).

⁹ This section describes the Antimonopoly Act as of January 2005. Proposals to amend the Antimonopoly Act, pending at that time, provided certain changes in the enforcement of the Act. For a fuller discussion of the Antimonopoly Act, see generally Tadashi Shiraishi, "Japan", in J. Basedow, ed., Limits and Control of Competition with a View to International Harmonization (The Hague: Kluwer Law International, 2002), 261-272.

¹⁰ For the JFTC's organization chart, see (<http://www.jftc.go.jp/e-page/about/role/organization.pdf>).

¹¹ See Naikakufu setchi h<mac>o [Cabinet Office Organization Act], arts. 4(3) and 64.

When it finds a business entity to be in violation of the Act, the JFTC usually recommends that the entity should cease and desist from violating the law (art. 48).¹² If the entity accepts the recommendation, the JFTC issues a "Recommendation Decision" to legally empower the recommendation (art. 48); most JFTC decisions take this form. If the business entity does not accept the recommendation, a hearing procedure will take place to determine whether a violation has occurred, after which an "After-hearing Decision" will be issued (art. 54). During the hearing, however, the respondent entity can decline to continue, in which case the JFTC issues a "Consent Decision" (art. 53-3).

The JFTC has a variety of alternatives to the issuance of formal decisions. The most visible are "Warnings" (keikoku) and "Cautions" (ch^{<mac>}ui), which it issues when it claims not to be able to amass sufficient evidence to prove a violation, but, nevertheless, is suspicious that illegal conduct has occurred.¹³ Another alternative is the conditioning of activities. The JFTC does not like to give administrative guidance, having criticized other agencies for doing so,¹⁴ but it does permit companies to consult with it as to the legality of particular transactions. The JFTC will provide a "yes" or "no" to companies that engage in such consultations. In the case of a negative response, the Commission will then wait for the offending company to "spontaneously" offer improvement measures, to which the Commission will

¹² See also arts. 7, 8-2, 17-2, 20 (power to issue cease and desist orders).

¹³ According to the JFTC (in its Annual Report of each year), the difference between Warnings and Cautions is that a Warning needs "suspicion of violation", while a Caution just indicates the "possibility of future violation".

¹⁴ See Gy^{<mac>}osei shid^{<mac>}o ni kansuru dokusenkinshih^{<mac>}o j^{<mac>}on o kangaekata [JFTC Guidelines Concerning Administrative Guidance Under the Antimonopoly Act], June 30, 1994, available at (<http://www.jftc.go.jp/e-page/guideli/administrativeGL.pdf>).

again respond.¹⁵ This kind of conditioning can most often be observed in the context of premerger notifications.¹⁶

<d>c. Penalties</>

When a business entity has committed an "unreasonable restraint of trade" in the meaning of Article 2(6), which roughly means an anticompetitive horizontal restraint, including price fixing and bid rigging, the Antimonopoly Act requires the JFTC to order the entity to pay an "administrative surcharge" (fine) of 6% of the sales amount of the product affected.¹⁷ This order can be appealed to the hearing panel at the JFTC (art. 48-2).

Some categories of violations, practically limited to price fixing and bid rigging, can be charged criminally. Individuals responsible for these violations can be prosecuted under Article 89 of the Antimonopoly Act, but these cases are rare and no individual has ever been imprisoned for a violation. Corporations can be prosecuted and fined under Article 95, up to ¥500 million (approximately \$4 million) pursuant to a 2002 amendment to the Antimonopoly Act.

The Public Prosecutor's Office can proceed under the Antimonopoly Act only when the JFTC officially files a criminal accusation with it (art. 96). The JFTC has adopted a rule that it will file an accusation in cases

¹⁵ This is according to public announcements by the JFTC. Some practitioners may disagree with this description.

¹⁶ Premerger notification is required for certain categories of mergers, corporate splits and acquisitions of businesses, see arts. 15, 15-2 and 16; others must be notified ex post, see art. 10. The JFTC has jurisdiction over all mergers, whether notified or not. In fact, it is extremely rare for the JFTC to take official measures in merger and acquisition cases. Rather, those cases are usually handled informally. For a detailed survey, see Yasuhide Watanabe and Yuko Tamai, "Japanese Merger Notification and Enforcement Policy," 15 Antitrust, 15 (2001): 49-54.

¹⁷For details and exceptions, see arts. 7-2 and 8-3.

that have significant effects on the Japanese general public and/or concern repeat offenders.¹⁸

<c>2. Private Actions</>

<d>a. Damages</>

An injured person can sue under the Antimonopoly Act Article 25 to recover single damages, but only after a JFTC decision as to illegal conduct has become "final and conclusive."¹⁹ Plaintiffs who sue under the Antimonopoly Act need not prove negligence or willfulness by the defendants and can request the JFTC to provide them with an opinion on damages.²⁰

Parties injured by antitrust violations can also sue under the general tort provision of Civil Act Article 709. It is well established that "unlawful conduct" under the meaning of Article 709 includes antitrust violations. This interpretation enables injured persons to take legal action in cases where the JFTC has not rendered a formal enforcement decision. Plaintiffs may also prefer Civil Act Article 709 for procedural reasons. Suits brought under the Antimonopoly Act must be brought in the Tokyo High Court before a panel of five judges, while Civil Act suits are brought in the relevant district court. Moreover, the Tokyo High Court's jurisdiction is limited to Antimonopoly Act violations which appeared in the preceding JFTC decision; plaintiffs who wish to litigate other allegedly unlawful conduct, whether it is related

¹⁸ See "Dokusenkinshih<mac>o ihan ni taisuru keiji kokuhatsu ni kansuru k<mac>oseitorihikiiinkai no h<mac>oshin" [JFTC policy of filing criminal accusations against violations of the Antimonopoly Act] (June 20, 1990). Prosecutors also have independent authority to prosecute price fixing and bid rigging under the Criminal Code. For a description of the interaction between the JFTC and the Public Prosecutor, see David Boling, "The Role of the Prosecutors: Japanese Antimonopoly Law Criminal Cases," Antitrust Magazine, 17 (2003): 90.

¹⁹ See art. 26(1).

²⁰ See arts. 26, 84.

to competition policy or not, of the defendant cannot join such claims before the Tokyo High Court. Thus, even in cases where the JFTC has rendered a formal decision, some plaintiffs have chosen to file in district court under Article 709 because of the procedural disadvantages of appearing before the Tokyo High Court.²¹

<d>b. Injunctions</>

Any person whose interests are significantly injured, or likely to be significantly injured, by an antitrust violation can seek injunctive relief pursuant to the Antimonopoly Act Article 24, which took effect in April 2001. The amendment to permit private injunctive relief came after considerable study of the effectiveness of private antitrust litigation and is based on the view that allowing plaintiffs to obtain injunctive relief will lead to greater use of private remedies.²² Plaintiffs can join damage claims (Civil Act art. 709 and/or others) and injunction claims (Antimonopoly Act art. 24).

<d>c. Other remedies</>

²¹See, e.g., Nihon Keizai Shimbun (Nikkei) (April 27, 2002) (reporting lawsuit by allegedly excluded company, Hakodate Shimbun, against Hokkaido Shimbun seeking damages pursuant to Civil Act in the Tokyo District Court, despite the fact that they could have relied on a previously entered JFTC decision, see Hokkaido Shimbun (JFTC, February 28, 2000), Kosei torihiki iinkai shinketsushu 46 (2000): 144. Note that the requirement that five judges be appointed to the Antitrust Tribunal of the Tokyo High Court is under criticism, even by a JFTC Research Group Report, see "Dokusenkinshih kenkyukai hokokusho" [Report by the Antimonopoly Act Research Group] (October 31, 2001). Indeed, it does not appear that the jurisdictional requirement has given the Tribunal particular expertise in antitrust cases. An examination of the judges named in the decisions by the Tribunal indicates that the Tokyo High Court cannot appoint judges to sit exclusively on antitrust cases, but, rather, appoints these judges on an ad hoc basis.

²² See "Dokusenkinshih ihan koi ni kakaru minjiteki kyusaiseido ni kansuru kenkyukai hokokusho" [Report by Study Group on Civil Remedy System to the Antimonopoly Act violations] (October 22, 1999).

Another avenue for private litigation is the use of the Antimonopoly Act as a defense in a suit for breach of contract. Civil Act Article 90 nullifies, in whole or in part, a contract incompatible with "public order." "Public order" has been held to include compliance with the Antimonopoly Act.²³

B. The Importance of Antitrust Enforcement in Japan

<c>1. The position of the JFTC</c>

Competition policy has acquired a priority in Japan, particularly after the Structural Impediments Initiative (SII) talks with the Government of the United States, which began in 1989 and continued to 1992.²⁴ A measure of this importance can be found in the statistics relating to the increase in the number of JFTC personnel. Since 1981, the JFTC has increased its authorized staff, while the size of the government as a whole has been cut. The number of the JFTC officials was 423 in 1981, 461 in 1989, and 564 in 2000.²⁵ By contrast, the size of the entire Government fell from 716,261 in 1981 to 653,103 in 2000.²⁶ Given that the law requires that the size of each agency be allocated by Cabinet Order,²⁷ the increase in the JFTC

²³ See, e.g., *Fujiki Honten v. Shiseido Keshohin Hanbai* (Sup. Ct., December 18, 1998) (Shiseido case), *Minshu*, 52 (1999): 1866 (assuming the point).

²⁴ For details of the talks from an antitrust viewpoint, see Harry First, "Antitrust Enforcement in Japan," *Antitrust Law Journal*, 64 (1996): 137, 163-173.

²⁵ *Kosei torihiki iinkai jimusho* [Fair Trade Commission General Secretariat], *Dokusenkinshi seisaku gojunenshi* [50 Years of Antimonopoly Policy], 2 (1997), 98-102; "Kosei torihiki iinkai nenji hokoku heisei 12 nendo" [JFTC Annual Report of 2000], Appendix p.1. There are 607 positions for 2002. JFTC Announcement on December 22, 2001.

²⁶ See (<http://www.soumu.go.jp/english/gyoukan/img/001.gif>).

²⁷ See *Gyosei kikan no shokuin no tein ni kansuru hokoku* [Act Concerning Quantitative Capacity of Administrative Personnel] (Law No. 33 of 1969, as amended), art. 2.

and the decrease in the whole Government is a definite signal of the priority given to the JFTC by Japan's Government.

Although some may argue the JFTC is still too small,²⁸ the important point here is the relative increase in priority that the JFTC has enjoyed compared to the rest of the Government of Japan. In addition to the number of employees, the rating of the JFTC's executive office was upgraded in 1996, from the simple "Secretariat" to the "General Secretariat" furnished with two bureaus, making the JFTC of equivalent grade to other agencies including METI (formerly MITI²⁹) and the MPHPT.³⁰

The size of any government agency is an important indication of its importance, because it shows that the agency's mission is sufficiently significant to enable it to compete successfully with other parts of the bureaucracy for resources. Indices related to an agency's output may also be useful for assessing the importance of an agency's mission. For the JFTC this could be measured by looking at the number of cases brought, although the decision to bring cases can be influenced by many factors.³¹

²⁸ The two U.S. federal antitrust enforcement agencies have an authorized staff of 1,355 "full time equivalents" for 2002. See (<http://www.usdoj.gov:80/jmd/2003summary/pdf/atr-bs.pdf>) (851); (<http://www.ftc.gov/ftc/oed/fmo/budgetsum2002.htm#Personnel>) (504 for competition mission). The U.S. economy, however, is about twice the size of Japan's, measured by GDP. Adjusting for this difference by doubling the JFTC's size would give the JFTC an equivalent 1,214 positions, making it almost 90% the size of U.S. federal antitrust enforcement authorities. The U.S. figures do not include U.S. state government antitrust enforcement resources.

²⁹ The Ministry of International Trade and Industry changed its name to the Ministry of Economy, Trade and Industry, in connection with the administrative reform in 2001.

³⁰ See 1996 amendment to the Antimonopoly Act (Law No. 83 of 1996).

³¹ The number of JFTC decisions has fluctuated since 1981, for example, 13 in FY1981, 5 in FY1986, 38 in FY1992, 20 in FY1995, and 26 in FY2000. The numbers exclude decisions on the amount of administrative surcharges. See "K<mac>osei torihiki iinkai nenji h<mac>okoku heisei 12 nendo" [JFTC Annual Report of 2000], 32-33.

<c>2. The JFTC and other agencies: from industrial policy to competition policy</>

A significant recent legislative change has been the abolition of most statutory exemptions from antitrust, including the exemption for public utilities and the exemption for recession and rationalization cartels. Along with this increase in antitrust's domain has come an increase in the JFTC's assertion of jurisdiction over industries regulated by other ministries.

In dealing with other agencies the JFTC has in the past relied mainly on the tool of a study group, "The Research Group for Competition Policy and Trade Regulations by the Government" (Kiseiken), which mostly consisted of university scholars. The JFTC was able to make the case for deregulation through the vehicle of the Kiseiken's reports, using the Kiseiken as a cloak to avoid friction with other regulatory agencies.³² Recently, however, the JFTC has moved into a more active phase, issuing joint guidelines with two agencies involved in important areas of the economy to which the JFTC seeks to bring more competition, electric power and telecommunications.

In 1999 the Electric Utilities Industry Act (EUIA) was amended, allowing for retail competition for sales to large purchasers of electric power. The Act was to take effect in 2000. As a result of the introduction of more competition in the electric power industry, METI (then MITI) and the JFTC collaborated to issue the Electricity Fair Trade Guidelines in 1999.³³ METI invited the JFTC

³² See Makoto Kurita, "Kisei kaikaku to k<mac>osei torihiki iinkai no katsud<mac>o" [Regulatory reforms and activities by the JFTC], in Akinori Uesugi et al., eds., 21 seiki no ky<mac>os<mac>o seisaku [Competition policy in the 21st century] (Tokyo: Nuno Publishing Co., 2000). The author of this article was chief of the Coordination Division of the JFTC, which has been in charge of the Kiseiken.

³³ Tekisei na denryoku torihiki ni tsuite no shishin [Ministry of International Trade and Industry & Fair Trade Commission, Guidelines

delegate, namely the Chief of the Coordination Division, to the "Working Group for Fair Trade" at the Electricity Industry Council (Denki Jigyō Shingikai), which consisted of antitrust law scholars and economists.³⁴ The purpose of the guidelines was to make sure that incumbent power companies did not engage in anticompetitive conduct that would disadvantage new entrants.

The critical point is that METI acknowledged the presence of the JFTC. To be sure, it is fair to say that METI took the leadership role. Before anything else, the forum was the Council led by METI. Taking a look at the contents of the guidelines, moreover, anticompetitive conduct which could be remedied by the tools articulated in the EUIA, including discriminatory transmission, were mentioned only in the context of the EUIA, even though that conduct could violate the Antimonopoly Act as well and thereby come under the jurisdiction of the JFTC. However, METI's jurisdiction under the EUIA does not extend to all types of anticompetitive behavior, such as exclusive dealing and primary line price discrimination, so it needed to work with the JFTC so that those problems would be dealt with effectively.

There continues to be shared interest between the JFTC and METI in competition issues in the electric power industry. For example, in 2001 and 2002 the JFTC investigated at least three incumbent electric power companies with regard to their conduct toward new entrants. Although the JFTC found no violation of the Antimonopoly Act in any of these cases, it did issue a "warning" to one company and "instructions" to the other two so that they might avoid future violations of the

for Fair Trade in Electricity] (December 20, 1999) (not available in English).

³⁴ Prof. Toshimasa Tsuruta (Economics)(Chairman), Prof. Makoto Kojo (Deregulation Law), Prof. Toshihiro Matsumura (Economics), Prof. Akira Negishi (Antitrust Law) and Prof. Tadashi Shiraishi (Antitrust Law).

Act.³⁵ On the other hand, METI would like to increase its influence in deregulating the economy, which means making use of competition principles. Although the Administrative Reform Act expressly states that competition policy would continue to be under the JFTC's jurisdiction, and not METI's,³⁶ METI has chosen the strategy of collaborating with the JFTC as a way of asserting competition policy competence over electric power companies. Indeed, the Electricity Guidelines were amended in exactly the same collaborative manner in 2002.³⁷

A similar process has occurred in telecommunications. In 2001 the JFTC and the MPHPT collaborated to issue the Telecommunications Competition Promotion Guidelines.³⁸ In contrast to the Electricity Guidelines, it is fair to say that the JFTC led the telecommunications collaboration. According to the Secretary General of the JFTC, the JFTC had intended to issue antitrust guidelines on its own and

³⁵ See JFTC Announcements on November 16, 2001 (Chubu Electric Power Co.; instruction), March 26, 2002 (Kyushu Electric Power Co.; instruction); and June 28, 2002 (Hokkaido Electric Power Co.; warning).

³⁶ See "Gyosei kaikaku kaigi saishin" [Final Report of Administrative Reform Council] (December 3, 1997). Chushinsei shingikai no kaikaku kihonsho [Basic Act for Reforms of Central Government Agencies] (Law No. 103 of 1998, as amended) (hereinafter "Administrative Reform Act"), art. 21(10) prescribes, "Competition policy including antitrust law enforcement, shall be under the jurisdiction of the Fair Trade Commission, not of the Ministry of Economics, Trade and Industry."

³⁷ Tekisei na denryoku torihiki ni tsuite no shishin [Fair Trade Commission & Ministry of International Trade and Industry, Guidelines for Fair Trade in Electricity] (July 25, 2002), available at (<http://www2.jftc.go.jp/e-page/legislation/index.html>) (in English). The member list of the Working Group, set forth in note 34 above, was unchanged. The Electricity Industry Council is now a part of the Omnibus Natural Resource and Energy Council [Shigen Enerugi Chosakai], due to the administrative reform in 2001.

³⁸ Denki tsushin bunya ni okeru kyosho no sokushin ni kansuru shishin [Fair Trade Commission & Ministry of Public Management, Home Affairs, Posts and Telecommunications, Guidelines for Promotion of Competition in the Telecommunications Industry] (November 30, 2001), available at (<http://www2.jftc.go.jp/e-page/legislation/index.html>) (in English).

had nearly finished their drafting, but decided to accept an offer from the MPHPT to prepare joint guidelines.³⁹ The guidelines that were issued refer to the Antimonopoly Act as well as the Telecommunications Industry Act, even when either statute can remedy the conduct, including discriminatory interconnections. Examining the byline of the joint guidelines, the JFTC appears first followed by the MPHPT, even though as a formal matter the JFTC was then an independent organ under the jurisdiction of the MPHPT.⁴⁰

Another example of the improved position of the JFTC is the treatment of the JAL/JAS merger. In 2002 the JFTC announced that the original plan submitted by the two airlines would violate the Antimonopoly Act.⁴¹ The JFTC subsequently cleared a modified plan which included divestiture of nine "round trip" slots at Haneda airport in Tokyo and other support to new entrants which, the JFTC believed, might enable them to act as "mavericks" in the industry.⁴² The Ministry of Land, Infrastructure and Transport (MLIT) had reportedly approved the original plan. The action by the JFTC made the MLIT take some measures to require the incumbents to support new entrants.⁴³

³⁹ Press Conference on June 27, 2001 (transcripts on file with the authors). Indeed, at the press conference the Secretary General mentioned the headings of the draft, and the finalized guidelines contain the same headings.

⁴⁰ This formal allocation was strongly criticized, mainly because it gave the appearance that the JFTC was dependent on the Ministry in charge of the telecommunications and broadcasting industries. This allocation was abolished in 2003 as discussed earlier in Section II.A.1.a.

⁴¹ JFTC Announcement on March 15, 2002.

⁴² JFTC Announcement on April 26, 2002. Other supports include airport facilities and aircraft servicing. With regard to "mavericks," see Jonathan B. Baker, "Mavericks, Mergers, And Exclusion: Proving Coordinated Competitive Effects Under The Antitrust Laws," New York University Law Review, 77 (2002): 135.

⁴³ MLIT Announcement on April 26, 2002.

The consideration of competition by agencies involved in the regulation of electric power, telecommunications, and airlines shows that some agencies have now begun to shift from so-called industrial policy to competition policy. This fact in itself supports the view that competition policy has acquired priority in Japan. Indeed, the explicit statutory rejection of METI jurisdiction over competition policy may evidence METI's effort (in vain) to acquire power to enforce some parts of the Antimonopoly Act.⁴⁴

<c>3. The JFTC's monopoly on enforcement</>

Enforcement of the Antimonopoly Act has been centralized in the JFTC since the statute's enactment in 1947.

<d>a. Private enforcement</>

Private enforcement in civil courts has been limited. A number of sources have stressed that the obstacles to private enforcement are found in the courts' general approaches to civil law matters, particularly to the calculation of damages.⁴⁵ This critique, however, has been unduly influenced by cases that arose out of the kerosene cartel.⁴⁶ These cases involved the oil embargo of the early 1970s, in which calculation of damages was very difficult because the plaintiffs were indirect purchasers and proof of causation was a complicated task.

⁴⁴ See "Gy<mac>osei kaikaku kaigi saish<mac>u h<mac>okoku" [Final Report of Administrative Reform Council] (December 3, 1997); Ch<mac>u<mac>o sh<mac>och<mac>o t<mac>o kaikaku kihonh<mac>o [Basic Act for Reforms of Central Government Agencies] (Law No. 103 of 1998, as amended), art. 21(10) (discussed earlier).

⁴⁵ Even the JFTC and its study group agreed with this analysis. See Harry First, "Antitrust Enforcement in Japan," Antitrust Law Journal, 64 (1996): 137, 168-169 (actions taken by the JFTC after SII).

⁴⁶ Kai v. Nihon Sekiy<mac>u (Sup. Ct., July 2, 1987) (Tokyo Kerosene case), 41 Minsh<mac>u, 41 (1987): 785; Nihon Sekiy<mac>u v. Sat<mac>o (Sup. Ct., December 8, 1989) (Tsuruoka Kerosene case), 43 Minsh<mac>u, 43 (1990): 1259.

In more recent cases involving municipal bid rigging, in contrast, plaintiffs have been successful in obtaining monetary relief; these cases are likely to involve direct purchasers and are far less complicated.⁴⁷ Further, commentators on antitrust damages in Japan have tended to focus on collusion cases, failing to pay adequate attention to the examples of cases in which plaintiffs have successfully recovered damages for exclusionary conduct.⁴⁸ Whatever the validity of the criticisms of the civil law's approach to damages, Article 248 of the Civil Procedure Act of 1998 attempted to clarify the law by prescribing, "When it is apparent that there existed damages and it is significantly difficult to prove the correct calculation, the court has discretion to adopt the appropriate amount of recovery taking account of all the trial and evidence."⁴⁹

What may be more of a deterrent to plaintiffs bringing an antitrust lawsuit is the judges' meager knowledge of antitrust principles, more so than their allegedly wooden application of civil law doctrines.⁵⁰

⁴⁷ Earlier examples include *Kawata v. Shimazu Seisakusho* (Nara Dist. Ct., October 20, 1999), Hanrei taimuzu, 1041 (2000): 182, and *Takahashi v. Toshiba* (Tottori Dist. Ct., March 28, 2000), *Kosei torihiki iinkai shinketsushu* 46 (2000): 673. Most of those cases were brought under the *Chiho jichi ho* [Municipal Autonomy Act] (Law No. 67 of 1947), which had permitted residents to sue on behalf of their municipal government; after an amendment in 2002, residents can sue the government to require it to sue the companies. The governments are usually direct purchasers from the bid-riggers.

⁴⁸ Examples include *Toshiba Elevator Technos v. Kosei Denki* (Osaka High Ct., July 30, 1993) (Toshiba Elevator case), Hanrei jiho, 1479 (1993): 21 (¥110,000 for one plaintiff, ¥73,360 for the other) and *Dejikon Denshi v. Nihon Yugiju* Kyodo Kumiai (Tokyo Dist. Ct., April 9, 1997) (Air Soft Gun case), Hanrei jiho, 1629 (1997): 70 (¥18,461,634).

⁴⁹ Civil law impediments have not been completely irrelevant, but the misperception itself may have contributed to the stagnation of private antitrust lawsuits by deceptively deterring private plaintiffs and even some lower court judges.

⁵⁰ This complaint is not unique to Japan. See, e.g., Jeremy Lever, "Private Antitrust Enforcement in the European Community," in Clifford A. Jones and Mitsuo Matsushita, eds., Competition Policy in the Global Trading System (The Hague: Kluwer Law International, 2002),

There are a number of examples of judicial ignorance of antitrust. Some Supreme Court cases have established general rules by simply copying JFTC guidelines.⁵¹ Another Supreme Court case neglected sixteen years' development of antitrust arguments since its former ruling.⁵² An example in the lower courts is Naigai v. Nissh^{<mac>o}, where the plaintiff argued that the defendant attempted to engage in unlawful exclusive dealing when it raised prices under a supply agreement in retaliation for the plaintiff's purchase of less expensive supplies from foreign importers. The district court avoided discussing the antitrust claim, merely holding that the defendant could not increase the price

224, 242 ("Most of Her Majesty's Judges have no knowledge of economic theory in general or competition and monopoly theory in particular.").

⁵¹ See, e.g., *Nihon Shokuhin v. Tokyo To* (Sup. Ct., December 14, 1989) (Shibaura Slaughterhouse case), *Minsh^{<mac>u}*, 43 (1990): 2078 (*Fut^{<mac>o} renbai ni kansuru dokusenkinshih^{<mac>o} j^{<mac>o} no kangaekata* [JFTC Guidelines on Predatory Pricing] (Nov. 20, 1984) with regard to the factors for determining illegality); *Fujiki Honten v. Shiseid^{<mac>o} Kesh^{<mac>ohin} Hanbai* (Sup. Ct., December 18, 1998) (Shiseido case), *Minsh^{<mac>u}*, 52 (1999): 1866 (*Ry^{<mac>uts^{<mac>u}} torihiki kank^{<mac>o} ni kansuru dokusenkinshih^{<mac>o} j^{<mac>o} no shishin* [JFTC Distribution Guidelines] (July 11, 1991), with regard to the framework for analyzing requirements contracts between retailers and manufacturers).

⁵² *Tokyo Ry^{<mac>osuiki} K^{<mac>ogy^{<mac>osho}}* (Sup. Ct., Sept. 25, 2000) (Water Meter case), *Keish^{<mac>u}*, 54 (2000): 689, simply followed the doctrine of *Idemitsu K^{<mac>osan}* (Sup. Ct., Feb. 24, 1984) (Oil Product Price Fixing criminal case), *Keish^{<mac>u}*, 38 (1985): 1287, failing to consider the approach of the JFTC After-hearing Decision, *Osaka Basu Ky^{<mac>okai}* (JFTC, July 10, 1995) (Osaka Bus Association case), *K^{<mac>osei} torihiki iinkai shinketsush^{<mac>u}*, 42 (1995): 3 (Narita, J.). In the Water Meter Decision (and also in the Oil Product Decision), the Supreme Court used the words "public interest" (art. 2(6)) to justify what it considers to be legitimate conduct. Art. 8(1), which prohibits similar conduct (i.e. horizontal restraints) initiated by trade associations, however, does not include the words "public interest." If "public interest" is the critical phrase for considering justifications, then legitimate horizontal restraints by trade associations could never be justified, while those by companies could be. The Osaka Bus Association Decision, an art. 8(1) case, made clear that it was the words "substantially restrict competition" rather than "public interest" that should be used for justification. Both arts. 2(6) and 8(1) include this phrase. The Water Meter Decision completely neglects this approach (possibly without knowledge of the existence of the Osaka Bus Association Decision).

under the existing contract.⁵³ Finally, adding to the judges' lack of knowledge of antitrust principles is the shortage of judges.⁵⁴ Consequently, it is not surprising that private civil antitrust litigation has yet to become an important part of the antitrust enforcement system in Japan.

<d>b. Insufficient Development of Legal Rules</>

The JFTC, as the centralized enforcer of antitrust, has been a cause of the inadequate development of legal doctrines. In other words, Japanese antitrust has been closer to the bureaucratic model of regulatory culture, rather than the legalistic model.⁵⁵

The JFTC has less experience and sophistication in difficult categories such as exclusionary conduct. Most

⁵³ See *Naigai v. Nissh*, unreported case (Osaka Dist. Ct., No. 3884 (wa) 1996, March 29, 1999); *Nipro v. Naigai*, unreported case (Osaka High Ct., No. 1700 (ne) 1999 et. al., Dec. 21, 2001). Naigai is a manufacturer of injection bottles based in Osaka and Nissh (now Nipro) is a sole provider of raw materials for injection bottles in West Japan. Nissh tried to raise the price substantially immediately after Naigai began to import raw materials from Korea and Germany. Naigai sought certification that it only had to pay the original price, emphasizing that Nissh's conduct was unlawful exclusive dealing. Although the courts ruled for Naigai, they did not find the conduct anticompetitive but relied on civil law for the proposition that there had not been an adequate conclusion of the contract to raise price. As a result, Nissh can still try to negotiate a price increase. The decisions are not yet reported, probably because decisions without antitrust but only common civil law issues are not sufficiently unique for case journals. The JFTC had begun administrative hearings with Nissh, see *Nissh* (JFTC Decision of Commencing a Hearing, March 17, 2000), *Kosei torihiki iinkai shinketsushu*, 46 (2000): 466, which might have deterred the judges from discussing antitrust issues before a JFTC After-hearing Decision was reached. For details of the parallel procedures, see Tadashi Shiraishi, "[Hakodate Shimbun to Ampuru Kijikan](#)" [Hakodate Shimbun and Injection Bottle Materials], *Hogaku kyoshitsu*, 244 (2001): 87.

⁵⁴ The quantitative shortage of judges in Japan has often been noted. See, e.g., J. Mark Ramseyer, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *Yale Law Journal*, 94 (1985): 604, 633-634.

⁵⁵ For the bureaucratic and the legalistic models of regulatory culture, see Harry First, "Antitrust Enforcement in Japan," 64 *Antitrust Law Journal*, 64 (1996): 137, 142, 176-179.

JFTC decisions have related to easy categories, which would be treated as per se illegal in the United States.⁵⁶ Some guidelines refer to more difficult areas, but with a high level of abstraction.⁵⁷ This leads the JFTC to a tendency to rely on informal enforcement to deal with hard areas. Thus, for example, the JFTC's "IT and Public Utilities Task Force," which was begun in the fiscal year 2001, issued only one warning⁵⁸ and two announcements of informal guidance⁵⁹ during its first year.⁶⁰

⁵⁶ 79 out of 128 JFTC decisions from FY 1995 to FY1999 are "Unreasonable Restraints of Trade" (art. 2(6) and the latter part of art. 3), roughly equivalent to horizontal agreements. The total number of 128 is that of decisions on illegality, excluding decisions on amount of administrative surcharges. The other 49 decisions (out of the 128) include horizontal agreements led by trade associations. They are formally dealt with under another provision (art. 8), but are substantially the same as "unreasonable restraints of trade."

⁵⁷ The landmarks are Ry<mac>uts<mac>u torihiki kank<mac>o ni kansuru dokusenkinshih<mac>o j<mac>o no shishin [JFTC Distribution Guidelines] (July 11, 1991) and Fut<mac>o renbai ni kansuru dokusenkinshih<mac>o j<mac>o no kangaekata [JFTC Guidelines on Predatory Pricing] (November 20, 1984). Although a number of guidelines have appeared recently, most of them adopt the same rules as the classic landmarks. The newcomers are often industry-specific guidelines. See, e.g., Tokkyo nouhou raisensu keiyaku ni kansuru dokusenkinshih<mac>o j<mac>o no shishin [JFTC Guidelines on Patent and Know-How Licensing] (July 30, 1999); Shurui no ry<mac>uts<mac>u ni okeru fut<mac>o renbai sabetsu taika t<mac>o heno tai<mac>o ni tsuite [JFTC Alcohol Retailing Guidelines] (November 24, 2000 and April 2, 2001); Gasorin no ry<mac>uts<mac>u ni okeru fut<mac>o renbai sabetsu taika t<mac>o heno tai<mac>o ni tsuite [JFTC Gasoline Retailing Guidelines] (December 14, 2001), as well as Electricity Guidelines and Telecommunication Guidelines. These are not intended to develop sophisticated rules, but are for enlightenment of those industries that have neglected antitrust. As far as exclusionary practices, the sophistication of the rules has not advanced since 1991.

⁵⁸ NTT East and NTT West, issued on December 25, 2001.

⁵⁹ See JFTC Announcements on November 16, 2001 (Ch<mac>ubu Electric Power Co.; instruction) and March 26, 2002 (Ky<mac>ush<mac>u Electric Power Co.; instruction). A second warning was issued in the 2002 fiscal year, see JFTC Announcement on June 28, 2002 (Hokkaid<mac>o Electric Power Co.; warning).

⁶⁰ A second warning was issued in the 2002 fiscal year, see JFTC Announcement on June 28, 2002 (Hokkaid<mac>o Electric Power Co.; warning). We do not deny "the effect of education and adverse publicity" that can result from informal enforcement, see John O. Haley, Antitrust in Germany and Japan: The First Half-Century, 1947-1998 (Seattle: University of Washington Press, 2001), 168-170, although it is not clear how substantial that effect is. What is

Another effect of the JFTC's operating in a bureaucratic framework is that the Commission tends to make overbroad pronouncements regarding the rules for antitrust violations. An important example is the disregard of business justification. Being an administrative agency, the JFTC can announce rules without mentioning business justification claims (e.g., efficiency arguments). When there is conduct restricting competition but with solid business justification, the JFTC can simply keep silent. When it feels it must announce its approval of a transaction, it tends to rely not on business justification but simply states its conclusion that the conduct is not anticompetitive at all. This behavior makes the JFTC's rulings unreliable.⁶¹

These factors lead to the conclusion that as a seldom challenged monopolistic enforcer, the JFTC has not been forced to develop adequate legal explanations for its actions. It is true that since 1991 one administrative judge of the JFTC's three-judge hearing panels⁶² has been a judge on loan from the courts to the JFTC, usually for three years,⁶³ and that this system has made after-hearing decisions relatively legalistic, both in substance and procedure. Nevertheless, these decisions still stand in some contrast to the JFTC's other decisions. This lack of general legal justification has

relevant here is the JFTC's lack of confidence in its legal doctrines involving exclusionary practices.

⁶¹ An example is the JAL/JAS integration, discussed in Section II.B.2. above. When clearing the modified plan, the JFTC reasoned that there would not be a substantial restriction of competition, never mentioning the failing company doctrine. Reportedly, JAS would have gone bankrupt without the integration.

⁶² Hearings are usually held before three administrative judges. The Commission approves proposed decisions submitted by the administrative judges, usually without any corrections.

⁶³ Judge Tadahiko Mitsuda, 1991-1994; Judge Kitaru Narita, 1994-1997; Judge Toshifumi Shibata, 1997-2000; Judge Jun'ichi Kaneko, 2000-2004; Judge Akihiro Nakayama, 2004-current (as of January 2005). The judge from the judiciary leads the hearing, with support from the other two, usually lifetime JFTC officials.

weakened the acceptance of JFTC decisions by lawyers and judges, a further cost of the way that the JFTC has chosen to protect its monopoly position.

<a>III. Deconcentrated Antitrust Enforcement: United States

A. The Basic Structure of U.S. Antitrust Enforcement

There are four groups of enforcers of antitrust law in the United States, the Antitrust Division of the Department of Justice, the Federal Trade Commission, the States, and private litigants. There is also a wide variety of other government agencies, both federal and state, that have some responsibility for considering competition issues.

The two major federal antitrust enforcement agencies are the Antitrust Division of the Department of Justice and the Federal Trade Commission. The Justice Department, an executive branch cabinet-level agency, began enforcing federal antitrust law when the Sherman Act was passed in 1890. The Federal Trade Commission, an independent administrative agency, was organized in 1915, established as an agency to engage in "preventive regulation" by investigating and prosecuting business abuses.⁶⁴ It was charged with enforcing two new statutes, the Federal Trade Commission Act and the Clayton Act. Both statutes, however, covered practices included within the Sherman Act. In addition, the Clayton Act gave enforcement authority to the Justice Department as well as to the FTC. The result was a high degree of overlapping enforcement

⁶⁴ See Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure (New Haven: Yale University Press, 1924), 86; Richard S. Harvey & Ernest W. Bradford, A Manual of the Federal Trade Commission (Washington, D.C.: J. Byrne & Co., 1916), vii.

responsibility, without any clear direction on how that responsibility would be shared.⁶⁵

Antitrust law is also enforced by the fifty states, the District of Columbia, and four U.S. territories. Most states have some form of state antitrust law which they can enforce in state courts; in fact, some of these state antitrust laws predate the Sherman Act.⁶⁶ In addition, since 1945 the courts have recognized that the states have jurisdiction to enforce federal antitrust law in federal court,⁶⁷ a power further confirmed by statute in 1976.⁶⁸ States can sue for damages incurred by their citizens, as well as for injunctive or structural relief to end anticompetitive practices.

⁶⁵ The lack of direction reflects the haste with which Congress changed the concept of the Commission. The bill passed by the House would have established a purely investigative agency, "hardly more than an adjunct of the Department of Justice"; one week later the Senate reported a bill giving the Commission the power to issue restraining orders. The bill was enacted into law barely three months later. See Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure (New Haven: Yale University Press, 1924), 25-26. Early sources view the Department of Justice as the agency for litigation in court (an agency of "repression and punishment"), while the FTC was to be "a 'commercial police,' to maintain a constant guard over our vast and complex interstate commerce." Richard S. Harvey & Ernest W. Bradford, A Manual of the Federal Trade Commission (Washington, D.C.: J. Byrne & Co., 1916), vii, 132. But it was also recognized that "it is apparently contemplated that both the Attorney General and the Federal Trade Commission could if they were so minded bring simultaneous proceedings against the same party on the same charges." Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure (New Haven: Yale University Press, 1924), 45. The lack of clarity in the division of antitrust statutes and enforcement responsibility in the United States was also confusing to Japan when the United States proposed an Antimonopoly Act that combined elements of the Sherman, Clayton, and Federal Trade Commission Acts into a single statute with a single enforcement agency. See Harry First, "Antitrust in Japan: The Original Intent," Pacific Rim Law & Policy Journal, 9 (2000): 50-53.

⁶⁶ See James May, "Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918," University of Pennsylvania Law Review, 135 (1987): 495, 499. For a review of state antitrust law, see American Bar Association Section of Antitrust Law, State Antitrust Practice and Statutes, 2d ed. (Chicago: Section of Antitrust Law, American Bar Association, 1999) (3 vols.).

⁶⁷ See *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945).

⁶⁸ See 15 USC <sec> 15c (parens patriae actions).

The fourth set of enforcers is private parties. When Congress enacted the Sherman Act in 1890 it included a private right of action for those injured in their business or property by virtue of an antitrust violation. Indeed, the novelty of the Sherman Act was not the private right of action (contracts in unreasonable restraint of trade were unenforceable at common law) as much as it was the provision of public enforcement. An important aspect of the private right of action, of course, is that the successful plaintiff can be awarded treble damages and attorneys fees. This has been a significant inducement to plaintiffs to bring antitrust cases.

In addition to these four groups, competition issues are also considered by a wide array of federal and state regulatory agencies. It has often been the case that when Congress enacted statutes establishing independent federal administrative agencies to regulate various sectors of the economy it has given these agencies either concurrent or exclusive jurisdiction over mergers and other competitive practices of the regulated industries. The Interstate Commerce Commission, for example, was given exclusive jurisdiction over railroad and trucking mergers under a broad "public interest" standard which was subsequently interpreted to include competitive considerations.⁶⁹ When Congress regulated the airlines it gave the Civil Aeronautics Board exclusive authority to review airline mergers, as well as unfair methods of competition.⁷⁰ Telecommunications and broadcasting

⁶⁹ See, e.g., *United States v. Interstate Commerce Commission (Northern Lines Merger Cases)*, 396 U.S. 491 (1970) (adequate consideration of competitive factors). Railroad mergers are still subject to regulatory approval under a public interest standard. See 49 U.S.C. <sec> 11324 (Surface Transportation Board).

⁷⁰ See 49 U.S.C. <sec> 1378(b)(1). The Department of Transportation continues to have jurisdiction over "unfair methods of competition." See 49 U.S.C. <sec> 41712; see also Department of Transportation, Enforcement Policy Statement on Unfair Exclusionary Conduct by Airlines (intended to prevent predatory pricing by major airlines in response to new entry; proposed April 6, 1998, but not adopted), available at (<http://www.dot.gov/affairs/dkt3713.htm>).

mergers are reviewed by the Federal Communications Commission, which has also adopted a variety of market structure rules intended to maintain competition in broadcasting markets.⁷¹ Banking mergers are reviewed under a competition standard by bank regulatory agencies.⁷² Similarly, electric power company mergers are reviewed by the Federal Energy Regulatory Commission for their competitive effects; the FERC also has jurisdiction over a variety of competitive practices in the electric power industry.⁷³ Some of these industries are also regulated on the state level (electric power and telecommunications, for example), with the result that state regulatory agencies may also consider competition related issues.

In light of the importance of these sectors, the federal antitrust enforcement agencies, particularly the Department of Justice, have historically made a significant effort to force the regulatory agencies to take account of competitive considerations when applying the statutory "public interest" standard under which much federal regulation is judged. Although this effort has produced mixed results, it has at least forced regulatory agencies to take some account of competition principles when making regulatory decisions and helped widen the number of enforcers of these principles.⁷⁴

⁷¹ See 47 U.S.C. <sec><sec> 214(a), 310(d). For a discussion and critique of FCC merger reviews in the telecommunications sector, see William J. Kolasky, "The FCC's Review of the Bell Atlantic/NYNEX and SBC/Ameritech Mergers: Regulatory Overreach in the Name of Promoting Competition," Antitrust Law Journal, 68 (2001): 771. These mergers are also subject to review by the antitrust enforcement agencies.

⁷² See Bank Merger Act of 1966, 12 U.S.C. <sec> 1828(c).

⁷³ See Federal Power Act, 16 U.S.C. <sec><sec> 824(b) (mergers); 824a-1, 824i-824k (wheeling and interconnection).

⁷⁴ See, e.g., *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973) (requiring consideration of anticompetitive effects when determining whether to allow utility to issue securities). Where the Department of Justice has concurrent jurisdiction, as in banking and energy, the regulatory agencies have often moved closer to antitrust standards in making their decisions on, e.g., mergers.

B. Distributed Antitrust Enforcement System

<c>1. Cooperation and competition</c>

The U.S. system of multiple antitrust enforcers stands in some contrast to Japan's system. The basic structure of Japan's enforcement system has fostered control over antitrust by the JFTC, control which the JFTC has tried to maintain. The basic structure of the U.S. enforcement system has kept any one agency from controlling antitrust, even if the federal agencies (and particularly the Justice Department) might have preferred otherwise. The United States has distributed its antitrust enforcement, rather than centralizing it.

If the problem of a centralized system is excessive uniformity, the problem of a decentralized system is excessive diversity. Policy making can be chaotic, increasing compliance costs for business, and can lead to contradictory approaches if enforcers disagree. The U.S. system has not avoided these problems completely, but it has evolved in a way that allows different agencies to develop different competencies which reflect, in part, their different institutional and legal interests. The result is a complex system in which the four enforcement agencies act, at times, cooperatively and, at times, competitively.

The two federal antitrust enforcement agencies have most often operated in a cooperative manner, generally avoiding major confrontations.⁷⁵ Both agencies have

⁷⁵ See Robert A. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy (Cambridge, Mass.: MIT Press, 1980), 193. Relations have not always been cordial, however, particularly in the early years when the Commission attempted to use its investigative powers to prod the Justice Department to enforce previously entered antitrust decrees. See Thomas C. Blaisdell, Jr., The Federal Trade Commission: An Experiment in the Control of Business (New York: Columbia University Press, 1932), 183-258 (investigations of meat-packing, steel, tobacco, oil, aluminum, and radio). These efforts "received slight consideration by the Department of Justice." (255)

handled antitrust prosecutions across the spectrum of possible violations, although with somewhat different statutory emphases. Prior to the 1950 amendment of Section 7 of the Clayton Act (the antimerger provision), the Justice Department played a "minor role" in the enforcement of that statute⁷⁶ (the Commission filed approximately six times more cases than the Justice Department⁷⁷). Even more pronounced was the attention paid by the FTC to Section 3 of the Clayton Act (exclusive dealing and tying) relative to the Justice Department; by 1940 the FTC had filed 154 proceedings under that section, while the Justice Department had filed only 7.⁷⁸ Even in the area of pricing conspiracies, the FTC was more active than the Justice Department, although by a small margin.⁷⁹ The only area in which one agency really "specialized" was criminal prosecutions under the Sherman Act, which are statutorily reserved to the Department of Justice.

It was not until 1938 that the first informal agreement was instituted between the Commission and the Justice Department to determine which agency should

⁷⁶ David D. Martin, *Mergers and the Clayton Act* (Berkeley: University of California Press, 1959), 205.

⁷⁷ See Gilbert H. Montague, "The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Antitrust Laws," George Washington Law Review, 8 (1940): 365, 377-78 (64 proceedings filed by FTC; 10 by Department of Justice; 1915 to 1939). Richard Posner lists 11 Justice Department cases brought for "acquisitions short of monopoly." See Richard A. Posner, "A Statistical Study of Antitrust Enforcement," Journal of Law and Economics, 13 (1970): 365, 398 (Table 23). The difference may represent a case brought only under the Sherman Act, which can also be used to prohibit mergers.

⁷⁸ Gilbert H. Montague, "The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Antitrust Laws," George Washington Law Review, 8 (1940): 365, 378-79.

⁷⁹ Gilbert H. Montague, "The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Antitrust Laws," George Washington Law Review, 8 (1940): 365, 388-99 (182 cases filed by FTC; 146 by Department of Justice) (1915-1939).

handle a particular investigation. This agreement was formalized in 1948.⁸⁰ In recent years cooperation between the two agencies has become more complex, as both agencies have taken more aggressive enforcement stances. The need to cooperate in merger enforcement was codified in 1976 when Congress required that premerger notification be given to both agencies simultaneously, relying on the agencies themselves to determine which mergers each would investigate but providing no explicit statutory directives.⁸¹ This required the agencies to improve their liaison procedures.⁸² More recently, after the new Bush Administration was elected in 2000, the heads of the Antitrust Division and the Federal Trade Commission made an agreement to re-divide the industries for which each agency would have responsibility, in the hope of ending battles over particular cases to which both agencies had a plausible claim.⁸³ Although this agreement was subsequently abandoned in the face of Congressional opposition,⁸⁴ the agencies continue to

⁸⁰ See U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, 3d ed. (Washington, D.C.: The Division, 1998), <sec> 7.A.1, available at (<http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm>). The 1948 Memorandum of Agreement is described in Report of The Attorney General's National Committee to Study the Antitrust Laws (1955), 376.

⁸¹ See 15 U.S.C. <sec> 18a(d) (concurrent jurisdiction).

⁸²The liaison process, as it operated by the 1970s, is described in Robert A. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy (Cambridge, Mass.: MIT Press, 1980), 193-94. The 1948 liaison procedure was formally modified in 1993, see 65 BNA Antitrust and Trade Regulation Report, 65 (1993): 746, and in 1995, see BNA Antitrust and Trade Regulation Report, 68 (1995): 403.

⁸³ See Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, available at (<http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>). For information on clearance delays, see (<http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm>) (in 28-month period, 136 matters to which both agencies asserted jurisdiction; average delay in resolving case allocation was 17.8 business days).

⁸⁴See (http://www.usdoj.gov/atr/public/press_releases/2002/11178.htm) ("[I]n view of the opposition expressed by Senator Hollings, Chairman of the Commerce, Justice and State Appropriations Subcommittee, to

divide merger investigations, but presumably in line with past practices.⁸⁵

Cooperation can also take the form of joint efforts. In the modern era the federal antitrust agencies have engaged in a limited amount of this type of cooperation with each other, generally limited to policy-making rather than investigation or enforcement in particular cases. For example, prior to 1992 each agency had its own set of merger guidelines. The 1992 Horizontal Merger Guidelines, however, were issued jointly, as have been subsequent guidelines and policy statements in other areas.⁸⁶ This proliferation of joint guidelines reflects both the increasing bureaucratization of U.S. antitrust enforcement and a conscious effort to articulate a consistent federal approach to competition matters.⁸⁷

A different form of cooperation occurs when the federal antitrust enforcement agencies become involved in competition issues that are statutorily within the jurisdiction of other federal agencies. The Justice

the agreement and the prospect of budgetary consequences for the entire Justice Department if we stood by the agreement, the Department will no longer be adhering to the agreement.") (statement by Charles James, Assistant Attorney General in charge of Antitrust Division) (May 20, 2002).

⁸⁵ For a description of the current agreement, see U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, 3d ed. (Washington, D.C.: The Division, 1998), <sec> 7.A.

⁸⁶ The agencies have issued joint guidelines for horizontal mergers, international operations, licensing of intellectual property, and competitor collaboration, along with a joint statement of enforcement policies in the health care sector, reproduced in John J. Flynn, Harry First and Darren Bush, Antitrust: Statutes, Treaties, Regulations, Guidelines, Policies 2001 (St. Paul, Minn.: West Publishing, 2001), 119-223, 256-287, 315-383. In 2002 the two agencies held joint hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy," see (<http://www.ftc.gov/opp/intellect/index.htm>).

⁸⁷ This contrasts with earlier conflicts in views between the two agencies. See Thomas C. Blaisdell, Jr., The Federal Trade Commission: An Experiment in the Control of Business (New York: Columbia University Press, 1932), 241 (with regard to 1920's FTC investigation of possible violations by Alcoa of a 1912 consent decree, "[t]he conflict between these two departments of government engaged in enforcing the law is striking.").

Department, for example, has been an active participant in regulatory decisions involving the restructuring of the electric power industry⁸⁸ and in airline merger decisions when they were subject to Department of Transportation approval.⁸⁹ This type of participation has generally been in the form of publicly filed comments which the regulatory agencies then consider, but are not required to accept.

More substantial cooperation in investigation and prosecution has taken place between the individual federal enforcement agencies and the states, and among the states themselves. These efforts are a relatively recent aspect of U.S. antitrust enforcement, beginning with cooperative efforts among the states in the 1980s and cooperative efforts between federal and state agencies in the 1990s.⁹⁰ This type of cooperation has several purposes. It extends enforcement resources in particular cases, by adding to the capacity that any single agency has to prosecute antitrust cases, and it helps to insure a common approach by different enforcement agencies. In addition to extending resources, such cooperation may also take advantage of different institutional competencies that the various antitrust enforcers might have. State antitrust enforcers, for example, may have a better understanding of local markets than federal enforcers, adding competence that can improve antitrust enforcement.⁹¹

⁸⁸ See Federal Energy Regulatory Commission, Order No. 888, Federal Energy Regulatory Commission Reports, 75 (1996): <par> 61,080.

⁸⁹ For example, the Northwest/Republic merger was opposed by the Department of Justice but approved by the Department of Transportation. See BNA Antitrust & Trade Regulation Report, 51 (1986): 198.

⁹⁰ See Robert Abrams & Lloyd Constantine, "Dual Antitrust Enforcement in the 1990s," in Harry First et al., eds., Revitalizing Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy (New York: Quorum Books, 1991), 484.

⁹¹ See Harry First, "Delivering Remedies: The Role of the States in Antitrust Enforcement," George Washington Law Review, 69 (2001): 1004.

A final form of cooperative effort involves the bringing of complementary cases. These are cases in which one enforcement agency makes use of the efforts of another. This can occur, for example, when private litigants sue for treble-damages at the conclusion of a successful federal enforcement effort. Price-fixing cases are the clearest example of such complementary prosecution, where the Justice Department brings a successful criminal action and private parties then sue the cartel for treble-damages.

Complementary cases are often derided as "free riding" on the government effort, but this label masks the extent to which private litigation can raise issues that are different from government litigation (for example, proof of the damages caused by defendants' conduct) and can still require extensive litigation resources. The label also minimizes the extent to which private litigation furthers the goals of antitrust enforcement by ensuring redistribution of monopoly gains from offenders to victims.⁹²

Antitrust enforcers also engage in competitive antitrust enforcement. "Competitive enforcement" occurs when one enforcer brings a case in which other enforcers have no interest. For example, private litigants have been quite concerned about distribution restraints, particularly dealer termination. When U.S. government enforcers were paying no attention to these restraints, private parties brought these suits.⁹³ Price

⁹² Government price-fixing prosecutions do not always lead to follow-on private treble damage litigation. For a study of follow-on litigation, which finds a lower percentage of follow-on cases than might otherwise be predicted, see Howard Marvel, Jeffrey M. Netter, & Anthony Robinson, "Price Fixing and Civil Damages: An Economic Analysis," Stanford Law Review, 40 (1988): 561, 572 (of 117 government criminal cases filed between 1972 and 1979, only about one-half resulted in follow-on civil suits, despite the fact that all but three of the cases resulted in convictions).

⁹³Note that private litigation in the distribution restraint area was not necessarily successful. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints subject to a rule of reason analysis; reversing jury award for plaintiff).

discrimination cases are now rarely brought by government enforcers, but private litigants continue to enforce laws that restrict sales at discriminatory prices.⁹⁴

Competition also occurs among government enforcers. One government agency may either be unable to follow through on an antitrust investigation⁹⁵ or may feel that particular type of conduct should not be viewed as an antitrust problem.⁹⁶ The latter was particularly the case during the Reagan Administration, when it took a consciously hands-off view of distribution restraints and mergers. State antitrust enforcers disagreed with this approach and became more active in the area, pursuing cases and issuing competing Guidelines.⁹⁷

2. Networked antitrust

Recent U.S. antitrust enforcement has tended to become more cooperative, and the distinction between joint cooperative efforts and complementary litigation has become blurred. Indeed, it is becoming increasingly

⁹⁴ See, e.g., *United Magazine Co. v. Murdoch Magazines Distrib., Inc.*, 2001 U.S. Dist. LEXIS 20878 (S.D.N.Y. 2001) (denying motion to dismiss claim of discriminatory pricing under Robinson-Patman Act); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133 (S.D.N.Y. 2000) (granting motion to dismiss claim of discriminatory pricing under Robinson-Patman Act). For a critical government view of the Robinson-Patman Act and its underlying policy, see United States Department of Justice, "Report on the Robinson-Patman Act" (1977).

⁹⁵ For a prominent example, see *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995) (Department of Justice brought suit brought after FTC deadlocked on whether to file an administrative complaint).

⁹⁶ See, e.g., Edward T. Swaine, "The Local Law of Global Antitrust," *William and Mary Law Review*, 43 (2001): 627, 762 (2001) (describing litigation involving collusion in restricting availability of pollution insurance coverage in the commercial general liability insurance market; case filed by private litigants and state enforcers after Justice Department declined to investigate); *BNA Antitrust & Trade Regulation Report*, 522 (July 20, 1971): A-16 (FTC issues complaint against Warner Lambert acquisition of Parke-Davis after Justice Department declines to bring suit).

⁹⁷ The states, through the National Association of Attorneys General, issued guidelines dealing with merger cases and vertical restraints, reprinted in *Trade Regulation Reporter* (CCH), 4, 13,401, 13,405.

frequent for federal, private, and state enforcers to be investigating a particular practice at the same time. In such cases it may be difficult to determine which enforcer is following which, even when looking at the timing of case filings.⁹⁸ Government enforcers are able to obtain discovery prior to filing suit and are generally cautious about filing suit until after they have assembled such evidence. Private parties cannot obtain pre-filing discovery. They tend to file suit when they have sufficient evidence to file suit in good faith,⁹⁹ even if they do not have sufficient evidence to prove the full scope of their case, relying on pretrial discovery to obtain further information. Even in cases where private plaintiffs are first to investigate a possible antitrust violation, there are still substantial advantages to sharing information with the government enforcement agencies and to coordinating settlements with them.¹⁰⁰

The increased cooperation among antitrust enforcers has led to the development of virtual networks of antitrust enforcers, as different antitrust enforcers deal with each other on a repeat basis. These networks help to coordinate the resources available for antitrust enforcement. Their non-hierarchical organization requires consensus for action, a process that may produce results that are different from what individual enforcers might have chosen. It also means that antitrust policy is less coordinated than if a single enforcer were making all the decisions. Enforcers are free to join the

⁹⁸ See *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 138 F. Supp. 2d 25 (D. Me. 2001) (complaint filed by states after concurrent FTC and state investigations; private class actions also filed; consolidated for pretrial proceedings).

⁹⁹ See Federal Rules of Civil Procedure, Rule 11.

¹⁰⁰ For an example of information sharing, see Arthur M. Kaplan, "Antitrust As A Public-Private Partnership: A Case Study of the NASDAQ Litigation," *Case Western Reserve Law Review*, 52 (2001): 111 (describing sharing of information between private plaintiffs and Department of Justice) (\$1.027 billion settlement).

network or not, to operate cooperatively or competitively. Indeed, they are free to change from cooperation to competition in the course of litigation, for example, when some parties settle litigation and others choose not to do so.¹⁰¹

The U.S. system of multiple enforcers has often been criticized. The most frequently criticized aspect has been the sharing of jurisdiction between the Department of Justice and the FTC, although there seems little prospect of its being changed in any fundamental way.¹⁰² Private enforcement has also been criticized, although court decisions limiting standing and damages have done much to narrow the ability of private plaintiffs to bring suit. State enforcement of antitrust law has similarly been criticized as duplicative of federal efforts or contradictory to the development of sound antitrust policy.¹⁰³ Various proposals have been made to better manage the diversity of enforcement efforts,¹⁰⁴ or to oust

¹⁰¹ The Microsoft litigation is a well-publicized example. The case was originally filed by 20 states (plus the District of Columbia) as well as by the Department of Justice. After the district court's major findings on liability were upheld by the Court of Appeals, the Justice Department announced a settlement with Microsoft, but not all the states agreed to join the settlement. Nine states (plus the District of Columbia) continued to litigate their relief claim separately from the other plaintiffs. Their different relief proposals, however, were eventually rejected by the courts. See *Massachusetts v. Microsoft*, 373 F.3d 1199 (D.C. Cir. 2004). See also Warren S. Grimes, "The Microsoft Litigation and Federalism in U.S. Antitrust Enforcement: Implications for International Competition Law," in Josef Drexler, ed., The Future of Transnational Antitrust - From Comparative to Common Competition Law (Berne/The Hague: Staempfli Publishers/Kluwer Law International, 2003) 237.

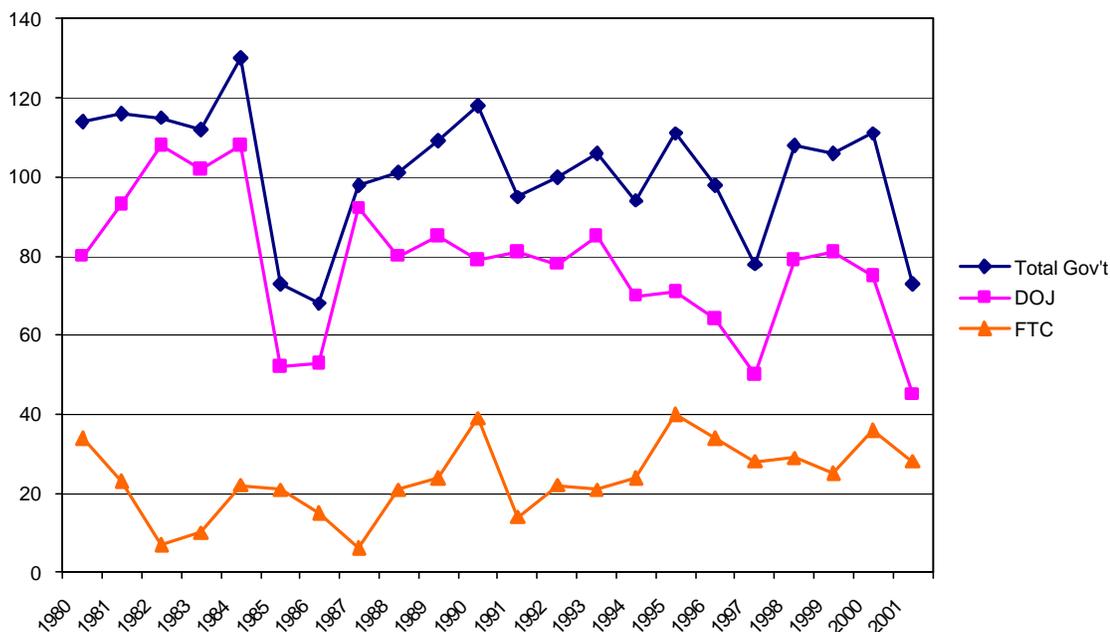
¹⁰² See, e.g., ABA Reports 1969, 1989 (case for abolishing the FTC's antitrust jurisdiction "has not been made"), reprinted in BNA Antitrust & Trade Regulation Report, 56, 1410 (Special Supplement) (April 6, 1989); Antitrust Law Journal, 58 (1989): 42. See also Ernest Gellhorn, Charles James, Richard Pogue, & Joe Sims, "Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization," Antitrust Bulletin, 35 (1990): 695 (1990).

¹⁰³ See, e.g., American Bar Association, Section of Antitrust Law, "Report of the Task Force on the Federal Antitrust Agencies—2001" (2001), 3 (describing current state and federal enforcement system as an "uncoordinated hodgepodge").

either private or state enforcement in some or all circumstances.¹⁰⁵

In the least, having multiple antitrust enforcers likely increases the amount of antitrust enforcement. Although the total number of cases brought by the federal enforcement agencies has tended to be roughly constant since 1980 (except for dips in four of those years), the total number of cases brought by each agency has not necessarily moved in tandem.

Figure 1. U.S. Government Antitrust Enforcement (DOJ and FTC), 1980-2001



Sources: Dep't of Justice, Antitrust Div., Workload Statistics; FTC: 5 CCH Trade Reg. Rep.

¹⁰⁴ These include proposals to allow for more consolidation of litigation, see Andrew Gavil, "Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation," *George Washington Law Review*, 69 (2001): 860.

¹⁰⁵ See Richard A. Posner, "Antitrust in the New Economy," *Antitrust Law Journal*, 68 (2001): 925, 940-42 (2001) (urging repeal of state antitrust enforcement authority and allowing Department of Justice to sue for consumer damages, thereby ousting private litigants).

More importantly, private enforcement has considerably increased the numbers of antitrust cases brought. Although the amount of private litigation has fluctuated over time, the number of private cases filed annually has exceeded U.S. government cases since the 1950s.¹⁰⁶ Between 1983 and 1990 there was a dramatic drop in private case filings, from approximately 1200 cases per year to approximately 400, but the numbers of filings in the 1990s have increased and they remain substantially higher than the number of cases brought by the federal enforcement agencies.¹⁰⁷

The national system of networked antitrust, with multiple enforcers, is now being expanded to the international level. The European Commission is promoting the network idea for coordinating its efforts with those of the national authorities within the European Union, although the network in Europe is not as well "connected" as it is in the United States and raises different legal and institutional issues than national networking does in the United States.¹⁰⁸ In addition an "International Competition Network" (ICN) of antitrust

¹⁰⁶ See Richard A. Posner, "A Statistical Study of Antitrust Enforcement," Journal of Law and Economics, 13 (1970): 373 (Figure II). Posner indicates that data for private litigation prior to 1938 are "very poor" and are only estimates. (370-71).

¹⁰⁷ See B. Zorina Kahn, "Symposium on Antitrust," Cornell Journal of Law and Public Policy, 9 (1999): 133, 137 (Figure 1). Data are lacking for the extent of antitrust enforcement by regulatory agencies, by private plaintiffs suing in state courts, and by state Attorneys General. For a description of recent state enforcement, see Harry First, "Delivering Remedies: The Role of the States in Antitrust Enforcement," George Washington Law Review, 69 (2001): 1004, 1017-18 (data for New York State).

¹⁰⁸ See Alexander Schaub, "Developments of European Competition Law," Speech Before Conference on Developments of Competition Law and Policy--European and National Perspective (April 19, 2002), 6 (describing the Commission and Member States as "network members"), available at http://europa.eu.int/comm/competition/speeches/text/sp2002_014_en.pdf. The EC maintains greater legal control over the enforcement efforts of member states than do the U.S. federal agencies over the efforts of state antitrust enforcers.

enforcement agencies has been formed, the focus of which will be on arriving at proposals for "procedural and substantive convergence in antitrust enforcement."¹⁰⁹ The ICN will develop non-binding recommendations on "best practices" which individual agencies will then have the option to implement voluntarily.¹¹⁰

Criticism of the system of multiple enforcement has often come from commentators who are concerned about an over-expansive application of antitrust law. This does not prove that the multiple system actually produces such results, or even that it increases antitrust enforcement. It is, nevertheless, some confirmation that if robust antitrust enforcement is the desired goal, multiple enforcers make robust enforcement more likely. This certainly appears to be the judgment of national competition authorities who are increasingly working together on cases involving international competitive effects.¹¹¹

<a>IV. Designing the Institutions of Antitrust in Japan

¹⁰⁹ See Press Release, U.S. Department of Justice, "U.S. and Foreign Antitrust Officials Launch International Competition Network" (Oct. 25, 2001), 3, available at (http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm). See also (<http://www.internationalcompetitionnetwork.org/about.html>) ("The focus will be on improving world-wide cooperation and on enhancing convergence through focussed dialogue.") As of October 2002, the ICN had representatives from 62 countries (65 competition authorities), with an interim steering committee representing 14 jurisdictions including Japan. See (<http://www.internationalcompetitionnetwork.org/steering.html>).

¹¹⁰ For results of the ICN's initial meeting in September 2002, see (<http://www.internationalcompetitionnetwork.org/conference.html>).

¹¹¹ For a description of these efforts, see Robert Pitofsky, "Antitrust Cooperation, Global Trade, and U.S. Competition Policy," in Clifford A. Jones & Mitsuo Matsushita, eds., Competition Policy in the Global Trading System (The Hague: Kluwer Law International, 2002), 56.

Japan is now in a period where it has chosen to emphasize the value of competition and markets over a regulatory industrial policy. This has led to the increased favoring of the JFTC within the government. The JFTC has increased its enforcement efforts to some extent, but these steps have not yet resulted in a marked increase in enforcement activity and there is still too little attention being paid to conduct outside the most obvious horizontal restraints.

Japan can learn from the decentralized system of enforcement that has been adopted in the United States and that is increasingly in use in Europe. Transposing institutions is, of course, a tricky business, as the United States itself learned when it proposed the original structure for the JFTC. Nevertheless, the U.S. experience does suggest at least three possible approaches that Japan could take.

The first is to increase the power of other government ministries to act on competition matters. In light of the past history of regulatory control in Japan, it might seem counter-intuitive to urge an increase in the power of other ministries over competition matters. These ministries may very well be more institutionally prone to a regulatory approach to competition matters than to a market approach; indeed, the past history of these ministries would so indicate. Further, the most likely candidate for such concurrent jurisdiction, the METI, is expressly restricted from handling competition matters under the Antimonopoly Act.¹¹² Nevertheless, an interim approach may be to network with these agencies and engage in cooperative enforcement on policy efforts, thereby enlightening these agencies on competition policy perspectives. As shown in the examples of the electricity and telecommunications sectors, other agencies have demonstrated a willingness to promote

¹¹² See Ch<mac>u<mac>o sh<mac>och<mac>o t<mac>o kaikaku kihonh<mac>o [Basic Act for Reforms of Central Government Agencies] (Law No. 103 of 1998, as amended), art. 21(10).

competition under certain circumstances and to work with the JFTC.

Cooperation and/or competition among government agencies might very well increase the vitality of competition policy. Mechanisms might need to be found to sort out problems if conflicts arose, but at least for the moment, the prospect of an increase in attention to competition matters could have very positive effects on the robustness of competition policy enforcement.

The second approach is to promote the greater power of the judiciary and the private bar in antitrust enforcement. For this to work satisfactorily, antitrust rules need to be more sophisticated and lawyers need to be better trained in antitrust tools and analysis. This means that the JFTC itself must make its articulation of antitrust rules more legally compelling. At the same time, antitrust education should play a greater role in the new law schools in Japan. With the increase in the number of lawyers that will be passing the bar examination, more lawyers and judges will be entering the profession.¹¹³ With a sufficient number of lawyers, the market mechanism should lead some of them to an antitrust specialty. With a sufficient number of judges, it would not be impossible for the Judiciary to have a special tribunal for antitrust at the Tokyo District Court, at least as an interim step for advancing antitrust specialization in Japan.¹¹⁴

¹¹³ Cf. Curtis J. Milhaupt and Mark D. West, "Law's Dominion and the Market for Legal Elites In Japan," Law and Policy in International Business, 34 (2003): 451 (presenting data indicating shift by elite university graduates away from civil service positions and into law practice; suggests that this may be due, in part, to an increased lifetime differential in earnings between the two careers).

¹¹⁴ This is in contrast to the current original antitrust jurisdiction of the Tokyo High Court, which presents procedural drawbacks to potential plaintiffs, as discussed in Section II.A.2.a. above. A special tribunal at the Tokyo District Court, by solving the procedural weaknesses of vesting original jurisdiction in the High Court, might prove more attractive to litigants and foster the growth of antitrust expertise (although plaintiffs could still go to another district court, of course). The Tokyo District Court currently has a tribunal accepting almost all antitrust private litigation, although

The third approach is to participate fully in the efforts of the ICN and to consider carefully its recommendations on best practices. The ICN may help provide a competitive spur that the JFTC needs to reexamine its internal operations and to engage in more effective enforcement in Japan. This network will bring a more open approach to antitrust enforcement generally and will give the JFTC an opportunity to articulate its policy approaches and the reasons supporting them. To the extent that these approaches are inadequate, the ICN can be instrumental in helping the JFTC improve.

<a>V. Conclusion

Japan's antitrust enforcement system has been centralized in the Fair Trade Commission since the enactment of the Antimonopoly Act in 1947. The centralization of enforcement has produced a situation in which the JFTC has not adequately articulated antitrust rules and has preferred to rely on informal enforcement to deal with difficult problems. Although private litigation is possible under the Antimonopoly Act and under Civil Act Article 709, to date private litigation has not emerged as a significant aspect of the enforcement system. Indeed, the failure to provide adequate legal rules or seek judicial enforcement has in itself contributed to the weakness of private enforcement.

A distributed model of antitrust enforcement relies on cooperative networking among antitrust enforcers, and competition among antitrust enforcers, to increase the effectiveness of the antitrust enforcement system. This is the model that has been used in the United States with increasing effectiveness in the past decade and is the model that is being developed now on an international level to deal with the increasing internationalization of business. If Japan is to have an antitrust enforcement

the tribunal does not deal exclusively with antitrust matters. Reportedly, the tribunal is busily occupied with non-antitrust cases.

system that can help bring about the more competitive economy that government policy makers appear to want, it needs to distribute antitrust enforcement authority more widely among government agencies and private litigants and it needs to become a full participant in the international enforcement network now being put into place. Failure to take these steps will likely continue the paradox of a concentrated enforcement power that produces weak antitrust enforcement.