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COMPETITION LAW FOR THE ASIA-PACIFIC ECONOMIC COOPERATION COMMUNITY: DESIGNING SHOES FOR MANY SIZES

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The articles of this inaugural volume of the *Washington University Global Studies Law Review* initially were presented at two related conferences on competition law within the Asia-Pacific Economic Cooperation (APEC) community. The first conference was held in Victoria, British Columbia, in September 2000; the second, in Tokyo, Japan, in July 2001. Both were sponsored jointly by the Chuo University Institute of Comparative Law in Japan, the University of Victoria Centre for Asia-Pacific Initiatives in Canada, the Asian Law Center of the University of Washington in Seattle, and the Whitney R. Harris Institute for Global Legal Studies of Washington University in St. Louis. Neither conference would have been possible without the generous support of the Center for Global Partnership of the Japan Foundation.

The aims of the project were twofold. We sought first to evaluate the current status of competition legislation in selected countries within the APEC community. At both meetings, the participants thus reviewed several of the most recent efforts to create effective regimes to promote competition policy within the APEC community. We considered what were, in effect, national reports on recent legislation in Indonesia and Thailand and the prospects for similar legislation in the People's Republic of China.

A second and more ambitious objective was to attempt an evaluation of both the most established competition law regimes in East Asia and a

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cluster of current issues. Thus, the discussions included critiques of competition policy in South Korea and Taiwan. In addition, we raised more general concerns related to the purpose and scope of competition policy and implementation in East Asia and the APEC region. More particularized questions and concerns were directed to competition policy in Japan, Canada, Australia, and the United States, especially with respect to either particular areas such as electric power utilities, telecommunications, and intellectual property, or law-related issues such as extraterritorial enforcement and cartel exemptions. During the discussions, two broader, more overarching themes emerged. They are captured in two words: *whether* and *what*.

The enactment of competition legislation has become a global phenomenon. Competition law has, in effect, become the latest fashion. To be someone, it appears, everyone—including the members of the APEC community—must have a competition statute. For some (particularly the countries of Central and Southeastern Europe as well as the Baltic states) the explanation lies in more than pure fad. To be someone means to be a member of the European "club" and true to the tradition of elite clubs everywhere. Proper dress—in this case competition legislation acceptable to those who run the club—is one of the prerequisites of membership.

In this proliferation of competition laws, often scant attention is paid to the most basic questions. For the most part these are quite evident, but they still need to be articulated repeatedly. All too often they are ignored, taken for granted, or simply left unstated. The first question is whether a competition law is needed at all. All but a few advanced industrial states can restate this threshold question by asking whether any type of competition law is appropriate for countries that seek to achieve sustained economic growth. Even when this initial question is answered affirmatively (i.e. that competition policy is important and some sort of competition law would be beneficial), a second question is posed even more rarely: what kind of competition policy and legal regime for its implementation are then appropriate? For many countries, legislators act as if a competition statute without a policy is sufficient. All that seems to be desired is something on the books as well as the additional façade of a nominal enforcement authority in charge. Legislation thus is drafted and enacted with little attention either to the underlying policies that the law might have been designed to establish, or to the capacity of the country's administrative and legal institutions to enforce effectively.

One can approach the questions of *whether* and *what* from several perspectives. Economic analysis and comparative legislation come immediately to mind. Some might prefer to use an essentially historical

approach. They thus could point to the United States, Germany (and Europe), and Japan as successful examples of industrial countries with the oldest and, by most accounts (excluding Japan), most effective competition laws. The problem with such assertions is that the historical record is quite muddled. With some irony, we become more faithful to the historical experience by debating the issues of *whether* and *what*. The principal antitrust statutes were themselves the product of great uncertainty—and, initially in Germany and Japan, imposed regimes. No consensus existed as to the economic need or consequences of the legislation that these countries eventually enacted. The statutes that did emerge after considerable debate were products of compromise, reflecting political reality more than economic analysis. Nor were economic aims the sole, or even predominant, concern. In each case, the equally important if not primary objective was political. That these regimes have become major models is perhaps the greatest irony of all. What remains necessary is a careful assessment of the need for competition policy in both economic and political terms as well as how to design effective legislation to deal with the particular problems of individual countries within the APEC community.

I. WHETHER—COMPETITION POLICY AND ECONOMIC GROWTH: THE GERMAN AND JAPANESE EXPERIENCE

Whether a vigorous competition policy inhibits or restricts economic growth is a major concern as an increasing number of industrializing countries within APEC and elsewhere have begun to consider the aims and purposes of a vigorous competition policy. This debate is not new. The long and successful experiments with antitrust regulation in Germany and Japan began with intense debate over the propriety of a vigorous competition policy in economies in which economic recovery was the highest priority.

Competition policy in both Germany and Japan originated in the presurrender planning within the U.S. Department of State for occupied Germany and Japan as well as the postwar international economic order. We are apt today to forget that the Havana Charter originally included detailed provisions proscribing certain restrictive practices in international commerce. Although only the trade provisions of the Charter survived in the guise of the General Agreement on Tariffs and Trade, for Germany, and Europe as a whole, U.S. antitrust policy became a central feature of the postwar reforms.

The actual policies for Germany and Japan as articulated in the instructions to the supreme military commanders in both theaters were virtually identical. Major efforts for the "decartelization" and "deconcentration" were undertaken from the start. These policies were equally controversial. Although defended by the economists as economically beneficial, proponents and critics alike emphasized political aims of these policies. In the language of the occupation statutes, "excessive concentrations of economic power" were viewed to be politically harmful as significant barriers to the development and vitality of democratic institutions. Such populist notions long had been part and parcel of the domestic American antitrust experience. It therefore was quite natural for the American occupation authorities to view the benefits of decartelization and deconcentration more in political than economic terms. The result, however, was heated debate within the American camp with respect to the potential economic consequences of a rigorous deconcentration effort in Germany and Japan. The debate pitted those who emphasized the political benefits of deconcentration against those who feared its adverse economic effects. The proponents of German and Japanese economic recovery ultimately triumphed and occupation deconcentration efforts either ended or were reduced significantly. Regardless, the issues raised remained unresolved.

The division of Germany among the four occupying powers (the United States, Soviet Union, United Kingdom and France), each of which possessed quite different and potentially contradictory policies, prevented uniform implementation of competition policies throughout occupied Germany. In the end, however, shared interests, a common concern for German recovery, and the dominance of the United States enabled cooperation among all of the Allies except the Soviet Union. This cooperation led first to a U.S./U.K. bizonal economic administration and, ultimately, the formation of the Federal Republic of Germany (FRG) in 1949. For the first time since their surrender, Germans would have a voice in competition policy.

The primarily German competition law (the Law Against Restraints of Competition, or GWB) did not reflect U.S. policies and approaches. Rather, it was based on the efforts that began in 1947 by a group of political economists supported by Ludwig Erhard, the first postwar economics minister of the FRG, to create a strong regulatory regime that was an "order of competition." The statute as enacted in 1957 (in force from 1958) reflected a series of political compromises, especially its emphasis on policing "abuses" of market power rather than engaging in structural reform. Although American impetus again led to the inclusion of

the prohibitions of anticompetitive conduct in the European Coal and Steel Community, the extension of these provisions to the Treaty of Rome and the development of European competition law also largely was a product of German efforts and thinking.

The German experience, I submit, is quite relevant for both APEC and other developing economies today. The intellectual forebears of German competition law—the ordo-liberals of the Freiburg School—viewed competition in constitutional terms. They emphasized both the economic and social goals of competition policy and did not question its role in fostering economic growth and the public welfare. They also understood that public monopoly could be as serious an evil as private monopoly. Similar understandings underpin Shujiro Urata's paper on Competition Policy and Economic Development in East Asia. He begins by defining competition policy broadly to include the variety of regulatory practices and economic policies that affect competition. In so doing he emphasizes the point that competition policy should not be viewed in the restricted terms of a single regulatory regime. Rather, the focus of attention should be an array of measures that either foster or constrain firm rivalry and competitive markets.

On these issues, two other contributions to this volume deserve special attention. The first is the essay by Hiroshi Iyori, a former secretary-general and member of the Japanese Fair Trade Commission. Few observers have more insight on the Japanese experience. The second is the analysis by Jiang Xiaojuan on the surprising procompetitive effects of Chinese industrial policy.

Read in the context of clarifying the need for competition policy, the critiques of competition policy in South Korea by Kyu Uck Lee, Taiwan by Lawrence Liu, Thailand by Sakda Thanitcul, and Indonesia by Hikmahanto Juwana combine to provide further confirmation of Urata's inclusive approach. Wang Xiaoye addresses the need for competition law in China in similarly expansive terms. However, as emphasized in her paper on the Prospect of Antimonopoly Legislation in China, she remains rather pessimistic with respect to the likelihood of legislative activity in the foreseeable future.

Whether or not, or to what extent, competition policies either inhibited or aided economic recovery and growth in either Germany or Japan are equally difficult questions to answer with accuracy. The historical record at least does not allow any certainty. In Germany, as noted above, concern over economic recovery brought the U.S. deconcentration efforts to a standstill. The German economic "miracle" had begun long before the passage of the GWB in 1957.

In Japan, a single occupation authority and Japanese government continuity permitted legislation enacted by the Japanese Diet, albeit under supervision from the Supreme Commander for the Allied Powers. When occupation ended, there thus was no need for new legislative action to ratify occupation regulation. Japan therefore justifiably can claim senior status as the country with the second oldest comprehensive competition law in the world. However, many would argue that competition and competition law played little role in Japan's remarkable and rapid postwar economic recovery and growth. Irrespective of competition law, new entry and fierce firm rivalry were in fact salient characteristics of the Japanese economy throughout the 1950s and 1960s, a period usually associated with industrial policy, the expulsion of legal cartels, and extreme protectionism. What needs to be underscored is that without government-imposed barriers to entry and government-enforced cartels, the Japanese economy would have been even more competitive. From these perspectives, once more the observations of Hiroshi Iyori on the lessons of Japanese economic development and the relationships between competition policy and government intervention in postwar Japan, as well as the less sanguine concerns raised by Walter Hatch in his paper on Japanese production networks in Southeast Asia, become even more telling.

II. WHAT—MODELS FOR COMPETITION LAW IN THE APEC COMMUNITY

The question of *what* competition law remains. Four regulatory regimes for competition policy—the United States, Japan, Germany, and the European Community—have become the principal models for global emulation and adaptation. The influence of American law as a model is notable in both Australia and Japan. Japanese law and German law both provided the primary models for the South Korean legislation. In addition, as Sakda Thanitcul notes, Korean law was in turn a source for Thai legislation. German and Japanese law also influenced the competition legislation adopted for Taiwan. The influence of all four regimes is evident in recent legislation enacted in Indonesia. Yet, as the articles included here demonstrate, none of these four dominant legal regimes should be considered an adequate model.

All four regimes were established in unique historical contexts. None represented a carefully planned or clearly articulated set of coherent policies; rather, each reflected a variety of compromises and political adjustments necessary for their enactment as national legislation or, as a matter of treaty law in the case of European law, member country acceptance. Nor were any of the four designed for economies and political

systems that do not share the particular features of an advanced industrial democracy. Competition law came into being in the United States, Japan, Germany, and Europe as a whole only after a strong private sector had developed. We do not need to either fully assess the relative strength of public and private actors nor determine the extent to which government intervention affected economic performance in order to recognize that the economic vigor of the private sectors in these countries was not completely dependent on industrial policy and government support at the time of the enactment of the countries' respective competition laws.

No claims of universality, inherent superiority or, what might be called, *a priori* preference thus can be made for any of these regimes. Accordingly, justification for the use of European law as a model for countries currently within the European Community, as well as those seeking to join, rests solely on a preference for uniformity within the Community. The E.C. competition law regime is not on its face any better or more appropriate for any member country than, say, German law, or even Japanese law for that matter. These observations lead to a third observation: no judgments may be reached properly on which, if any, "model" of competition law is appropriate without careful evaluation of the aims of the regime being considered, as well as the mechanisms for their effective implementation.

Historically, competition policy has had two primary objectives—one economic, the other political. The standard economic justification of competition policy has been to promote economic efficiency, which, it is argued, is jeopardized by any exercise of the power to determine prices in the market. By eliminating the acquisition of "monopoly power" or its exercise, competition policy thus promotes the efficient allocation of economic resources and thereby contributes to the maximization of economic welfare. From a purely economic viewpoint any exercise of monopoly power produces unwanted consequences. The question of who exercises the power is largely irrelevant. That issue is central, however, to the second category, the political or social aims of competition policy.

Often expressed rather crudely by the phrase "big business is bad," the political justifications for competition policy were at the core of the American postwar efforts to create competition policy regimes in both Germany and Japan. Deconcentration and decartelization policies were understood to be essential components of the American "democratization" policies in both countries. These policies, as well as the revitalization of antitrust enforcement in the United States under Thurman Arnold, reflected a largely American mix of Marxist and free market ideas. The American New Deal left as being accepted the Marxist proposition that

fascism in Germany and Japan was the product of an industrial-military alliance. The antitrust reformers viewed the concentrated industries of Germany—the Krupps and I.G. Farbens—as well as the *zaibatsu* in Japan as partners in international military aggression. However, unlike European socialists, they did not view economic concentration as the inexorable final phase of "monopoly capitalism" to be welcomed as the precondition for nationalization.

The American antitrust reformers in Germany, Japan, and at home in the United States believed that competitive markets with multiple private rivals also were fundamental to the development of democratic political processes. Nevertheless, they did not fear government intervention in the economy and tended to favor, or at least condone, some public monopolies. The evil was private—not public—monopoly power and profits. For the countries in APEC it therefore is important, I believe, to clarify at the outset which of these two clusters of goals—or both—are intended. On the answer hinges much of the policy choices that have to be made.

Such an evaluation of aims or objectives requires at the outset the collection of accurate and comprehensive data on the industrial structure and the political, legal, and administrative capacities of the country or community in which the regime is to operate. Equally important is an objective and realistic assessment of what might best be called the "conditions of competition" and the "conditions of enforcement" in that country or community. To create a regulatory regime for competition policy without such data and assessment is almost certain to lead to unintended and potentially undesirable outcomes. One may well question, for example, the applicability of the Japanese experience with technology standards (as described by Eriko Watanabe) to less industrialized countries in the Asia-Pacific region.

At this point, we know too little to begin to suggest in any detail the features for effective competition law in the APEC community. Nonetheless, some rebuttable assertions seem warranted by the data we do have. Each of the papers presented at the Victoria and Tokyo conferences and collected here provides valuable information and insights. These allow a number of tentative conclusions. Additional support may be found in the overall Taiwan experience as detailed by Lawrence Liu as well as the three comparative studies. Toshiaki Takigawa examines American, British, and Japanese regulatory approaches for introducing competition into previously monopolistic public utility industries. William Neilson, Robert Howell, and Sōuichiro Kozuka jointly offer an analysis of the relationships between competition law and intellectual property in Canada, Japan, and

the United States. In the third comparative study, Jacqueline Bos details differences and similarities of the exemption of specific anticompetitive conduct under American, Australian, European, and Japanese law. Finally, Dorsey Ellis, Naoaki Okatani, and Mitsuo Matsushita each add information on the mechanics and strategies of enforcement, as well as the current status and problems of efforts for international cooperation.

In other words, we know enough about the "conditions of competition" and "enforcement" in some of the member-countries of APEC at least to suggest some of the main concerns that an effective competition regime should address.

Excluding the United States and Japan for purposes of this analysis because they are best treated separately, the APEC countries fit into six broad categories: (1) the predominately English-speaking, common-countries states of North America and the South Pacific—i.e., Australia, Canada (with apologies to Quebec), and New Zealand; (2) South Korea and Taiwan, the two newly industrialized economies of East Asia; (3) the developing countries of Southeast Asia—i.e., Indonesia, Malaysia, and Thailand; (4) the economically "liberalized" socialist countries of East Asia—i.e., China and Vietnam; (5) the Latin American countries of North, Central, and South America—represented, for our purposes here, by Chile and Mexico, and (6) the "city-states" of Singapore and Hong Kong.

Along with the United States, Australia, Canada, and New Zealand share a cultural and institutional experience forged largely during early to mid-nineteenth century British rule. Along with the United States, the three represent the "western" countries of APEC. All have well-established political institutions and market economies. In addition, as we might expect, all have equally well-established competition laws that largely reflect blended borrowings from the United States and the United Kingdom adapted to indigenous political and economic conditions.

They also are similar in economic structure and per capita income. All three are quite prosperous with per capita incomes almost equal to Japan. They have vigorous primary industries (agriculture, forestry, and mining). In this respect, they have much in common with Chile. Indeed, collectively with Chile, the combined population (sixty-seven million) is slightly larger than Thailand (sixty-one million), but slightly less than the combined population of South Korea and Taiwan (sixty-nine million). All four (including Chile) are small, mineral rich, agricultural countries. Each also has a vigorously competitive market economy reinforced by at least a relatively effective competition law.

Because of their size and the apparent lack of any serious competitive restraints in their economies, these three regimes too often are left out of

discussions on APEC competition law, except as potential sources for models, policies, and practices to emulate. This is unfortunate because I believe that in so doing we are ignoring, first and foremost, meaningful examples of contextual adaptation of competition law; that is, how competition policies can be crafted consciously and implemented to achieve desired outcomes after taking into account local economic and political conditions. Each of these countries also has something special to teach us about the application of competition policy in economies dominated by agriculture, forestry, and mining, and in which foreign investment has played a significant role in economic development.

The countries in Group Two—South Korea and Taiwan—also have established (albeit relatively recent) competition legislation. As the two newest industrialized countries in East Asia, they seem to have much in common. The peoples of both countries developed historically within the cultural and political orbit of imperial China. They both experienced economic and institutional transformation under Japanese colonial rule. Finally, they both exemplify the much touted proposition that economic growth in market-driven economies not only produces wealth but also leads to the emergence of democratic political institutions and processes—a widely shared view, especially within circles that view China's economic growth and increased participation in the global economy with great favor.

South Korea and Taiwan also share a common feature in industrial structure that differs markedly from Japan but is equally evident in other Asian economies: the exclusivity of family-controlled firms. All private businesses in both countries are family-owned. Even the *chaebols* in Korea or the businesses that constitute the largest manufacturing networks in Taiwan are family-owned. In neither country have managerial functions become separated from ownership as they have in the United States, Japan, and the other "advanced" industrial economies of Western Europe (as well as the countries listed in Group One).

Despite these and other similarities, critical aspects of the political economies of South Korea and Taiwan remain very different. These differences appear to have influenced the levels of concentration and the conditions of competition significantly in the two countries. In South Korea, the national government under General Park Chung Hee pursued an industrial policy modeled on the Japanese experience. The government encouraged the creation of the *zaibatsu*-like *chaebol*. It ensured targeted industries access to capital, promoted their exports, and protected them from competition by foreign entries into South Korean markets. Reinforced by Korean patterns of kinship and authority, a lineage-based

class hierarchy is said to have emerged in South Korea. In Taiwan, in contrast, government intervention in the economy was far less directive. Although the Taiwan government encouraged exports and pursued protectionist policies, the government's role in the economy was more passive. Moreover, very different patterns of kinship and economic interaction developed in Taiwan as non-kinship ties in business became increasingly important, producing competitive tensions within kinship groupings. Taiwan, as a result, appears to have less industrial concentration and more inter-firm rivalry than South Korea.

For purposes of competition policy, the countries in the three remaining categories—the three largest "developing" countries of Southeast Asia (Indonesia, Malaysia, and Thailand), the "economically liberalizing" socialist states (China and Vietnam), and the APEC community's Latin American members (especially Mexico)—can be considered together. Each confronts challenges and problems common to the others. In the 1980s, all of them began to institute a remarkably similar set of institutional reforms to create freer and more open economic markets. Like their more industrialized peers, they too began to "deregulate" and "privatize" their economies. Competition legislation thus is viewed in each of these countries to be an important component of these reforms. However, unlike the political economies of the countries in each of the previously described groups, these countries share deeply embedded traditions of active government (or patrimonial ruler) participation in the economy. None have developed fully a vigorous and independent private sector. In short, none has an established economic market free from active government intervention favoring particular economic players. In addition, none of these countries has established either an administrative or judicial system manifestly able to implement effectively and fairly a legal regime either designed to promote firm rivalry based on consumer rather than political preferences or intended to foster democratic processes by reducing the influence of concentrated wealth. The countries within the APEC community that seem to have best overcome, or at least be in the process of moving beyond, such legacies are Singapore, South Korea, and Chile. Thus, they deserve the closest comparative attention.

Given the role of government in the economy and the lack of an effective, efficient, and, above all, corruption-free regulatory and juridical infra-structure, the competition law regimes that now exist on the books or are being planned are almost certain to fail. Instead of enabling or fostering new entry and firm rivalry, the regulatory tools of these new regimes are far more likely to be manipulated in favor of politically-favored firms and industries. Competition law itself is apt under these

conditions to create additional regulatory barriers to innovation by the most efficient incumbent firms and to hinder new entry. From these observations at least a few general recommendations seem warranted.

1. Competition policy for the liberalizing countries in the APEC community should aim first and foremost at government measures that reduce competition rather than private anticompetitive conduct. Ideally, those responsible for the enforcement of competition policy should have the means and will to identify and eliminate at least the most pernicious governmental barriers to new entry, especially regulatory barriers that by design or effect protect incumbent firms from potential rivals. In particular, enforcement authorities should be able to intervene to curtail government licensing controls and other regulatory measures that either create barriers to entry or enable the exercise of monopoly power or the abuse of market domination.

2. Competition legislation should be drafted to establish clear rules and precise standards of conduct. To the extent possible, legislators should avoid ambivalent or broad delegations of administrative or judicial discretion. Per se prohibitions of anticompetitive conduct with manifest harm to consumers are preferable to "rules of reason" left to discretionary "case-by-case" administrative or judicial determination.

3. Positive government actions should be taken to ensure the availability of capital to new entrepreneurial endeavors based on an objective economic assessment of risk as well as effective legal and administrative mechanisms for terminating failed ventures.

4. An independent Competition Enforcement Authority should be established with a professional staff that includes personnel trained in law as well as economics. The Authority should have responsibility to review any dealings between competitors, including patent and other intellectual property transfers, that presumptively could affect competition by reducing the capacity for entry by potential rivals.

5. Vertical restraints—including, for a limited duration, resale maintenance—by new entrants into a national market, including new entry by established foreign firms, should be treated as presumptively valid.

6. Some form of multilateral cooperation, especially with the established competition enforcement authorities, should be developed to enable a coordinated approach to merger control as well as conduct by multinational corporate enterprises and firm networks that reduces new entry within foreign markets.

In conclusion, the development of a shared competition policy within the APEC community is neither feasible nor desirable. Rather, national and regional efforts should be directed primarily toward both the

identification of existing barriers to entry (and other public as well as private impediments to effective market competition) and the development of effective remedial measures. APEC community structures should be involved in these tasks by providing fora in which problems that are common to most, if not all, countries in the region can be analyzed and effective solutions can be articulated.