

COMPETITION POLICY AND GOVERNMENT INTERVENTION IN DEVELOPING COUNTRIES: AN EXAMINATION OF JAPANESE ECONOMIC DEVELOPMENT

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I. INTRODUCTION

The December 1998 Report of the World Trade Organization (WTO) Working Group on the Interaction between Trade and Competition Policy points out that trade policy and competition policy (primarily privatization, deregulation, and antitrust) interact to promote free competition, economic efficiency, and economic development in developing countries.¹ The Report concludes that governments should not intervene to restrain competition, even if competition may damage certain industries.² On the other hand, the 1994 World Bank Report on East Asia reaches the opposite conclusion.³ This report analyzes the cases and processes of East Asia's rapid development since 1980 (commonly called the "East Asia Miracle") and concludes that positive measures enacted by East Asian governments greatly influenced regional economic development.⁴

These two views do not necessarily conflict, and may exist in concert. This Article will discuss these two perspectives by first introducing the Japanese experiences in government intervention and competition policy, and then recommending what the competition policy should be in the Asia-Pacific Economic Cooperation (APEC) community. This analysis will divide government control into two aspects: intervention for forming and

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1. See World Trade Organization, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/3 (Oct. 11, 1999), available at http://docsonline.wto.org/gen_browse.asp.

2. *Id.*

3. See WORLD BANK, THE WORLD BANK ANNUAL REPORT 88-89 (1994), available at <http://www-wds.worldbank.org>. See also World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, WORLD BANK POLICY RESEARCH REPORT (1993), available at <http://www-wds.worldbank.org> (discussing the relationship between public policy and rapid economic growth in East Asia).

4. *Id. Cf.* Masahiko Aoki et al., *Beyond The East Asian Miracle: Introducing the Market-Enhancing View*, in THE ROLE OF GOVERNMENT IN EAST ASIAN ECONOMIC DEVELOPMENT 1-37 (Masahiko Aoki et al. eds., 1997) (examining the role of government policy in facilitating or complementing private sector coordination).

maintaining free markets and competition (“A-type” intervention) and intervention for controlling free markets and competition (“B-type” intervention).

II. THE GOVERNMENT’S ROLE AND COMPETITION POLICY IN JAPANESE ECONOMIC DEVELOPMENT

A. Pre-World War II

1. Government Control and Competition in the Meiji Era

The Tokugawa Shogunate had adopted an isolationist policy since the seventeenth century, and it was shocked to witness the United Kingdom defeat China in the Opium War (1839-42), as well as the subsequent invasion of China by Western countries. The Opium War demonstrated the superior military power backed by Western countries’ post-Industrial Revolution economic development. In 1853, the United States demanded the opening of Japanese markets. After intense discussions, the Tokugawa Shogunate executed the Japan-U.S. Friendship and Commerce Treaty, and thereafter executed similar treaties with Holland, Russia, Britain, and France. The Satsuma and Tyousyuu Domains, which had opposed the Shogunate’s open-door policy strongly, formed the government after the Meiji Restoration in 1868, and thereafter changed the policy to open Japan up to the world.

The new government remodeled various institutions after Western models to catch up with the Western countries. By 1872, the government had abrogated feudal domains and barriers, liberalized land trade, abolished regulatory trade associations and the status system, established communication and transportation systems, and introduced free choice of professions. By 1882, the government had established an educational system, company system, currency system, central bank, financial system, securities exchange, and legal system. The government enforced these changes, but most of the changes represented formations of infrastructures for a free economic system, generally regarded as “A-type” intervention.⁵ After Japan opened itself up to liberal Western ideas and classical Western economics, economic liberalism predominated in Japan until the end of World War I.

5. Cf. Yoshio Kanazawa, *The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 482 (Arther T. von Mehren ed., 1963) (stating that the privatization of most government enterprises ultimately led to *zaibatsu* cartelization) [hereinafter *LAW IN JAPAN*].

2. *Free Competition from Foreign Countries*

The aforementioned commerce treaties barred Japanese restrictions on trade imports and reduced all Japanese custom duties to 5% or less. These restrictions remained effective until 1911. During this period, Japanese industries encountered intense competition from Western countries. As a result of defeat at the hands of foreign competition, the Japanese government sold many of its wholly owned factories to private companies by 1890, including its iron, steel, shipbuilding, and spinning plants. Economic liberalism, influenced by British economic theories, dominated this era. However, notwithstanding the trend toward privatization, the government still maintained telephone and telegraph services, postal service, basic railroads, and military industries. It was during this period that major enterprise groups called *zaibatsu* began developing.⁶

3. *Government Intervention Between the World Wars*

During the post-World War I depression, the Japanese government introduced anticompetition measures, which it accelerated following the 1929 depression. Many argued that the scarcity of land and resources, the extreme size and poverty level of the population, and excessive competition justified economic control to restrict the excessive competition and nationalization of industries. The government enacted numerous “B-type” economic control laws, including the Major Industries Control Law of 1931 (which promoted cartelization in major industries) and various business control laws that restricted new entry and prices. These policies soon developed into the wartime economic control system. In 1940, the government reformed the administrative structure of economic control to control commodities under the order of the War Mobilization Act of 1938.⁷ This structure continued well after World War II ended.⁸

6. The term *zaibatsu* refers to the great family-controlled banking and industrial combines of modern Japan. For background information on *zaibatsu*, see HIDEMASA MORIKAWA, *ZAIKATSU: THE RISE AND FALL OF FAMILY ENTERPRISE GROUPS IN JAPAN* (1992).

7. See YUKIO NOGUCHI, *1940 NEN TAISEI [1940 SYSTEM]* (1955).

8. *Id.*

B. *Post-World War II*

1. *The Economic Democratization Policy: Introduction of a Free Market System*

In 1945, the General Headquarters of the Allied Powers (GHQ) introduced economic, social, and political democratization policies into Japan. The GHQ planned to democratize the centralized Japanese economic system and eliminate its militaristic character. These policies promoted farmland reform, labor system reform, *zaibatsu* dissolution, the elimination of excessive economic concentration, the abolition of various economic control laws and associations, and the enactment of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (“Antimonopoly Law”). The GHQ intended these changes to result in the formation of a free competitive market economy.

2. *The Idea of the Economic Democratization of Postwar Japan in the United States*

In 1943, Robert Fearey, a U.S. State Department official, first introduced the idea of economic democratization at a meeting to discuss postwar occupation policy for Japan. By that time, the U.S. Government already had decided to confine Japan to its pre-Sino-Japanese War borders. However, the issue of Japanese economic reorganization remained. Fearey recognized that: (1) Japan contained a large number of poor people and only a handful of rich people due to the feudalistic tenant farming system, restricted labor unions, and *zaibatsu* control over major industries; (2) Japan contained very few middle class citizens, which was in contrast to modern Western countries where the middle class dominated; (3) the Japanese national market was very small and restricted; (4) Japan invaded foreign countries in pursuit of new markets and resources; and (5) it was necessary to democratize the Japanese economic system in order to expand the national market and bring about the healthy development of Japan.⁹ The report of Corwin D. Edwards’ *zaibatsu* research mission in 1946 substantially confirmed Fearey’s idea.¹⁰

9. See Robert Fearey, Japanese Post-war Economic Considerations, U.S. State Dept. Doc. No. E 155 T. 354 (July 21, 1943). Cf. Marlene J. Mayo, *American Wartime Planning for Occupied Japan: The Role of the Experts*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952 3 (Robert Wolfe ed., 1984) (discussing how the U.S. government designed postwar planning for the occupation and reform of Japan to advance the security and interests of the United States as a global power).

10. An outline of the report of the Edwards Mission was made public on Oct. 10, 1946, and a

3. *Enactment of the Antimonopoly Law*

The GHQ requested that the Japanese government enact an antimonopoly law in November 1945 to form a basic economic order from a permanent part of Japan's economic democratization, apart from the temporary measures like *zaibatsu* dissolution and the abolition of economic control laws and associations. Initially, the Ministry of Commerce and Industry prepared a draft of an antimonopoly bill in early 1946. This draft permitted the existence of cartels, but regulated their abusive conduct because Japan's few resources and large population made trusting free competition dangerous. The GHQ rejected this draft and proposed a model draft bill known as the Kime draft.¹¹

Shortly thereafter, the Economic Stabilization Agency modeled a new draft after U.S. antitrust laws. The agency set up a drafting committee in the fall of 1946, chaired by Ryogo Hashimoto, the father of future Prime Minister Ryutaro Hashimoto. This committee understood the policies embedded in U.S. antitrust law and thought that the future Japanese economy should exist as a free market economy and participate in free international trade.¹² The final draft, which closely resembled U.S. antitrust statutes, was enacted in April 1947 as the Antimonopoly Law. The Antimonopoly Law describes its purpose in Section 1:

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraints of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to

summary of it is contained in JAPAN FAIR TRADE COMM'N, *THE ANTIMONOPOLY POLICY: 20 YEARS*, at 7, reprinted in Sheet No. ESS (A)-02447-48 (National Diet Library, 1982).

11. See 1 FAIR TRADE COMM'N, *50 YEARS OF THE ANTIMONOPOLY POLICY* 25, 678; Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1, 35-40 (2000).

12. Ryogo Hashimoto wrote:

The fundamental idea of the [Antimonopoly] Act could be said that it was founded basically on the economic ideal of liberalistic capitalism, which is a most orthodox idea . . . Of course, our nation instituted market control policies and measures in prewar times, and there might be various measures to cope with issues such as scarce economic wealth, fear of capital exhaustion, underdeveloped private investment, mass production of inferior goods, or collapses due to excessive competition, depletion of resources, etc. However, I will hope for a fresh, vigorous future of our nation, always competing with actively and decisively and standing side by side with business to produce superior goods and services, to take care of such issues.

Ryogo Hashimoto, Dokusen Kinshi-ho to Wagakuni Keizai [Antimonopoly Law and the Japanese Economy], *NIHON KEIZAI SHINBUN*, 1947, at 4-6.

encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.¹³

The government enacted the Antimonopoly Law as the cornerstone for the economic order of the new era. The GHQ did not mandate enactment of the Antimonopoly Law; the Japanese government enacted it autonomously along with the farmland and labor union system reforms.

4. Early Enforcement of the Antimonopoly Law

The government organized the Japanese Fair Trade Commission (JFTC) in July 1947 to enforce the Antimonopoly Law. Kikumatsu Nakayama, the first chairman of the JFTC (1947-1952), explained the aims of the Antimonopoly Law as follows:

“Economic democratization” means an economic situation where faithful and fair people are respected and honored, and where their abilities can be freely, highly and fully developed, so that people are able to have the chance to enjoy a happy social life. Formally, it is a situation where the denial of munitions industries, dissolution of *zaibatsu*, popularization of capital, cooperation and participation in the management of workers, reforms of farmland, etc., are realized, and the fundamental idea is the establishment, maintenance and development of a humane economy based on egalitarianism, freedom and fraternity. Frankly speaking, it is an economic situation where there is a universally diffused and growing real income without an unequal distribution or binding of capital, which is “a humane economy, a free and creative economy for human beings by human beings” . . .

The purpose of a national economy linked to the world economy is not only to protect the lives of a nation's people but is also a situation where the people of the world can enjoy the results. An economy which contains the causes for an imperialistic economic invasion should not be called a wholesome national economy. A wholesome national economy is a “peaceful economy,” from which the relief and

13. Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Act No. 54 of 1947, § 1 [hereinafter Antimonopoly Law], *reprinted in* HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* app. A, at 387 (1994).

development of humane lives of the people of the world as well as a nation can be produced, and where there is no more struggle and exploitation . . .

Summarizing the above, “the democratic and wholesome development of the national economy” means the maintenance and development of an economic situation in which the opportunity of developing the faithful and true power of a human being in correspondence with his/her talents can be equally recognized, and thereby bring about the relief of human lives.¹⁴

This was an excellent expression of the Japanese free market economy combined with popular Confucian philosophy.¹⁵ Nakayama firmly believed that the Antimonopoly Law was necessary for the new Japanese economic order. The JFTC’s second chairman, Masatoshi Yokota (1952-1957; future Chief Justice of the Supreme Court of Japan), held deep respect for Nakayama and shared similar beliefs in the importance of the Antimonopoly Law.¹⁶ The ideas behind the enforcement policies of the early JFTC flow directly from their combined experience and wisdom.¹⁷

C. The Development of Industrial Policy

1. The Postwar Government Economic Intervention

Difficult economic conditions persisted after World War II, spurring the adoption of temporary “B-type” government interventions until 1950. In addition, Reconstruction Finance Corporation Act of 1946, the U.S. Reconstruction Finance Corporation selectively allotted financial resources to essential industries to prompt rapid postwar recovery.¹⁸ The Reconstruction Finance Corporation ceased activity in 1951, but the

14. 1 UMIKUCHI SHOTEN, KEIZAIMINSHUKA [THE ECONOMIC DEMOCRATIZATION] 16 (1948) (emphasis added).

15. Confucian philosophy was influential in Japan at least until 1960. It respected practical righteousness, thoughtfulness, and fidelity. See KIN NIKKON, HIGASIAJIA NO KEIZAIHATTEN TO JUKYO BUNKA [ECONOMIC DEVELOPMENT OF EAST ASIA AND CONFUCIAN CULTURE] (1992) (exploring the relationship between Confucian culture and the economic development of East Asia).

16. See MASATOSHI YOKOTA, HO NO KOKORO [SPIRIT OF THE LAW] 96 (1971).

17. See, e.g., Kohji Tanabe, *The Process of Litigation: An Experiment with the Adversary System*, in LAW IN JAPAN, *supra* note 5, at 73.

18. The Reconstruction Finance Corporation was similar to a U.S. agency created in 1932 under the Hoover administration to facilitate economic activity by lending money during the Great Depression. For more information, see Ronald C. Moe, *The Reconstruction Finance Corporation: A Brief History* (Cong. Research Serv., 1979), at <http://www.napawash.org> (describing the history of the Corporation and focusing on its creation and transformation throughout the 1940s and 1950s).

government subsequently established the Japan Development Bank in 1952. The government controlled the importation of goods with the Foreign Exchange Control Act of 1949, and regulated the importation of technologies with the Foreign Investment Act of 1950. This control continued through the liberalization of trade in 1960 and the liberalization of capital in 1968.

2. *The Development of Industrial Policy*

Apart from these temporary control measures, an industrial policy of “B-type” government intervention developed after the 1951 San Francisco Peace Treaty between the Allied Powers and Japan. Industrial administrative agencies, whose staff had been trained under the wartime control system, could not understand the new free market system.¹⁹ They still focused on resource scarcity and population density, and believed that both free competition (such as in the United States) was inappropriate for Japan and the government should restrict excessive competition. In addition, the dominant economists at that time were Marxians and scholars who recommended a planned economy to the administrative agencies. These “B-type” industrial policies aimed to promote exports, relieve depressed industries, protect small and medium-size enterprises, and rationalize and promote industries. Ever since, Japanese antimonopoly policy has coexisted with confrontation and compromise.

As part of the execution of industrial policies, (1) the government created financial institutions like the Japan Development Bank and the Export and Import Bank and financed them according to the industrial policies, (2) the Economic Planning Agency designed a five-year economic plan, and (3) each industrial agency began performing according to the industrial policies and creating special privileged semi-governmental corporations (*tokushu hojin*) in various fields.

3. *The Enactment of Various Exemption Laws*

Beginning in 1951, MITI intervened in industries by specially allocating financial resources, providing special tax reductions, granting exemptions for cartelization through the enactment of special laws, and issuing informal administrative recommendations (*kankoku sohtan*) for the stabilization,

19. For example, Mr. Yoshihiko Morozumi, who participated in drafting the Antimonopoly Law and later became the vice president of the Ministry of International Trade and Industry (MITI), stated that being trained under the prewar economic system made it difficult to understand the basic ideas of the antimonopoly policy. See Yoshihiko Morozumi, *Watashi no Rirekisho* [My Personal History], NIPPON KEIZAI SHINBUN, Mar. 13, 1996, at 13.

rationalization, or promotion of specific industries.²⁰ A bureaucracy kept from the wartime mobilization system of 1940 performed these interventions. The tight relationship between government, industry, and politicians under a strong conservative government accelerated these interventions after the 1955 coalition.

The government originally enacted these exemption laws as temporary measures, but decided to lengthen their life significantly. For example, the government extended the The Act on Temporary Measures for the Promotion of the Machinery Industry (*Kikai Kogyo Shinko Rinji Sochi-ho*) of 1961, which authorized the existence of rationalization cartels through several amendments, until 1985 when strong criticism by the United States prompted its abolition.

4. *The Relaxation of the Antimonopoly Law in 1953*

After the San Francisco Peace Treaty in 1951, industrial circles such as the *Keidanren*, and industrial administrative agencies such as MITI, requested the relaxation of the Antimonopoly Law. These groups insisted on a basic free formation of cartels. In 1953, the government amended the Antimonopoly Law to authorize both depression cartels and rationalization cartels. Even after this amendment, MITI enacted the aforementioned special exemption laws and carried out many recommendations to curtail production. In 1958, the Diet debated a draft bill to relax the Antimonopoly Law further. Although many major industries and MITI supported this bill, it met strong opposition from consumers, farmers, small enterprise groups and journalists, and consequently never became law.

5. *Modification of Japan's Industrial Policy*

In 1960, the Japanese government began to employ a price stabilization policy, consumer policy, small business policy, and trade liberalization policy, which greatly influenced the development of Japanese antimonopoly policy as a whole. Young scholars, influenced by their economics studies in the United States, positively supported the new direction in which Japan's antimonopoly policy seemed to be heading. MITI's Industrial Structure Research Committee stated in its 1963 report that the Japanese economy, in principle, allowed for the free activities of enterprises, and that it was necessary to utilize competitive functions to stimulate the creativity of

20. See Yutaka Kosai, *The Reconstruction Period*, in *INDUSTRIAL POLICY OF JAPAN* 25 (Ryutaro Komiya et al. eds., Kazuo Sato trans., 1988).

enterprises and promote economic efficiency. This reason alone, MITI indicated, made the Antimonopoly Law extremely important. Popular opinion perceived this as a change in industrial policy, and the Cabinet stopped issuing anticompetitive administrative recommendations in 1964, but MITI was pushing the modified industrial policy to maintain and assist the formation of oligopolistic industries.²¹

6. The Relationship Between Japanese Antimonopoly Policy and Industrial Policy

Scholars differ in their evaluations of the effects of the antimonopoly policy and industrial policy on economic developments after World War II. In early times, many appreciated the industrial policy; however, most attribute Japan's recent economic development to vigorous competition among enterprises under the economic democratization policy and the competition policy enforced through the Antimonopoly Law.²²

D. Development of Competition Policy after the 1970s

1. The Strengthening of the Antimonopoly Law

By 1970, Japan's gross national product rivaled that of developed Western countries, and although market intervention and the activities of enterprises carried out through industrial policies should have ended, they continued through two oil crises and numerous trade disputes. The Japanese government used the 1977 amendment to strengthen the Antimonopoly Law to oppose abusive conduct by big businesses and introduce the surcharge system against price cartels, over the objections of industrial circles and MITI.

2. Promotion of Competition Policy and the Decline of Industrial Policy

In the early 1980s, in response to the altered economic climate, the Japanese government partially implemented new privatization and

21. The Tokyo High Court's Decision in the Oil Cartel Criminal Cases of 1980 exposed the relationship between administrative guidance and oil cartels in the 1970s. See J. Mark Ramseyer, *The Oil Cartel Criminal Cases: Translations and Postscript*, 15 L. JAPAN 57, 57-66 (1982). The Temporary Act for Specific Industries Promotion (*Tokutei sangyo shinko rinji sochi ho*), drafted and proposed by MITI in an attempt to form oligopolistic markets, never was enacted.

22. See *infra* Part II.E.1.

deregulation policies. The government privatized the Japan Telegraph and Telephone Public Corporation, Japan National Railway Corporation, and Japan Tobacco Corporation in 1985, but delayed other deregulation, which caused the Japanese economy to stagnate in 1990. The coalition between the government, industries, and politicians through industrial policies was one of the principal causes of this delay.

Foreign governments have criticized the Japanese industrial and closed market policies strongly. For example, the United States, in the Structural Impediments Initiative negotiations with Japan from 1989 to 1990, strongly requested that Japan adopt a deregulation and competition promotion policy to open the Japanese market to foreign countries.

Throughout the 1990s, Japanese economic policy essentially revolved around deregulation and competition promotion, primarily to structurally improve the Japanese economy in the new era of globalization. The government revised the Antimonopoly Law several times during this period to strengthen its regulations and toughened enforcement, which now includes criminal prosecution. In the process, the government abolished many exemption laws. MITI did not oppose such changes, but instead supported them and ceased pursuing an anticompetitive industrial policy. In addition, the government also developed and instituted reforms for administrative agencies, financial institutions, and privileged corporations.

E. Antimonopoly Policy, Economic Development, and Technological Innovation

1. Antimonopoly Policy and Economic Development

Until 1965, industrial circles and economic administrations criticized antimonopoly policy because it promoted excessive competition, disturbed the activities of enterprises, and hindered economic development. However, many now attribute Japan's rapid postwar economic development to the competition policy under the economic democratization policy rather than to the anticompetitive industrial policy.²³

Due to the dynamic competition promoted under the Antimonopoly Law, new entrants such as Sony and Honda were able to develop freely, which in turn spurred rapid innovation in many other fields.

23. Cf. TAKAHIDE NAKAMURA, LECTURES ON MODERN JAPANESE ECONOMIC HISTORY 1926-1994 145-54 (1994) (discussing the positive impact of economic democratization on Japan); ELEANOR HADLEY, ANTITRUST IN JAPAN 439-53 (1970) (assessing the success of U.S. economic democratization on the Japanese economy).

2. *Antimonopoly Policy and Technological Innovation*

Strong innovation, promoted by the antimonopoly policy, influenced Japan's rapid postwar economic development, thereby promoting competition. After the war, a gap between Japan and the United States and other Western countries emerged, which forced Japanese enterprises to compete with imported foreign technologies. The foreign technologies were imported under unfavorable contract terms, which are prohibited by Section 6(1) of the Antimonopoly Law.²⁴ In 1968, when capital liberalization began, the JFTC issued the Antimonopoly Act Guidelines for International Licensing Agreements. The guidelines eliminated grant-back clauses (referring to the assignment of a licensee's right of technological improvement) in contracts, which obliged a licensee to give technology improved by the licensee to the licensor.²⁵ The elimination of grant-back clauses gave Japanese enterprises incentives to develop technological improvements, and it ultimately contributed to technological improvements by the licensors as well. The policy of eliminating grant-back clauses spread to developing countries through the United Nations Conference on Trade and Development (UNCTAD) and likely contributed to developing members' economic growth.²⁶

3. *Evaluation of Industrial Policy*

Recently, many have criticized industrial policy, which is a "B-type" intervention of the free market. However, it is necessary and rational during a

24. Section 6(1) of the Antimonopoly Law states that "[n]o entrepreneur shall enter into an international agreement or an international contract which contains such matters as constitute [an] unreasonable restraint of trade or unfair trade practices." Antimonopoly Law § 6(1).

25. The guidelines examined nine types of tying clauses. Section I(7) of the guidelines stated that one unfair business practice, in international licensing agreements was

to make it obligatory for the licensee to inform the licensor of knowledge or experience newly obtained regarding the licensed technology, or to assign the right with respect to an improved or applied invention by the licensee to the licensor or grant the licensor a license thereon. However, such cases are excluded where the licensor bears similar obligations and the obligations of both parties are equally balanced in substance.

Japan Fair Trade Comm'n, Antimonopoly Act Guidelines for International Licensing Agreements § I(7) (May 24, 1968), *reprinted in* ANTIMONOPOLY LEGISLATION OF JAPAN (Masanao Nakagawa ed., 1984). The FTC corrected the 1892 grant-back clauses in the 15 years from 1970 to 1984. 2 FAIR TRADE COMMISSION, 50 YEARS OF THE ANTIMONOPOLY POLICY 466.

26. See United Nations Conference on Trade and Development, Control of Restrictive Practices in Transfer of Technology Transactions, U.N. Doc. TD/AC 1/17 (1978) (explaining the effectiveness of anti-grant-back policies); United Nations Conference on Trade and Development, Draft International Code of Conduct on the Transfer of Technology, U.N. Doc. TD/CODE TOT/47 (1985), available at <http://www.unctad.org/stdev/compendium/documents/TD.CODE.doc>.

time of scarcity to allocate resources to maximize economic development, provide information or advice to enterprises, adjust friction between industries, and eliminate the anxiety of enterprises. Nonetheless, industrial policy should only be used in exceptional circumstances, and then only as a temporary measure. Furthermore, the developing country should conclude use of the policy as soon as it catches up to advanced Western countries.

III. SUGGESTIONS FOR COMPETITION POLICY IN APEC

A. Free Trade and Competition Policy

After World War II, the free trade established under the General Agreement on Tariffs and Trade (GATT) and WTO stimulated massive economic development in many countries. Japan attained its economic development from as far back as the Meiji era by following a free trade policy. Regional free trade areas and bilateral free trade agreements are necessary to promote free trade and will not hamper the free trade of the world economy as long as each observes the conditions articulated in the preamble to the Agreement Establishing the World Trade Organization.²⁷ However, in addition to international free trade policy, countries must adopt a national competition policy, consisting of privatization, deregulation, and antimonopoly laws.

B. Government Intervention and Economic Development

A positive and well-planned “A-type” government intervention in elements of the infrastructure like education, legislation, transportation, and telegraph and telephone systems does not necessarily disturb a free market. Such intervention actually helps form a free market system by preparing the system’s infrastructure. In Japan, the Meiji government created various infrastructures by conducting positive intervention. The government intervention for the postwar economic democratization was a similar “A-type” intervention.²⁸ Cases may exist where it is necessary for a government to provide information, guidance, protection, or regulations for immature enterprises and industries through “B-type” interventions to attain rapid development. However, these “B-type” interventions must be minimal, temporary, and exceptional, and a policy of free competition must

27. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125, 1144 (1994).

28. See *supra* Part II.C.1.

predominate, for the prolonged “B-type” anticompetitive interventions of the past may be principally responsible for the long and difficult economic stagnation Japan has endured since 1990.

C. Prohibition and Exemption of Antimonopoly Laws

Antimonopoly laws should confirm the aims of promoting competition, prohibit price cartels and similar agreements, and create an independent enforcement agency. Countries could allow necessary exemptions under certain conditions such as those stated in Article 81(3) of the Treaty Establishing the European Community.²⁹ Even in the United States, the judicially created rule of reason doctrine serves as the fundamental principle of U.S. antitrust laws.

D. Free Competition and Fair Conduct

The national government must control the monopolizing and abusive conduct of market dominating enterprises as well as other unfair business practices. A tendency exists at present, under the influence of the Chicago School of Economics, to have antitrust laws aim exclusively to promote economic efficiency. However, legislators enacted most antitrust laws, including those in the United States, to prevent the abusive practices of big businesses.

Circumstances may require East Asian countries under Confucian influences to state unequivocally that antitrust law aims to protect free competition and the fair conduct of corporations simultaneously. Varied national, social, and cultural traditions influence what people consider fair, and for people in East Asia, fairness remains one of the most important values in their social lives.

Because many countries—each with its own history and culture—form APEC, antimonopoly laws may embody different tones. However, if APEC understands that the primary purpose of all antimonopoly laws is to promote free competition, harmonizing those different laws may not be so difficult.

29. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997).