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Toward a Theory of Jurisdictional Competition: The Case of the Japanese FTC

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Abstract: The Japanese antitrust agency (the J-FTC) holds a jurisdictional monopoly over most issues. Because overlapping jurisdictions would enable politicians to gauge relative bureaucratic performance, this monopoly prevents politicians from monitoring the agency on most issues. In response, J-FTC bureaucrats have chosen not to enforce those statutory provisions like criminal penalties that firms might contest. Consequently, firms face virtually no criminal sanctions for violating the antitrust statute. Most Japanese markets are still competitive -- but primarily because they are large, fluid, and easy to enter. The J-FTC enforces the law only in areas where politicians can monitor its performance, and politicians have the information they need to monitor only on issues about which they care deeply.

All else equal, monopolist agencies will regulate less actively than competitive agencies. Yet politicians do not win elections by creating agencies they cannot control, and even monopolist agencies will regulate actively when politicians can gauge their performance. In equilibrium, therefore, politicians will grant agencies a jurisdictional monopoly over electorally important issues only when they have access through other sources to information by which to monitor their bureaucrats.

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Should politicians create agencies that compete with each other, or should they give each a jurisdictional monopoly? Which jurisdictional structure would win them the most votes, and when?

At least in the private sector, competition improves performance. By contrast, monopoly sometimes retards it. At least if firms compete for buyers and sellers, only the more efficient survive. By contrast, a firm without competitors will sometimes earn its owners monopoly rents -- but sometimes dissipate them through sheer waste. Sometimes, as the adage goes, the rewards of monopoly are an easy life.

How then should (and will) politicians structure their bureaucracies? Bureaucrats cannot exploit a monopoly by raising prices. Perhaps if they cannot raise price, they will ease their jobs instead. To forestall such shirking, perhaps politicians should (and perhaps vote-maximizing politicians will) structure jurisdictional competition into the agencies they create.

If only matters were so simple. Much of what regulators do in modern democracies at best wastes resources. At worst it dramatically reduces social welfare. If effective regulators would stymie market processes, then anything that cuts their effectiveness arguably improves that welfare. If giving them a regulatory monopoly would cause them to intervene less, then arguably a regulatory monopoly is the way to go.

Matters are not quite that simple either. Even libertarians acknowledge that some government programs could -- properly administered -- promote social welfare. Antitrust is a case in point. To be sure, over-zealous antitrust regulators have done more than their share of harm to the U.S. economy.[1] And given the ease with which new firms can enter most markets and the way most cartels self-destruct, competition often enforces itself without such regulators anyway.

Yet in some circumstances, aggressive antitrust enforcement can generate a social good. When it does, efficient regulators would outperform the inefficient. And if they did, then jurisdictional competition among antitrust agencies might indeed enhance aggregate welfare.

The positive puzzle is no simpler than the normative. On the one hand, politicians sometimes earn votes by routing regulatory rents to supporters who contribute the resources they need. On the other, voters care about public goods as well as private, and regulatory efficiency is one. All else equal, politicians who create inefficient regulatory arrangements should earn fewer votes than their more efficient rivals and disappear. If granting an agency a jurisdictional monopoly would increase its efficiency, then rational legislators will grant it that monopoly; if it would not, then they will institutionalize bureaucratic competition instead.

To explore these issues, we take one example of a monopolist agency -- the Japanese antitrust authority (the J-FTC). We then use the example to illustrate these

[1] See generally Fred S. McChesney & William F. Shughart II, The Causes and Consequences of Antitrust: The Public-Choice Perspective (Chicago: University of Chicago Press, 1995).

dynamics and suggest some strands to a more general theory of jurisdictional monopoly in government. All else equal, monopolist agencies should regulate:

(i) less actively than competitive agencies;

(ii) more actively when politicians have access to alternative sources of information about agency performance; and

(iii) more actively when the agency regulates a given industry than when it regulates a given class of conduct across industries.

Politicians, however, will -- again, all else equal -- more likely grant an agency a regulatory monopoly when:

(a) the agency regulates a given industry rather than a given class of conduct;

(b) the agency's mandate does not much matter; and

(c) the politicians have access to alternative sources of information about agency performance.

As a result, jurisdictional choice is fundamentally endogenous. To the extent electoral markets clear, rational politicians will not create agencies whose bureaucrats would simply consume social resources to no electoral return. Monopolist agencies might indeed regulate less actively than competitive agencies if politicians chose jurisdictional mandates randomly. Yet politicians do not choose mandates randomly. Instead, in equilibrium they will tend to create monopolist agencies when they (the politicians) control other ways to induce higher levels of effort among their bureaucrats. If so, then among the agencies actually created, those with competitive jurisdiction will <u>not</u> necessarily out-perform those with a monopoly.

We begin by contrasting the structure of antitrust enforcement in the U.S. and Japan (Section I). We recount a recent monopolization dispute in Japan and survey the J-FTC's work product (Section II). We explore the welfare implications of jurisdictional monopoly among agencies, and the political dynamics involved (Section III). Finally, we offer some preliminary thoughts about a more general theory of jurisdictional competition in government (Section IV).

I. <u>The Structure of Antitrust Enforcement</u>

A. <u>Introduction</u>:

1. <u>Jurisdictional competition in the U.S.</u> -- a. <u>The phenomenon.</u> The U.S. government delegates antitrust enforcement to two agencies: the Antitrust Division of the Department of Justice, and the independent Federal Trade Commission (US-FTC). On many issues, the two agencies forthrightly compete. Indeed, both agencies enforce both the Clayton Act bans on tying and exclusive dealing arrangements, and the Sherman Act bans on cartels and monopolization.[2]

In fact, however, regulatory competition in the U.S. extends much farther. Given the national-state federalism, inter-bureaucratic competition characterizes a wide variety of agencies that police conduct across multiple industries. Many misdeeds constitute both federal and state crimes, for example, and potentially generate dual prosecutions. Securities fraud may lead to litigation by both the SEC and state agencies. Environmental violations may give rise to both federal and state actions, and so too

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[2] See Ernest Gellhorn & William E. Kovacic, Antitrust Law and Economics in a Nutshell 29-30 (St. Paul: West, 4th ed., 1994); Phillip Areeda & Louis Kaplow, Antitrust Analysis: Problems, Text, Cases 100 (New York: Aspen, 5th ed. 1997).

banking fraud and labor disputes. Even so plebian a crime as a killing can result in both a local prosecution for murder and a federal one for infringing the decedent's civil rights.

What is more, independently of federal and state regulators, victims of legal wrongs can often sue on their own. Take antitrust. Should sellers collude to fix prices, their buyers can run to court. They can sue for injunctive relief. They can sue for treble damages. And by the Illinois Brick-Hanover Shoe logic, they can even demand those price markups they pass on to their own buyers.[3]

b. The logic. Despite its occasional critics, this inter-jurisdictional rivalry does create potential efficiencies. Between states, for example, the competition can drive governments to improve their legal frameworks.[4] Between the federal and state governments, the mechanism is more subtle. Delaware may lose corporate franchise revenues to Nevada if Nevada offers better corporate law. But the Antitrust Division will not directly lose revenue if it polices price-fixing more lackadaisically than California.[5]

Whether the rival agency is state or federal, however, politicians can still use it to obtain information about how their bureau performs.[6] Politicians are busy, and they are generalists. They cannot regularly visit the offices of the Antitrust Division, and could not cheaply gauge its performance if they did. If the Division files cases that the courts reject, they can use that rejection as information. If the Division files no cases at all, they will be at a loss. Without more information, they cannot readily tell whether the staff members (a) did not bring enforcement actions because they were lazy, or (b) did not bring them because they had earned such a ruthlessly efficient reputation that few firms broke the law.

In this context, inter-agency competition generates information about relative performance by which politicians (as principals) can monitor their bureaucratic appointees (as agents).[7] If the Antitrust Division does not bring enforcement actions but

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[3] Sherman Act, Sec. 4, 15 U.S.C. Sec. 4 (200x); Clayton Act, Secs. 15, 16, 15 U.S.C. Sec. 26 (200x); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach., 392 U.S. 481 (1968); see William Landes & Richard Posner, Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick, 46 U. Chi. L. Rev. 602 (1979).

[4] Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J. L. & Econ. 23 (1983). The classic debate concerns corporate law. For the opposing viewpoints, see William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L.J. 663 (1983); Ralph K. Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977); Roberta Romano, The Genius of American Corporate Law (Washington, D.C.: American Enterprise Institute, 1993); Lucian A. Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in the Corporate Law, 105 Harv. L. Rev. 1435 (1992).

[5] The preemption doctrine causes federal regulatory competition to restrain state regulators in a different way. See Mark J. Roe, Delaware's Competition, 106 Harv. L. Rev. __ (2004).

[6] See generally Mathew D. McCubbins & Thomas Schwartz, Congressional Oversigh Overloked: Police Patrols versus Fire Alarms, 28 Am. J. Pol. Sci. 165 (1984); Jonathan R. Macey, Organizational Design and the Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243 (1990).

[7] See generally Edward Lazear & Sherwin Rosen, Rank-Order Tournaments as Optimum Labor Contracts, 89 J. Pol. Econ. 841 (1981).

its rival agencies do, politicians can more easily gauge why the Division did not act. That prospect of inter-agency competition, in short, gives politicians (who ultimately control an agency's staffing, budgets, and power) more information by which to monitor their agencies. And the prospect of that monitoring, in turn, potentially reduces an agency's shirking from the outset.[8]

2. Jurisdictional monopoly at the Japanese Fair Trade Commission. -- a. The J-FTC mandate. Unlike the Antitrust Division and the US-FTC, the Japanese Fair Trade Commission (J-FTC) enjoys a jurisdictional monopoly over most of the issues in its portfolio. The law involved is the 1947 Antimonopoly Act.[9] Drafted under pressure from the U.S.-dominated occupation, many of its provisions resemble U.S. law.

By Section 3, for example, the Antimonopoly Act prohibits "monopolization" and "improper restraints of trade," and by Section 19 bans "unfair trade practices." The Act defines the terms in largely predictable ways. According to Section 2(e), a firm monopolizes a market if it "excludes or dominates the business activity of another firm," and thereby "substantially restricts competition in a given field of trade." By Section 2(f), it improperly restrains trade if "in collusion with another firm" it sets prices or quantities and "substantially restricts competition in a given field of trade." And it engages in an "unfair trade practice" under Section 2(i) if it engages in J-FTC-designated conduct that "threatens to interfere with fair competition." As one of the unfair practices, the J-FTC designates "an improper refusal to deal with a firm or a restriction on the quantity or content of any goods or services traded."[10]

b. The J-FTC's powers. Over these actions and others, the J-FTC exercises its mandate. Established by the Antimonopoly Act as an independent agency under the Prime Minister's office (Sec. 27), the Commission holds responsibility for enforcing the Act (Sec. 27-2). The Act in turn provides for five commissioners (Sec. 29), gives them five-year terms (Sec. 30), and protects them against pay cuts (Sec. 36) or removals without cause (Sec. 31).

To facilitate the J-FTC's work, the Act gives it the power to order firms to appear before it and submit information and records as necessary (Secs. 40, 46). It delegates to it the authority to order firms to collect data (Sec. 41). And it authorizes it to undertake its own investigations and searches (Sec. 46).

When the J-FTC believes that a firm may have monopolized, restrained trade, or traded unfairly, it can initiate administrative proceedings. It will first propose a "recommendation order," and if the firm objects to the order hold a series of hearings. At their conclusion, it can issue its order and direct the firm to "take appropriate action" (Sec. 48). To enforce the order, it can sue for an injunction as necessary (Sec. 7; available for

[8] See generally Barry Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policy Making by the FTC, 91 J. Pol. Econ. 765 (1983).

[9] Shiteki dokusen no kinshi oyobi kosei torihiki no kakuho ni kansuru horitsu [Law Regarding the Prohibition of Private Monopoly and the Maintenance of Fair Trade], Law No. 54 of 1947. See generally John O. Haley, Antitrust in Germany and Japan: The First Fifty Years, 1947-1998 (Seattle: University of Washington Press, 2001).

[10] Fukosei na torihiki [Unfair Trade Practices], J-FTC Designation (kokuji) No. 15 of June 18, 1982, Sec. 2.

Sec. 3 violations but not Sec. 19). If dissatisfied with the J-FTC's conclusion at the end of the hearings, the firm may contest the order in court (Secs. 77-82).

If the J-FTC believes that firms have fixed prices, it can levy an administrative surcharge (Secs. 7-2, 48-2). The Act sets the surcharge at 6 percent of the firms' gross receipts during their cartel (Sec. 7-2). It adds lower rates for smaller firms and firms in the service sector. If a firm objects to the proposed surcharge, then as with recommendation orders it can demand a series of hearings. At their conclusion, it can again challenge the outcome in court (Sec. 48-2(e)).

The Act gives other penalties and remedies, but in most cases the J-FTC exercises an effective veto over their application. For example, Section 89 details fines and prison sentences for price-fixing and monopolization (though not for unfair trade practices). The Ministry of Justice (MoJ) prosecutes the case (unlike American states, Japanese prefectural governments cannot bring antitrust actions), but -- crucially -- by Section 96 cannot file a criminal case unless the J-FTC first recommends prosecution.

Neither can private parties file civil suits under the Act without the J-FTC's blessing. According to Section 25, firms injured by monopolization, price-fixing, or unfair trade practices can sue for damages (actual rather than treble damages; they need not show intent). Yet by Section 26 they may not sue until after the J-FTC has issued a final administrative order. Should the J-FTC choose either not to file an administrative case or to settle it without a final order, they may not sue at all.

3. <u>Alternatives to the J-FTC.</u> -- To be sure, the J-FTC cannot veto all antitrust litigation. Some actions that violate the Antimonopoly Act also violate other laws. Over litigation involving such behavior, the J-FTC has no formal control.

a. <u>Criminal suits.</u> Suppose, for instance, that firms rig their bids on public construction projects. By doing so, they violate Section 3 of the Act and subject themselves to its criminal penalties. Concomitantly, however, they also violate the Criminal Code.[11] As a result, even without a J-FTC complaint prosecutors can file (and have filed) criminal charges.[12]

b. <u>Private suits.</u> In violating the Antimonopoly Act, sometimes firms expose themselves to multiple sources of civil liability. The risk stems from the overlap between the Act and the general tort damage provisions of the Civil Code.[13] Although monopolization, price-fixing, and unfair trade practices all give rise to Section 25 claims, if a plaintiff can show either negligence or intent they also give rise to tort liability.

<u>Monopolization.</u> Suppose a firm tries to monopolize an industry by pressuring others to boycott a potential competitor. Not only does the firm violate Section 3 (as well

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[11] Keiho [Criminal Code], Law No. 45 of 1907, Sec. 96-3.

[12] E.g., [Parties unnamed], 874 Hanrei taimuzu 291 (Tokyo D. Ct. Mar. 7, 1994); Japan v. Ohira, 1989 Kosai keiji saiban sokuho shu 297 (Takamatsu High Ct. Apr. 25, 1989) (Hanrei taikei No. 27828291); [Parties unnamed], 43 Tokyo kosai keiji hanketsu jiho 69 (Tokyo High Ct. Dec. 16, 1992) (Hanrei taikei No. 28025154).

[13] Minpo [Civil Code], Law No. 89 of 1896 & Law. 9 of 1898, Sec. 709.

as the unfair trade practice ban in Section 19) and risk civil liability under Section 25, it also risks liability under the Civil Code. During the war with China in the 1930s several wholesalers tried to monopolize the Osaka-Kobe banana market. When a Chinese retailer independently imported the fruit from Taiwan, they organized a boycott. The retailer sued, and the Supreme Court held the wholesalers liable: by coordinating the boycott, they committed a compensable tort.[14]

Or, take the more recent case against an association of toy gun manufacturers. Faced with a producer who refused to join, the association pressured retailers not to stock the firm's guns. The renegade firm sued, and the court found the boycott an "unreasonable restraint of trade." Because the J-FTC had decided not to take action, the firm could not have sued under Section 25. It sued under the Civil Code instead, and the court held the boycott a compensable tort.[15]

Price-fixing. Firms that fix prices similarly violate both Section 3 of the Antimonopoly Act and the Civil Code. When oil refiners agreed to raise prices in the early 1970s, two groups of consumers sued. One waited until after the J-FTC had issued an order against the firms, and brought its case under Section 25 of the Act.[16]

The other group did not wait. Instead, it sued the refiners under the Civil Code's tort damage provisions. Held the Supreme Court: the buyers could collect. In colluding to hike prices, the refiners had committed a tort and owed them damages.[17]

Unfair trade practices. Firms that engage in Section 19's ban on "unfair trade practices" likewise face parallel litigation. They straightforwardly risk Antimonopoly Act liability under Section 25. Yet they also risk challenges under the Civil Code. Tying contracts, for example, both violate Section 19 of the Act and constitute intentional or negligent torts.[18] Pyramid-sales schemes do likewise, and so do attempts to monopolize.[19]

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[14] Chin v. Fujimori, 19 Daishin'in minji hanrei shu 1521 (Sup. Ct. Aug. 30, 1940).

[15] Dejikon denshi, K.K. v. Nihon yugi ju kyodo kumiai, 1629 Hanrei jiho 70 (Tokyo D. Ct. Apr. 9, 1997). Because the defendant was a trade association rather than a group of firms, the restraint of trade fell under Section 8 of the Act rather than Section 3. The court also noted that the boycott constituted an "unfair trade practice" under Section 19.

More generally, boycotts are illegal. When a suspect in a police investigation learned that a local store owner was a potential witness, for example, the suspect pressured others to avoid the store owner's shop. The witness sued, and the court held the suspect liable for his lost business. See Fujii v. Ichida, 599 Hanrei jiho 72 (Kumamoto D. Ct. Mar. 24, 1969).

[16] Kai v. Nippon Sekiyu, K.K., 1005 Hanrei jiho 32 (Tokyo High Ct. July 17, 1981), aff'd, 1239 Hanrei jiho 3 (Sup. Ct. July 2, 1987).

[17] Sato v. Seikyu Renmei, 997 Hanrei jiho 18 (Yamagata D. Ct. Mar. 31, 1981), rev'd, 1147 Hanrei jiho 19 (Sendai High Ct. Mar. 26, 1985), aff'd sub nom. Nippon Sekiyu, K.K. v. Sato,, 1340 Hanrei jiho 3 (Sup. Ct. Dec. 8, 1989).

[18] Toshiba Erebeeta tekunosu, K.K. v. K.K. Zokumoku kantei jimusho, 1479 Hanrei jiho 21 (Osaka High Ct. July 30, 1993).

[19] Kono v. Berugii daiyamondo, K.K., 878 Hanrei taimuzu 235 (Nagoya D. Ct. May 27, 1994) (pyramid-sales scheme); Dejikon denshi, K.K. v. Nihon yugi ju kyodo kumiai, 1629 Hanrei jiho 70 (Tokyo D. Ct. Apr. 9, 1997) (monopolization).

c. Implications. The fact remains, however, that the J-FTC largely operates without competition. It faces no state governments that would bring an antitrust case, and no competing national agency that would enforce the Antimonopoly Act. Although some antitrust violations do constitute Criminal Code offenses, most do not -- and over prosecution for these exclusively antitrust crimes, it wields a veto.

While the J-FTC holds less control over private suits, such suits matter far less. Fundamentally, neither private suits under the Act nor private suits under the Civil Code much matter. The reason goes to the (relative lack of any) incentives to bring these claims in Japan.

To file an antitrust suit, a private plaintiff incurs enormous costs. In the U.S., as Judge Wyzanski put it, antitrust litigation involves "an enormous, nearly cancerous, growth of exhibits, depositions, and ore tenus testimony."[20] Notwithstanding these costs, U.S. plaintiffs do still sue. From 1980 to 1984, they brought over 6,000 suits, and from 1985 to 1989 nearly 4,000.[21] If successful, they collect treble damages. As noted earlier, under the Illinois-Brick-Hanover-Shoe rule, if they bought from an offending firm they collect even overcharges they pass on to their consumers. And if the government has filed a suit first, they free-ride on its documentary and evidentiary efforts.[22]

Compare Japan. If the J-FTC decides not to proceed, private claimants may sue under the Civil Code but not the Antimonopoly Act. Under either statute, they collect only single damages. Because the courts do not enforce Illinois-Brick-Hanover-Shoe, they collect only the amount of any over-charge that they can prove they did not pass on to their own buyers.[23]

Given the absence of Illinois-Brick-Hanover-Shoe, in theory end-users (typically consumers) could sue as well as the intermediate buyers (typically retailers). In theory -- but only in theory. In most industries, end-users greatly outnumber intermediate buyers. Each individually pays only a miniscule portion of any monopolist's or cartel's total overcharge, and Japanese civil procedure does not provide for class actions.[24]

What is more, even though the J-FTC's inactivity does not preclude Civil Code claims on its face, it precludes them in practice. Because of the litigation costs involved, many U.S. antitrust plaintiffs can cost-effectively sue only when they can free-ride on the government's prior litigation. Absent that litigation, they will have little evidence on which to base their claims. Without an active J-FTC, in Japan they have little evidence.

II. Japanese Antitrust Enforcement

A. Introduction:

[20] United States v. Grinnell Corp., 236 F. Supp. 244, 247 (D.R.I. 1964), aff'd in part, 384 U.S. 563 (1966).

[21] Harry First, Antitrust Enforcement in Japan, 64 Antitrust L.J. 137, 163 tab. 3 (1995).

[22] Sometimes they can even invoke issue preclusion. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[23] J. Mark Ramseyer, The Costs of the Consensual Myth: Japanese Antitrust Enforcement and Institutional Bariers to Litigation in Japan, 94 Yale L.J. 604, 628-29 (1985).

[24] J. Mark Ramseyer & Minoru Nakazato, Japanese Law: An Economic Approach 146-47 (Chicago: University of Chicago Press, 1999).

To explore the implications this jurisdictional monopoly poses for antitrust enforcement in Japan, take a recent dispute. The case involved as flagrant an attempt to monopolize as any textbook writer could want. Even so, the J-FTC refused to act. Only after the victim, a small firm named Naigai, had sued the monopolist in court for injunctive relief -- sued, and won -- did the J-FTC decide to move.

In Section B below we recount the dispute. We follow with an analysis of the doctrinal developments behind the J-FTC's inaction (Sec. C), and survey broader data on J-FTC enforcement patterns (Sec. D). Finally, we analyze the economic implications involved (Sec. E).

B. The Naigai Story:

Naigai made ampules, the lightweight disposable glass pharmaceutical containers with break-off tops.[25] Typically, an ampule holds enough drug for one injection. For the U.S. market, pharmaceutical firms tend not to package their drugs in ampules. Instead, they use rubber-topped vials. Elsewhere, however, they use ampules, and in both Europe and Japan use ampules for about 40 percent of their single-dose drug sales.[26]

Ampules and vials accomplish the same purpose: both hold one dose. Because ampules use less glass, they cost about half as much as vials. Because physicians must break the glass rather than just poke their hypodermics through a rubber top, however, ampules are harder to use. Given that ampules cost a ninth of the price of a typical drug dose, convenience apparently beats cost in the world's richest economies.[27] It loses most elsewhere else.

Naigai was the biggest of the Japanese ampule makers. As of 1999, it employed about 80 workers and controlled a third of the 7 billion yen market (at the close of 1999, $1 equaled about 102 yen).[28] Since its start in the early post-war years, it had been run by its founder. In 1991, the founder resigned and passed control to his son, the University of Tokyo- and Wharton-trained Keisuke Muratsu.

To fabricate ampules, firms like Naigai use specially blown glass tubing. Although many firms supply the tubes internationally, within Japan only Nippon Electric Glass (NEG) does.[29] NEG is a large, Tokyo-Stock-Exchange- (TSE-) listed firm with nearly 4,000 employees.[30] It makes a wide variety of glass and other products, and ampule tubes account for only a small fraction of its sales. It sells about 15 percent of

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[25] In fact, the manufacturer was Naigai Glass [Naigai garasu kogyo, K.K.], and it bought its glass through a subsidiary named K.K. Naigai. Because the distinction does not matter for our purposes, we treat the firms as one and refer to the combined entity as Naigai.

[26] Yoshiro Miwa & J. Mark Ramseyer, Kyoso seisaku no nozomashii sugata to yakuwari (jo) [The Desireable Shape and Function of Competition Policy: Part I], 1261 Jurisuto, 144, 151 n.8 (2004).

[27] Miwa & Ramseyer, supra note (jo), at 151 n.8.

[28] Nihon keizai shimbun, June 10, 1999 (evening ed.); employee figures are as of 2003, Miwa & Ramseyer, supra note (jo), at 152.

[29] I.e., Nihon denki garasu, K.K.; see K.K. Naigai v. K.K. Nissho, unpub'd op. (Osaka D.Ct. Mar. 29, 1999), at 6, aff'd sub nom. Nipuro, K.K. v. K.K. Naigai, unpub'd op. (Osaka High Ct. Dec. 21, 2001); Nihon keizai shimbun, June 10, 1999 (evening ed.).

[30] Nikkei kaisha joho [Nikkei Company Data] 495 (Tokyo: Nihon keizai shimbun sha, Summer 2001-III).

this tubing abroad, and the rest within Japan.[31] Those domestic sales it routes through two wholesalers: Nissho in the west (where Naigai operated) and Maeda Glass in the east.[32] Nissho is itself a big TSE-listed seller of medical equipment with nearly 2,000 employees, and sells the tubing to 15 ampule fabricators.[33]

The ampule tube market was small, but it paid NEG and Nissho large rents. In the early 1990s, roughly comparable tubing from Germany and South Korea sold on the international market for at least 30-40 percent less than NEG and Nissho charged their Japanese buyers. Indeed, where Nissho charged domestic buyers 700 yen/kg, NEG sold comparable tubes abroad for only 175-200 yen/kg.[34]

Muratsu decided to exploit this differential. Even before becoming Naigai president, he explored the possibility of importing tubes. Upon taking office, he promptly met with tubing manufacturers in Germany, the U.S., and South Korea. He knew he could not buy all of Naigai's tubes abroad. Too many buyers specified NEG glass for that. Still, for two-thirds of their orders the buyers did not demand NEG glass, and for them he hoped to swap cheaper foreign glass.[35]

When Muratsu notified Nissho that he planned to fill some of his orders with foreign glass (or perhaps when Naigai's Korean supplier mistakenly faxed its invoice to NEG rather than Naigai), Nissho and NEG sensed a crisis. If the largest ampule maker started importing tubes, others would follow. No longer could they charge their high prices. To stop Muratsu from carrying out his plan, Nissho pleaded. It complained, it negotiated, it threatened. By 1992, however, Muratsu was already proceeding with his plans. Forthrightly, he imported much of the tubing he needed.[36]

Facing an intransigent Muratsu, in 1995 Nissho retaliated. That April, it hiked Naigai’s prices. Earlier, it had charged all domestic buyers uniformly. No more. Now it charged Naigai a 20 percent premium. Earlier it had offered all buyers a variety of discounts. Now it offered Naigai none.[37]

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[31] It also monitored its exports to prevent grey-market reimportation.

[32] I.e., Maeda garasu, K.K.; see Naigai v. Nissho, supra note (D. Ct.), at 5-6, 13, 33; Nihon keizai shimbun, June 10, 1999 (evening ed.).

[33] Naigai v. Nissho, supra note (D. Ct.), at 5; Nikkei, supra note (2001), at 1054; Nihon keizai shimbun, June 10, 1999 (evening ed.).

[34] Naigai v. Nissho, supra note (D. Ct.), at 22; Nipuro v. Naigai, supra note (High Ct.), at 17; Nissho ni haijo kankoku [Abolishment Recommendation to Nissho], Nihon keizai shimbun, Feb. 16, 2000; Miwa & Ramseyer, supra note (jo), at 150 nn. 6, 7.

[35] Naigai v. Nissho, supra note (D. Ct.), at 20-21, 34-35; Miwa & Ramseyer, supra note (jo), at 151.

[36] Naigai v. Nissho, supra note (D. Ct.), at 12-13, 34-38; Nipuro v. Naigai, supra note (High Ct.), at 11; Nihon keizai shimbun, June 10, 1999 (evening ed.).

[37] Naigai v. Nissho, supra note (D. Ct.), at 6-7, 17, 29 & Attach. 1; Kosei torihiki iinkai, K.K. Nissho ni taisuru kankoku oyobi Nihon denki garasu K.K. ni taisuru keikoku ni tsuite [Regarding the Recommendation to Nishso and the Warning to NEG] (Feb. 15, 2000), at 2 (hereinafter cited as J-FTC memo). We cite to the official internal annual reports as given to such depositories as the library of the University of Tokyo Economics Faculty. Confusingly, when the J-FTC sells the same annual report to the public it titles it as the report for the subsequent year. The J-FTC released its report on its 2002 fiscal year (April 2002-March 2003), for example, in the fall of 2003. It denominated the official copy deposited at

Naigai refused to pay the premium, but wanted Nissho tubes anyway. Fearing (reasonably enough) that Nissho would not deliver unless it paid the new higher price, in April 1996 it sued for declaratory judgment. Explained Naigai, Nissho's new prices constituted both an "unfair trade practice" and an "unreasonable restraint of trade." Nissho charged it a premium only because it imported some of its supplies, and that violated the Antimonopoly Act. Accordingly, the Osaka District Court should declare the premium illegal.[38]

Nissho did not respond to the suit by cutting Naigai's prices. Instead, it cut the prices it charged everyone else. Indeed, it cut their prices close to cost. Those rivals then cut their own ampule prices, and Naigai (despite its higher tubing costs) had no choice but to match them.[39]

Nissho did more. When Naigai continued to import, Nissho slashed Naigai's credit line and forced it to pay cash. Through its aggressively low export prices, NEG had in turn been causing trouble for its Korean rivals. Naigai had been trying to buy from those firms, but because of NEG's pricing they now found it hard to meet Naigai's orders. When Naigai tried to make do with NEG glass instead, Nissho refused to sell.[40]

At least in court Naigai won. After filing suit in 1996, it won at the District Court in 1999 and on appeal in 2001. The courts declared Nissho's pricing illegal, and held that Naigai need not pay the premium. When Nissho refused to deliver, the District Court ordered specific performance.[41]

At the J-FTC Naigai had less luck. Naigai started importing in 1992, and Nissho hiked its prices in 1995. Naigai filed a complaint with the J-FTC almost immediately. Yet not until June 1999 -- <u>after</u> Naigai had won in District Court -- did the J-FTC launch its own investigation.

Five years later, the J-FTC continues to investigate. In early 2000, it ruled that Nissho had violated Sections 3 and warned that NEG may have violated it too.[42] Although it imposed no penalties, if Nissho consented to the "recommendation order" Naigai could file a private damage action under Section 25. Nissho refused to consent, and that in turn forced the J-FTC to launch a series of hearings. The High Court affirmed the 1999 District Court decision in favor of Naigai in late 2001, but as of mid-2004, the J-FTC was still holding hearings. Until it issues a final order, Naigai can file a Civil Code damage action but not a Section 25 suit.

C. <u>Monopolization</u>:

1. <u>The doctrinal puzzle.</u> -- To explain why it hesitated to charge Nissho with monopolizing, the J-FTC might have pointed to legal doctrine. In its recommendation

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the University of Tokyo as the 2002 Annual Report. The identical report it sold to the public it denominated the 2003 Annual Report.

[38] Naigai v. Nissho, supra note (D. Ct.), at 12-13, 40.

[39] J-FTC memo, supra note, at 2-3.

[40] J-FTC memo, supra note, at 3.

[41] Miwa & Ramseyer, supra note (jo), at 147 & n. 4; Naigai v. Nissho, supra note (D. Ct.); Nipuro v. Naigai, supra note (High Ct.).

[42] In re K.K. Nissho, Kankoku sho [Recommendation], unpub'd (J-FTC, Feb. 15, 2000).

order, it wrote that Nissho had tried to monopolize the industry "by <u>excluding</u> the business activity of <u>Naigai</u>."[43] It set itself a hard task. Nissho did not force Naigai out of the industry. It did not even want Naigai out. It just wanted Naigai not to buy tubing abroad. The firms it <u>did</u> want to exclude were the foreign firms that might otherwise have sold tubing in Japan.[44]

Even had the J-FTC tried to show that Nissho attempted to exclude another tubing supplier, it would have found the job hard. In his own treatise, Shogo Itoda -- by far the most influential of the five commissioners -- defined exclusion as conduct with at least a “high probability of causing a firm to be excluded from the market."[45] Arguably, Nissho never took actions that the J-FTC could convince a judge had a “high probability” of excluding Naigai. After all, whether in Japan or here, judges like seeing things <u>ex post</u>. A decade after Nissho started retaliating, Naigai adamantly remains in business.[46]

The Antimonopoly Act did give the J-FTC an alternative: prove that Nissho "dominated" Naigai. According to the Act (Sec. 2(e)), a firm monopolizes a market if it either "excludes or dominates the business activity of another firm." Nissho may not have tried to exclude Naigai, but it unambiguously tried to dominate it.

The J-FTC did not try to show domination, and Itoda explains why. According to Itoda, to show that one firm “dominated” another the J-FTC would have needed to show that the one firm “directly or indirectly restricted the business activity of the other firm and ... caused it to follow its plans." That much the J-FTC could easily have shown. Crucially, however, by Itoda’s account, the J-FTC would have had to show that Nissho accomplished this domination by "holding stock or ownership interests, or by placing people on the board of directors.”[47] Given that Nissho never tried to buy an equity stake in Naigai or to control its board, by Itoda’s approach it never tried to dominate Naigai.

2. <u>The etymology of the doctrine.</u> -- Nissho controlled the domestic market for ampule tubing. To keep its monopoly, it threatened to punish any firm that tried to import cheaper tubes abroad. Nonetheless, according to the leading commissioner, it may not have tried to "monopolize."

The J-FTC apparently adopted this bizarrely restrictive approach in order to cabin the logic it had successfully sold the courts decades earlier.[48] In the 1950s as now, the premium soy sauce brand in Japan was Noda shoyu's Kikkoman. Kikkoman controlled a third of the Tokyo market, and Yamasa, Higeta, and Marukin trailed it with much lower market shares. When Kikkoman raised its price in 1950, Yamasa and the others promptly followed. Perhaps the J-FTC thought they had tacitly colluded on price. Rather than attack them for fixing prices, however, it attacked Noda for monopolizing the market.

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[43] Recommendation Decision, supra note, at 15 (ital. added).

[44] Why the J-FTC did not accuse Nissho of trying to exclude these foreign competitors mystifies us.

[45] Jirei dokusen kinshi ho (shimpan) [The Case Law on the Antimonopoly Act (New Ed.)] 49 (Tokyo: Seirin shoin, 1995).

[46] Of course, as we imply in note [-2], supra, Nissho <u>did</u> keep its foreign competitors out of the market.

[47] Itoda, supra note, at 49.

[48] Noda shoyu, K.K. v. Kosei torihiki iinkai, 10 Kosai minshu 743 (Tokyo High Ct. Dec. 25, 1957).

According to the theory the J-FTC successfully advanced, when Noda hiked Kikkoman prices the others had no choice but to raise theirs as well. Reasoned the J-FTC and the court, in this market price signaled quality, and consumers wanted high quality. If Noda raised its prices and Yamasa did not follow, consumers would see Kikkoman as the better soy sauce and buy less Yamasa. Explained University of Tokyo antitrust scholar Mitsuo Matsushita, faced with Noda's price hike its rivals had "no choice but to follow suit."[49] Noda dominated its rivals, domination constituted monopolization, and monopolization violated the Antimonopoly Act.

"And now what?," the J-FTC apparently then asked. Having sold the court an absurd theory, what was it to do? Commentators noted the obvious problems almost immediately. Wrote antitrust scholar Shigekazu Imamura, "simply being a price leader without [taking exclusionary tactics] does not constitute private monopolization."[50] Itoda himself repeated the point in 1995: holding the status of price leader is no evidence that a firm is trying to monopolize a market.[51]

In this context, the odd doctrinal glosses apparently represent the J-FTC's response to the "now what" problem. Having induced the court to take a wildly expansive position in Noda, the J-FTC apparently cabined the decision's reach by interpretation: it limited "domination" to cases where the predator took an equity stake or board seat in its rivals, and "exclusion" to those where it adopted strategies with a high probability of driving uncooperative buyers from the industry.[52] Plainly, its doctrinal glosses do limit Noda's reach. Unfortunately, they do so by excluding the sort of straightforwardly exclusionary tactics Naigai encountered.

3. Jurisdictional competition and doctrine. -- Had the J-FTC no jurisdictional monopoly, its bizarre interpretations would matter less. Suppose a rival national agency like the MoJ exercised concurrent jurisdiction over monopolization cases. If the J-FTC ignored a monopolist, the MoJ could sue the firm. If the J-FTC sold the court an absurd theory, the MoJ could give the court a chance to reverse itself. If prefectural governments could enforce antitrust laws, they could do the same.

Hypothetically, under current Japanese law so could private plaintiffs. After all, for many antitrust violations -- price-fixing, monopolization, unfair trade practices -- they can sue under the Civil Code independently of the J-FTC. Hypothetically -- but only hypothetically. As explained above, although J-FTC inactivity does not preclude such private litigation in theory, it precludes it in practice. Given the costs involved, claimants can cost-effectively sue only when they can ride "piggy-back" on the government's litigation. Absent a prior J-FTC case, they have no back on which to ride.

D. Enforcement Patterns:

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[49] Mitsuo Matsushita & John D. Davis, Introduction to Japanese Antimonopoly Law 26 (Tokyo: Yuhikaku, 1990).

[50] Shigekazu Imamura, Dokusen kinshi ho (shimpan) [Antimonopoly Act (New Ed.)] 73 n.1 (Tokyo: Yuhikaku, 1978).

[51] Itoda, supra note, at 57-58.

[52] On domination, see, e.g., In re Toyo seikan, K.K., 19 Shinketsu shu 87 (Sept. 18, 1972).

1. <u>The procedural mix</u>. -- a. <u>Criminal cases.</u> The J-FTC initiates almost no criminal cases (Table 1). Since 1947, it has launched only thirteen. Since 1980 it has begun six, and since 1998 two.[53]

[Insert Table 1 about here.]

By contrast, the U.S. Antitrust Division filed 41 criminal cases in 2001, 33 in 2002, and 41 in 2003. It initiated 80 restraint-of-trade investigations in 2001, 94 in 2002, and 133 in 2003. Although it currently focuses on international cartels, it remains active elsewhere as well. In 2001, for example, it launched 11 investigations for monopolization, 13 in 2002, and 10 in 2003. From all this, it collected during those three years criminal fines of $280 million, 75 million, and 107 million respectively. Indeed, since 1996 it has even collected over-$10 million fines from 11 Japanese firms.[54]

b. <u>High volume cases.</u> Not only does the J-FTC avoid criminal prosecutions, it tends to avoid any action that would involve the courts at all. Among the proceedings it initiates, by sheer number three -- all of them extra-judicial -- predominate. First, it files hundreds of administrative actions under a statute nominally designed to protect subcontracting firms.[55] By the terms of this statute, a buying firm (by stereotype the larger firm) must give each subcontractor a document detailing the terms of their deal.[56] Often the firms do exchange written documents,[57] but sometimes they apparently find the documentation not worth the bother. When they do, the J-FTC can order them to document the terms anyway. In 2002, it filed 1,366 actions under this statute, 1,127 for failure to exchange a written contract (Table 1).

Second, the J-FTC handles hundreds of predatory pricing (it classifies predatory pricing as an "unfair trade practice")[58] complaints. In 2002, for example, it handled 1,007 such complaints (Table 1), and disposed of them through expedited (and penalty-less) procedures. Of these cases, 904 involved discount liquor stores.[59] Having recently deregulated the retail liquor market, legislators face vociferous complaints from the small shops threatened by the new discount outlets.[60] To offer the legislators political cover, the J-FTC duly complied.

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[53] Kosei torihiki iinkai, ed., Kosei torihiki iinkai nenji hokoku, Heisei 15 nenban [Annual Report of the Fair Trade Commission, 2002 Edition] 360-62 (Tokyo: Kosei torihiki iinkai, 2002) (hereinafter J-FTC 2002 Annual Report). All data from this J-FTC source refer to the Japanese government's fiscal years.

[54] Antitrust Division Workload Statistics; Sherman Act Violations Yielding a Fine of $10 Million or More (Feb. 1, 2004); Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program (Feb. 1, 2004) -- all at www.usdoj.gov/atr/public.

[55] Shitauke daikin shiharai chien to boshi ho [Act to Prevent Delays, Etc. in Payments to Subcontractors], Law No. 120 of June 1, 1956.

[56] Shitauke, supra note, at Sec. 3.

[57] See Banri Asanuma, Manufacturer-Supplier Relationships in Japan and the Concept of Relation-Specific Skill, 3 J. Japanese & Int'l Eco. 1, 3-4 (1989).

[58] Fukosei na torihiki hoho [Unfair Trade Practices], FTC Kokuji No. 15 of June 18, 1982, Sec. 6.

[59] J-FTC 2002 Annual Report, supra note, at 277.

[60] Kosei torihiki iinkai, ed., Kosei torihiki iinkai nenji hokoku, Heisei 11 nenban [Annual Report of the Fair Trade Commission, 1999 Edition] 276 (Tokyo: Kosei torihiki iinkai, 1999); Kosei torihiki

Third, the J-FTC handles several hundred (again, penalty-less) cases a year under the deceptive advertising statute (Table 1).[61] Of the 534 cases brought by the J-FTC in 2002, 22 resulted in cease-and-desist orders. The rest ended in warnings.[62]

c. Recommendation orders. Of the procedures the J-FTC sometimes invokes, the most individually time-consuming involve "recommendation orders" (see Section I.A.2.b., supra). In 2002, the J-FTC issued 37 such orders (Table 2). In none did it try to impose a penalty. As one might expect with a sanctionless order, the firms generally acquiesced. Indeed, in 2002 only one firm contested its recommendation order.[63]

[Insert Table 2 about here.]

d. Surcharges. Instead of prosecuting cartels criminally, the J-FTC typically levies an administrative "surcharge" on their gross sales (again, see Section I.A.2.b., supra). It seldom demands significant amounts. From 1998 to 2002, it collected mean per firm amounts ranging from 5.5 million yen to 16.3 (Table 1). At the close-of-2002 exchange rate of 119 yen/dollar, that came to $46,000 to $137,000 per firm -- amounts that probably do not even force the firm to disgorge its monopoly overcharge. Given the trivial penalty, most respondent firms again acquiesce.

Primarily only firms assessed much higher amounts contest the surcharge. In 2002, for example, the J-FTC imposed surcharges on 599 firms, and 561 firms agreed to pay a mean 7.7 million yen ($65,000; Table 2). On the 38 firms that demanded administrative hearings, the J-FTC had imposed a mean 51.3 million.[64]

2. The substantive mix. -- Bid-rigging cases dominate the J-FTC's price-fixing portfolio -- whether criminal actions, recommendation orders, or surcharges. Of the 6 criminal cases it filed since 1980, 5 involved bid-rigging. Of the 37 recommendation orders since 1998, 31 concerned bid-rigging (Table 2).[65] And of the 24 billion yen it collected in surcharges since 1998, 64 percent came from bid-rigging cases.[66]

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iinkai, ed., Kosei torihiki iinkai nenji hokoku, Heisei 12 nenban [Annual Report of the Fair Trade Commission, 2000 Edition] 302 (Tokyo: Kosei torihiki iinkai, 2000).

[61] Futo keihin rui oyobi futo hyoji boshi ho [Act to Prevent Improper Promotions and Labeling], Law. No. 120 of 1956. The statute does include provisions for trivial fines, but only for refusal to cooperate with the J-FTC's investigations. See Futo keihin, supra note, at Sec. 12. Although the act nominally provides for concurrent prefectural enforcement (Sec. 9-2), the prefectures act under the supervision of the J-FTC.

[62] J-FTC 2002 Annual Report, supra note, at 298.

[63] J-FTC 2002 Annual Report, supra note, at 357.

[64] J-FTC 2002 Annual Report, supra note, at 130-31. Presumably, most firms only find it cost-effective to contest the higher surcharges. Despite the superficially mechanical surcharge formula, we suspect it harbors enough flexibility to let the J-FTC assess higher surcharges on those firms it believes will likely challenge its order anyway.

[65] J-FTC 2002 Annual Report, supra note, at 43-48. The figures on Table 2 are based on the J-FTC's own categorization. In fact, one of the cases in 2002 catalogued by the J-FTC as an unfair trade practice involved an attempt to rig public bids.

[66] J-FTC 2002 Annual Report, supra note, at 131 (uncontested surcharge actions only).

Yet the J-FTC did not begin the bid-rigging crusade; the MoJ did. Because bid-rigging also violates the Criminal Code, the Ministry can prosecute such cases without advance FTC action. It can, and did. Where it successfully obtained bid-rigging convictions already in 1989, the J-FTC did not file its first criminal bid-rigging case until 1993.[67]

By contrast, the J-FTC does have exclusive jurisdiction over monopolization, and uses it to prosecute no one. Although the U.S. Antitrust Division handles many fewer monopoly than cartel cases, it does handle some: in a typical year, about a dozen. In a typical year, the J-FTC handles none. Despite the retaliation against Naigai that Nissho began in 1995, as noted earlier the J-FTC did not open its investigation until 1999. This reluctance did not signal a change. Instead, in its half-century the J-FTC has filed only 13 recommendation orders for monopolization -- none from 1973 to 1985, and five from 1986 to 2002. Never has it brought criminal charges.[68]

E. <u>Market Consequences</u>:

1. <u>Introduction.</u> -- Outside of bid-rigging cases, through its inactivity the J-FTC has largely eliminated the legal penalties for anti-competitive behavior. For a firm and its officers, whether to fix prices or monopolize will depend in part on the penalty they potentially pay and the probability they will actually pay it. In Japan under the J-FTC, firms and officers face high potential criminal penalties. They face almost no risk of actually paying them.

The J-FTC does collect substantial surcharge revenues. In 2002, for example, it collected 4.33 billion yen (about $36 million). That year, the U.S. Antitrust Division collected fines of $75 million. The J-FTC collects small amounts from many firms; the Antitrust Division collects larger amounts from fewer. Under either regime, the comparison suggests, firms face similar risk-adjusted penalties.

For at least two reasons, the comparison misleads. First, even the surcharge the J-FTC imposes primarily on bid-rigging firms. Of the amount it raised in 2002, it collected 74 percent from bid-riggers. For other antitrust violations, firms face much lower risk-adjusted penalties.

Second, the comparison suggests deterrent equivalence only if firms break the law at similar rates in the two countries. We have no reason to think they do. Although Japanese firms do pay the administrative surcharge, as we suggest above the surcharge probably does not even recoup the monopoly overcharge. Effectively, it imposes no deterrent value at all. Corporate officers, in turn, face virtually no risk of going to prison.

2. <u>Large markets.</u> -- The effect that the J-FTC's inactivity has on competition will vary substantially by market. In large markets with low entry costs, the inactivity may matter very little. There, firms will price competitively regardless of what the J-FTC might do. In smaller markets, its under-enforcement can matter a good deal more.

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[67] J-FTC 2002 Annual Report, supra note, at 361. The Criminal Code cases are cited in note xx, supra. The only other criminal case since 1980 involved price-fixing in the commercial-use plastic-wrap market. The J-FTC filed its charges in 1991, and the district court convicted in 1993. See J-FTC 2002 Annual Report, at 361; Japan v. [Unnamed Parties], 840 Hanrei taimuzu 81 (Tokyo High Ct. Dec. 14, 1993).

[68] J-FTC 2002 Annual Report, supra note, at 358-62.

In big markets with low entry costs, most firms charge competitive prices, antitrust penalties or no. Suppose incumbent firms agree to hike prices. Despite their agreement, they will each have an incentive to renege and under-sell their rivals. Because in real-world markets they will renege, most cartels self-destruct. Ultimately, most earn their members only modest monopoly rents.

Often, a monopolist can do no better. Even if it faces no rivals now, if it charges monopoly prices it will. By hypothesis, its potential rivals incur few costs to enter the market, and (given the market size) large potential profits if they do. In such a market, an incumbent monopolist can stay a monopolist only by pricing so aggressively that no one has an incentive to enter.

Profit margins in the large Japanese markets reflect this logic. No doubt readers have heard the stories about American firms that went to Japan, lost their money, and came home broke. They did not come back broke because they found the markets closed. They came back broke because they found the markets so competitive.

In a recent study, Michael Porter and Mariko Sakakibara survey the extensive empirical evidence on Japanese market competition. Even "at the height of the period during which Japan's supposedly interventionist industrial policy seemed to be ascendant," they write, "the level of competition in Japan was similar [to] if not higher than that of other industrialized economies."[69] David Weinstein finds that even legally sanctioned cartels did not significantly raise prices.[70] Conclude Porter and Sakakibara, in "the internationally successful industries, internal competition in Japan was invariably fierce . . .."[71]

3. Small markets. -- Little markets with high entry costs are different. There, antitrust authorities can indeed affect competition; there, if they do not enforce the statute an incumbent monopolist can successfully charge monopoly prices. The ampule tubing market is a case in point. Although only NEG made ampule glass in Japan, many others could have. Internationally, several already did. Potentially, any one of them could have cultivated the Japanese market. Domestically, at least a half-dozen major firms made glass products, and NEG did not rival the largest. Potentially, any one of them could have entered the Japanese ampule tubing market as well. Where NEG had sales of 340 billion yen at the close of fiscal 2001, for example, industry leader Asahi Glass had sales of 1.3 trillion.

None of NEG's international and large domestic rivals did try to enter the Japanese ampule glass market, and perhaps that is the point. NEG and Nissho charged high prices, and any of the major rivals could have entered the market and contested them. None did. Instead, when Naigai tried to buy cheaper tubing abroad, NEG and Nissho hit hard.

As badly as NEG and Nissho hurt Naigai, they could hardly have held a firm like Asahi Glass at bay. If fear of NEG and Nissho kept incumbent ampule fabricators from

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[69] Michael E. Porter & Mariko Sakakibara, Competition in Japan, 18 J. Econ. Perspectives 27, 32, 35 (2004).

[70] David Weinstein, Evaluating Administrative Guidance and Cartels in Japan (1957-1988), 9 J. Japanese & Int'l Eco. 200 (1995).

[71] Porter & Sakakibara, supra note, at 28.

buying its tubes, Asahi could have integrated into fabrication. Among the fabricators, Naigai with its 80 employees was the biggest. Asahi glass employed over 7,000. If it had wanted to make its own ampules, it could have built its own plant or bought an existing fabricator outright.

Apparently, for NEG's potential rivals ampule tubing presented too specialized and small a market to contest. To enter the ampule sub-market, they would have needed to invest in ampule-tube production facilities, and possibly in those for ampule fabrication as well. Both processes involved substantial technological demands.[72] In fact, several decades earlier Asahi Glass had itself tried to compete in the ampule tubing market, and failed. If a rival like Asahi again did invest in the facilities and start to produce, NEG would then have promptly cut prices to competitive levels. In theory, the major firms could have tried to enter the market. In fact, they never did.

4. Market size in Japan. -- If the effect of antitrust enforcement varies by the size of the market, market size varies by time and geography. In the late 19th century, high transportation costs and geographical diversity kept much of the U.S. partitioned into small and isolated markets. Consistent with the gains from antitrust enforcement in such markets, between 1867 and 1893 24 states passed antitrust statutes.[73]

By contrast, modern Japanese markets are large. Japan packs half the population of the U.S. into an area smaller than California, and within that area packs most of the 127 million into a few metropolitan centers. The large firms then move their employees regularly among those centers. Regional differences have long since disappeared, ethnic distinctions are trivial, class differences barely survive, and wealth is more equally distributed than in the U.S.

As a result, Japanese markets tend to be big. Because transportation is cheap, geography does not segment firms by locale. Instead, firms buy factor inputs and sell intermediate goods on national markets. Because regional, ethnic, class, and economic differences are so small, tastes do not much vary across the country. Instead, what a firm can sell a 45 year-old man in Tokyo it can probably sell a 45 year-old in Hokkaido.

The implications for antitrust follow. With a large, mobile, and relatively homogeneous population in a few metropolitan centers, Japan has few isolated markets. It has some, the ampule tubing market being a prime example. But it has fewer than in a more segmented economy like the 19th-century U.S. -- and suffers correspondingly smaller efficiency losses from any bureaucratic indolence in antitrust.

III. Jurisdictional Monopoly in Government

A. Monopoly and the Easy Life:

1. Monopolist firms. -- Potentially, the rewards of monopoly lie in an easy life. With but one seller from whom to buy, consumers unhappy with the goods a monopolist

[72] Those requisite investments, in turn, created scale economies that would likely have made it inefficient for a second firm to manufacture tubing in Japan unless that supplier were to sell the tubing internationally as well. Much of the tubing-production technology had been developed by Nissho; NEG manufactured the tubing using Nissho's technology.

[73] Donald J. Boudreaux, Thomas J. DiLorenzo & Steven Parker, Antitrust Before the Sherman Act, in McChesney & Shughart, eds., supra note, at 255, 267. Obviously, this does not preclude other reasons legislatures in these states might have passed the statutes.

sells have no recourse but to do without. With no rivals to whom to turn, they give the seller less reason to innovate and less cause to cut costs. Rather than maximize profits, its managers maximize slack and live the easy life.

Potentially, but only potentially. Ultimately, whether a monopolist's managers can maximize slack depends on capital-market constraints. Should they shirk, they give their investors an incentive to take control. Through a tender offer or negotiated acquisition, they can sell to an acquirer who will intervene, slash slack, and boost effort and innovation back to competitive levels. Fearing his intervention, in equilibrium monopolist managers will work at competitive levels and pay the firm's monopoly rents to their investors.

2. <u>Monopolist bureaucracies</u>. -- a. <u>The slack-maximizing option.</u> Monopolist bureaucrats cannot pay investors any monopoly rents as higher profits. Unable to raise profits, might they rationally maximize their job amenities instead? Perhaps their peers at monopolist firms work and innovate at market rates, and pay investors the monopoly rents as higher profits. With no profits to maximize, might monopolist bureaucrats pay themselves the rents instead -- through higher pay, higher budgets, greater power, or simple slack?[74] To raise their pay, budget, or power, they would need to lobby the legislature. As they can maximize slack by default, might they choose that route instead?[75]

b. <u>The J-FTC choice.</u> Judged by their work product, J-FTC bureaucrats do seem to maximize slack. Consistently, they focus on those tasks that elicit little opposition. Every year, they process a thousand expedited predatory pricing complaints. Facing no penalty the firms duly accede -- and the J-FTC closes the case. Every year, they handle hundreds of deceptive advertising claims. Again facing no penalty the firms comply -- and the J-FTC closes the case. And every year, they process a thousand cases involving firms that fail to document the deals they cut with their suppliers. The firms swap the documents -- and the J-FTC once more declares victory and goes home.

J-FTC bureaucrats do process a few dozen "recommendation orders." Yet here too they rarely collect a substantial penalty. Imposing no penalty, they elicit little opposition. Only criminal cases would generate the opposition a slack-maximizing bureaucrat would dread, and J-FTC bureaucrats avoid them like the plague. Price-fixing they seldom prosecute, and monopolization never. Even when they do prosecute, they rarely demand prison time for the executives involved

On but one antitrust violation does the J-FTC even purport to impose heavy penalties: bid-rigging. Yet bid-rigging is an area where it enjoys no jurisdictional

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[74] Instead of shirking, J-FTC bureaucrats could of course choose to indulge any agency slack by promoting policies different from those of the LDP. We instead focus on simple shirking because we are aware of no one who claims that J-FTC commissioners hold policy preferences significantly different from those of the LDP leadership.

For the hypothesis that bureaucrats instead maximize power, see Macey, supra note; for the hypothesis that they maximize their budget, see William Niskanen, Bureaucracy and Representative Government (Chicago: Aldine-Atherton, 1971).

[75] For an analysis of judges as slack-maximizing agents, see Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 S. Ct. Econ. Rev. 1 (1993).

monopoly. Over bid-rigging but not other antitrust violations, prosecutors at the MoJ can file criminal charges without J-FTC clearance. And even here, the J-FTC tends to rely on surcharges. Through the mechanism it collects trivial per-firm penalties, and spares the executives prison time.

B. Electoral Market Effects:

1. The market constraint. -- At least potentially, all this misleads. At least potentially, the electoral market should constrain monopolist bureaucrats in much the way the corporate-control market constrains monopolist managers. In economic markets, the notion of easy-living monopolists hinges on a partial-equilibrium analysis. A general-equilibrium analysis would instead incorporate off-setting corporate-control-market effects.

So too with the electoral market. A general-equilibrium analysis would look not just at the bureaucratic incentive to maximize slack, but at the off-setting effect of the electoral market.[76] At root, government bureaucrats (as agents) work for politicians (as principals), and politicians need to maximize votes -- or they do not stay politicians.[77] Indirectly to be sure, to obtain those votes they hire, fire, promote, and supervise the bureaucrats through whom they supply voters with the policies and programs voters demand. Unless they offer voters a portfolio of services at least as desirable as what those voters could obtain from their rivals, voters will elect the rivals instead. In the limit, as Jeffrey Banks and Barry Weingast put it, "those agencies that have a significant potential to extract rents from politicians simply will not be created."[78]

J-FTC bureaucrats work for politicians who face exactly such electoral-market constraints. From 1955 to 1993 and again since 1996, those politicians have come from the conservative Liberal Democratic Party (LDP). Yet that they came from a single party does not mean they faced uncompetitive electoral markets. It simply means the party won the competitions.

The LDP won the elections barely. Through most of the post-war years, it won on margins that teetered regularly on the edge of defeat: at or below 50 percent during most of the three decades after 1960.[79] Individual LDP legislators regularly lost, and by

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[76] Additionally, to the extent that regulators do enjoy supra-market slack, they presumably dissipate the anticipated rents in competing for the job. See Pablo T. Spiller, Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed," 33 J. Law & Econ. 65, 68 (1990).

[77] See generally Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, A Theory of Political Control and Agency Discretion, 33 Am. J. Pol. Sci. 588 (1989); Barry R. Weingast, The Congressional-Bureaucratic System: A Principal-Agent Perspective (With Applications to the SEC), 44 Pub. Choice 147 (1984).

We do not quarrel with the many scholars who argue that political considerations may drive antitrust enforcement. E.g., Shughart, supra note (McChesney book); Richard A. Posner, The Federal Trade Commission, 37 U. Chic. L. Rev. 47 (1969). Rather, we explore here the agency slack in precisely that relationship between politicians and antitrust bureaucrats.

[78] Jeffrey S. Banks & Barry R. Weingast, The Political Control of Bureaucracies under Asymmetric Information, 36 Am. J. Pol. Sci. 509, 521 (1992).

[79] J. Mark Ramseyer & Frances McCall Rosenbluth, Japan's Political Marketplace 41 (Cambridge: Harvard University Press, 1993).

some measures faced reelection odds lower even than those in the U.S., U.K., and (then-West) Germany.[80] Ultimately, the politicians who controlled the post-war Japanese government (nearly) consistently came from the LDP only because the LDP (nearly) consistently offered voters a policy-and-program portfolio that more closely matched voter preferences than those of its rivals.

2. Electoral markets and information. -- Electoral markets may not eliminate agency slack at bureaucracies, but they do give politicians an incentive to keep it low. Economic markets do not eliminate slack in firms either, but they induce the firm to hold it close to cost-justified levels. So long as voters care about bureaucratic efficiency, those politicians who reduce slack should capture an electoral advantage. "If information asymmetries are potentially advantageous to agencies," explain Banks and Weingast, "politicians will look for ways to mitigate this problem or will not create the agencies in the first place."[81] Put conversely, politicians will do create the agencies without mitigating the problem will not stay politicians. All else equal, those politicians we see in office should be those who find ways to keep agency slack in check.

One way politicians can generate the information they need to check slack is by inducing an agency to compete against other agencies. In economic markets, principals use such tournaments to obtain information about their agents' performance.[82] Investors gauge a firm's performance by comparing it to the market, for example, while corporate boards gauge the performance of one division by comparing it to another. In government, politicians need analogous information about their agencies, and one way to obtain it is by assigning bureaucrats overlapping jurisdiction.

In thus gathering information about the relative performance of their bureaus, politicians affect the performance itself. When agents know that their principal will gauge and reward their performance ex post, they exert more effort ex ante. If overlapping jurisdictions give politicians better information about the relative performance of their bureaucrats, those bureaucrats will work harder from the start.

3. The J-FTC and the electoral market. -- a. Bid-rigging. Slack or no, the J-FTC does seem to choose its work with eye on electoral dynamics.[83] During the early post-war decades, the LDP relied heavily on the rural vote. In part the party's leaders courted that vote through agricultural protection policies, but in part they courted it through lavish private goods as well. Those private goods cost money, and to pay for them the leaders extracted funds (both legally and illegally) from the business community. In exchange, they supplied the inefficient regulatory policies that earned the party its reputation for "money politics."

By the late 1970s, LDP leaders had decided to jettison this market niche. Instead, they would re-position their party as the representative of the urban consumer. Voters

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[80] Kent E. Calder, Crisis and Compensation: Public Policy and Political Stability in Japan, 1949-1986 66-69 (Princeton: Princeton University Press, 1988.

[81] Banks & Weingast, supra note, at 521.

[82] Lazear & Rosen, supra note.

[83] For a fuller discussion of the ties between the electoral rules and the changing pattern of rural-urban and business-consumer bias in Japanese politics, see Ramseyer & Rosenbluth, supra note, at chs. 2-5.

had moved to the cities en masse, they reasoned, and unless they shifted the party's niche they were unlikely to stay in power. By the 1990s, they had largely abandoned the protectionist agricultural policies to the Japan Communist Party.

To become a consumer party, however, the LDP leaders also needed to abandon the inefficient regulatory policies they had long traded for financial support. In the past, they had routed the money raised through these policies to the support groups (the koenkai) that kept their back-benchers in office. Yet those support groups worked less well among transient urban voters than they had in the 1960s among more sedentary provincial voters. To market the party to urban voters, reasoned party leaders, they needed to abandon the "money politics" they had used so successfully in the past.

To claim to abandon money politics is one thing; to claim it credibly is another. To make their claims credible, through the MoJ LDP leaders began prosecuting legislators, bureaucrats, and business executives who transferred funds illegally. Most flamboyantly, in the late 1970s prosecutors brought charges against ex-prime minister Kakuei Tanaka for taking bribes from Lockheed. By the 1990s, they had institutionalized their anti-corruption crusade in wide-spread bid-rigging prosecutions. The J-FTC merely followed this lead.

b. Predatory pricing. If the bid-rigging prosecutions reflect the LDP's "new" electoral strategy, the predatory pricing and deceptive advertising prosecutions reflect the old. More specifically, they reflect the LDP's long-time reliance on the small-business sector. The gains from competition accrue broadly to the public, while the costs fall heavily on narrowly focused and clearly identifiable groups. In the Japanese retail industry, those costs fell on the small high-cost outlets that had long supported the LDP.

By the close of the 20th century, many of these small shops had become obsolete.[84] When Japanese consumers lived without cars, they bought local -- and these shops facilitated that. Once they acquired cars, however, they increasingly bought in bulk from larger but more distant discount stores over the weekend. As part of their strategy of shifting toward urban consumers, LDP leaders had themselves promoted this transition -- not just by building networks of suburban highways, but by deregulating fields like the retail liquor industry as well. When their traditional supporters suffered, they offered the predatory-pricing prosecutions as a transitional measure. The J-FTC simply enforced these stop-gap policies.

c. Deceptive advertising. If the J-FTC uses the predatory-pricing claims to curb price competition, it uses the deceptive-advertising claims to curb non-price competition. Here, it initiates two types of actions. First, it enforces limits on the type and value of promotional items retailers can give customers. Some of these limits it sets administratively. For others it relies on industry trade associations. As of 2003, 39 associations used the statute involved to maintain their own limits on promotional gifts.[85]

In recent years, the J-FTC enforced promotional restrictions in about a fifth to a third of its deceptive advertising actions. In the 1980s, it enforced them in as much as 80

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[84] See generally Yoshiro Miwa, Kiyohiko G. Nishimura & J. Mark Ramseyer, eds., Distribution in Japan (Oxford: Oxford University Press, 2002).

[85] J-FTC 2002 Annual Report, supra note, at 304, 431-36.

percent of the actions.[86] In a typical 2002 case, for example, it attacked a golf course for offering a 1 million yen (about $8,400) sweepstakes prize to frequent players. Like the predatory-pricing claims, these cases do not promote competition. They retard it.

Second, through the statute the J-FTC polices deceptive advertising. At least according to its annual report, it stops genuinely misleading claims. Among its 2002 cease-and-desist orders it attacked firms that presented imported beef as Japanese, for instance, or duck down as goose. Here too, however, it relies heavily on industry self-regulation: 62 trade associations use the statute to maintain their own codes on acceptable advertising.[87]

4. Information asymmetry and the J-FTC. -- a. Bid-rigging. Not only does the J-FTC shape its work by LDP electoral strategy, it focuses on the work about which the LDP has the best information. This is not accidental; it is what theory predicts: where politicians most strongly care about what their bureaucrats do, they will find ways to monitor; where politicians most closely monitor, bureaucrats will perform.

To return to the central dichotomy in this article, compare monopolization and bid-rigging. Over monopolization the J-FTC has a jurisdictional monopoly; over bid-rigging it does not. Suppose it never prosecutes anyone for monopolization. Maybe it never prosecutes because no one monopolizes, but maybe it never prosecutes because prosecution requires effort. Absent information about the prevalence of monopoly in the market, LDP leaders will not know.

By contrast, suppose the J-FTC never prosecutes anyone for bid-rigging. Again, maybe it never prosecutes because no one rigs bids, but maybe it never prosecutes because prosecution takes work. When the MoJ began to prosecute bid-riggers successfully, LDP leaders found the answer: the J-FTC had been shirking.

The information politicians generate can affect bureaucratic performance, and at the J-FTC it apparently has. They have no information about monopolization -- and the J-FTC invests virtually no effort in pursuing monopolists. They do have information about bid-rigging -- and the J-FTC launches even criminal cases against bid-riggers (though only on rare occasions). Indeed, for all practical purposes the J-FTC launches criminal cases only against bid-riggers.

b. Predatory pricing and deceptive advertising. The hundreds of predatory pricing and deceptive advertising actions that the J-FTC files similarly reflect the information politicians collect. Although the J-FTC does have a jurisdictional monopoly over these claims, politicians have other sources of information. Price competition benefits consumers, but imposes costs on a narrowly focused group of obsolete producers and retailers. These firms, as noted earlier, long gave financial and logistical support to the LDP politicians. Although LDP leaders have been trying to jettison them, they retain some access to legislators -- and the J-FTC's enforcement numbers reflect that access. Should discounters slash prices and the J-FTC not respond, these firms will complain to their local legislator. On issues that matter to them, as Mathew McCubbins and Thomas Schwartz explain, constituents can regularly report to their legislators about their

[86] J-FTC 2002 Annual Report, supra note, at 303, 428-29.

[87] J-FTC 2002 Annual Report, supra note, at 304, 437-45.

bureaucrats.[88] Jurisdictional monopoly or no, on these issues politicians will have the information they need to gauge the J-FTC's performance.

IV. Toward a Theory of Jurisdictional Monopoly

A. Introduction:

If legislators granted an agency a jurisdictional monopoly, what effect would the monopoly have on the agency's performance? When would legislators find it advantageous to give it that monopoly? Although the questions suggest a general "theory," we offer none here -- no formal model, no econometric tests, not even a broad-based comparative analysis. Rather, we have a much more modest aim. Based on this frankly anecdotal account of the travails of Naigai and the J-FTC, we instead suggest several components that a general theory might include.

B. The Economic Effect of Jurisdictional Monopoly:

1. Introduction. -- When politicians delegate authority to multiple agencies, they (as principals) potentially create a tournament among their bureaucrats (as agents). Through that tournament, they obtain information by which to gauge relative performance. Grant an agency a jurisdictional monopoly, and they deprive themselves of that information. With less information by which to monitor, they create the potential for slack.

Bureaucrats at monopolist agencies can indulge that slack in two very different ways: through inactivity or through "industry capture." At the J-FTC, they apparently chose to do less work. Elsewhere, however, they sometimes adopt the goals of the regulated industry. Many of the classic examples of captured bureaucrats, for example, involved monopolist agencies: the ICC and the railroads, local regulators and the public utilities, the CAB and the airlines, or state bar associations and lawyers.

2. Industry-regulating agencies. -- Whether monopolist bureaucrats work for the regulated industry or simply work less seems to turn on their ostensible mandate: whether to regulate a given industry or to regulate a given class of conduct.[89] In either case, they choose the strategy that minimizes their effort. What strategy minimizes effort, however, depends crucially on the job legislators assigned them.

For example, suppose bureaucrats regulate a given industry (the ICC, for example, or the CAB). As scholars in the 1970s and 80s showed at elaborate length, they minimize effort by giving firms in the industry what they want. The resulting regulatory program will redistribute wealth from consumers to producers, but by the classic Olsonian logic dissatisfied producers will protest more vehemently than dissatisfied consumers. Give the former what they want, and agency bureaucrats obtain an easy routine. Crucially for our analysis here, producers do not want agencies that do nothing. They want agencies

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[88] McCubbins & Schwartz, supra note; Arthur Lupia & Mathew D. McCubbins, Designing Bureaucratic Accountability, 57 L. & Contemporary Prob. 91 (1994).

[89] A distinction made, for example, in Macey, supra note.

that create and protect monopoly rents. That, as the scholars pointed out, the agencies routinely gave them.[90]

3. Conduct-regulating agencies. -- By contrast, suppose bureaucrats regulate a given class of conduct like price-fixing or monopolization. They do not interact regularly with a small cohort of firms. Instead, at least by their mandate they police a larger population of firms against specified misconduct.

These conduct-regulating bureaucrats minimize effort by closing their eyes. Unless their politician-principals can gauge the extent of the misconduct independently, in ignoring what occurs they reduce their workload. Sure it prosecuted no firms for monopolization, the J-FTC could explain. It prosecuted none because none monopolized.

When the constitutional congress adopted a federal structure in 1787, it limited the number of conduct-regulating agencies that would later take a jurisdictional monopoly. Like the US-FTC and the Antitrust Division, most such federal agencies share their mandate with state competitors. Under Japan's more centralized governmental structure, national politicians can readily grant conduct-regulating bureaucrats a jurisdictional monopoly, and sometimes do. Such agencies minimize their effort by turning a blind eye to misconduct. On most antitrust violations, apparently, that is exactly what the J-FTC has done.

C. Jurisdictional Monopoly and the Electoral Market:

A fuller theory of bureaucratic jurisdiction would not just explain the effect that a jurisdictional monopoly can have on an agency's performance. It would also address the incentive politicians have to grant such a monopoly. When would vote-maximizing legislators give their agencies a monopoly? Agencies face some economies of scale, and occasionally those of scope as well. To the extent they do, legislators who split an agency's work among several potentially reduce its effectiveness. When might politicians nonetheless structure competition into an agency's jurisdiction?

We sketch three preliminary considerations. First, legislators will more likely grant an agency a jurisdictional monopoly if they plan to use the agency to distribute regulatory rents. For all the reasons identified in the literature, politicians sometimes find it advantageous to grant firms those rents in exchange for money and other favors. The rents are usually inefficient, but for politicians the contributions sometimes more than offset any voter disapproval.

Politicians determined to reward their favored firms with these regulatory rents may give the agency a jurisdictional monopoly precisely because it creates slack. For an industry-regulating agency, the strategy that minimizes effort is the strategy that grants the industry what it wants. The jurisdictional monopoly will result in "agency capture" -- but to politicians hoping to distribute regulatory rents to incumbent firms, that may be the whole point.[91]

[90] Macey makes a similar prediction, though he argues that the single-industry agencies back the goals of the regulated industry because bureaucrats maximize authority rather than slack. See Macey, supra note, at 105-06.

[91] As described, of course, this is a corner solution. In most cases, the interests of the enacting coalition among politicians and the regulated industry will not be perfectly aligned. See Spiller, supra note (JLE).

Second, politicians have little reason to establish competitive tournaments over tasks that carry no electoral consequences. Take the J-FTC. The agency regulates market competition, yet most large markets are naturally competitive without antitrust agencies, and in Japan most markets are large. Necessarily, Japanese politicians would earn only modest gains through more active antitrust.

The gains to an active antitrust policy are not zero, as Naigai's travails illustrate. Even in Japan, some markets are small enough and some entry barriers high enough to let incumbents price monopolistically. In such markets, more active antitrust enforcement might indeed generate efficiency gains -- and occasionally voter support. Such markets are few, however, and if sufficiently few rational legislators may decide not to use tournaments to induce effort.

Last, legislators will more likely grant an agency a jurisdictional monopoly when they can assess its performance independently. By Contrast, they structure jurisdictional competition into their agencies when they need a tournament to assess bureaucratic performance. If they have other ways to gauge that performance, they will not need to institutionalize competition through overlapping jurisdictions. Not needing bureaucratic competition, they may opt for the bureaucratic economies of scale and scope inherent in a jurisdictional monopoly instead.

IV. Conclusions

Would politicians give their agencies a jurisdictional monopoly, if only their bureaucrats would work?

Would dinosaurs have developed oppositional thumbs, if only the meteorite had missed. Some counter-factuals are worth asking, but some are not. If bureaucrats find it in their self-interest to exert effort, they will exert it. Otherwise they will not, and they do not always find it in their self-interest. Primarily only when the politicians who control their careers have access to information about their performance, will they find it in their self-interest.

The J-FTC holds a jurisdictional monopoly over most antitrust issues. Consequently, on most issues politicians cannot compare the J-FTC's performance with that of other bureaucrats, and on most issues it chooses the path of least resistance. For virtually all antitrust violations, it ignores criminal (and heavy administrative) penalties, and on virtually all issues, Japanese firms face no serious penalties for violating the antitrust statute. Japanese politicians do have information about J-FTC performance on those selected issues that matter to them. And where politicians have that information, J-FTC bureaucrats work hard.

More generally, politicians do not win elections by creating agencies they cannot control. As a result, in equilibrium they will grant an agency a jurisdictional monopoly only in limited circumstances. In equilibrium, they may grant a jurisdictional monopoly if they think it will lead to agency capture, and a captured agency maximizes votes. They may grant a jurisdictional monopoly if they think an issue presents no serious electoral consequences. And they may grant a jurisdictional monopoly if they have other ways to assess an agency's performance.

Table 1: J-FTC Work Product --
Selective Actions, 1998-2002

	1998	1999	2000	2001	2002
Criminal prosecutions	0	2	0	0	0
Recommendations	27	27	18	38	37
Of which --					
Monopolization	1	1	0	0	0
Bid-rigging	17	18	10	33	30
Surcharge actions	16	20	16	15	37
Of which --					
No. of firms	576	335	719	248	561
Per firm amount	547	1,630	1,185	887	773
Predatory pricing	574	672	1,044	2,624	1,007
Subcont'g violations	1,272	1,104	1,140	1,314	1,366
Of which --					
Inadeq. document'n	1,039	826	843	1,067	1,127
Deceptive advertising	461	322	471	472	534

Notes:
"Surcharge actions": uncontested actions only.
"Per firm amount": x 10,000 yen.
"Predatory pricing": Number of expedited proceedings involving low-priced retail sales.
"Subcontracting violation": Investigations under the Shitauke daikin shiharai chien to boshi ho [Law to Prevent Delays, etc., in Payments to Subcontractors], Law No. 120 of 1956.
"Inadequate documentation": Failure to deliver written contracts.
"Deceptive advertising": Disposition under the Futo keihin rui oyobi futo hyoji boshi ho [Law to Prevent Unjust Premia Materials and Unjust Indications], Law No. 1 of 1962.
“Surcharge actions” exclude contested surcharges (which have generally ranged from 1 to 4 per year).
Cases are for the Japanese fiscal years involved.

Source: Kosei torihiki iinkai, ed., Kosei torihiki iinkai nenji hokoku, Heisei 14 nenban [Annual Report of the Fair Trade Commission, 2002 Edition] 16, 39-41, 135, 284-285, 356-57 (Tokyo: Kosei torihiki iinkai, 2003).

Table 2: Recommendation Orders and Warnings, for Antimonopoly Act Violations, 2002

	Recommendation Orders	Warnings	Cases Dropped	Total
Monopolization	0	1	1	2
Price-fixing	2	7	1	10
Bid-rigging	30	5	0	35
Other cartel	1	4	0	5
Unfair trade practice	3	38	3	44
Other	1	11	0	12
Total	37	66	5	108

Notes: Warnings include keikoku and chui, and exclude the predatory pricing, subcontracting, and deceptive advertising actions listed in Table 1. Cases are for the 2002 fiscal year.

Source: Kosei torihiki iinkai, ed., Kosei torihiki iinkai nenji hokoku, Heisei 14 nenban [Annual Report of the Fair Trade Commission, 2002 Edition] 41 (Tokyo: Kosei torihiki iinkai, 2003).