

10 Policy transfer and its limits

Authorised cartels in twentieth-century Japan

Takahiro Ohata and Takafumi Kurosawa

Introduction

The history of cartel registration in Japan deserves special attention for several reasons. First, the country had the world's most institutionalised and encompassing cartel registration system during the second half of the twentieth century. A systematic international comparison conducted by Corwin Edwards, a renowned trust-buster in US and founder of Japan's post-war antimonopoly law, showed that the scope of reporting requirements was the widest in Japan among the 11 nations compared (Wells 2002; Edwards 1967: 48).

Second, Japan's system clearly exhibits the dual nature of the cartel register; namely, authorisation of cartels on the one hand, and containment of them on the other. The balance between these two factors changed over time, reflecting the industrial structure, the role of state intervention, and the international environment. Additionally, Japan is representative of how the practice of cartel registration flourished in the spheres between the general prohibition of cartel and economic liberalism, where *laissez-faire* meant the liberty of contract and relative freedom for cartels.

Third, Japan's cartel registration system exhibits the uniqueness as well as the universality of the nation's experience. Its uniqueness lies in the dramatic volte-face in the competition policy following American occupation and policy transfer immediately after the Second World War. The huge leap from the promotion of cartels and a war economy to the other extreme of an idealistic and draconian post-war anti-trust law was ordered and supervised by the General Headquarters of the Supreme Commander for the Allied Powers (GHQ/SCAP). It was part of the 'greatest experiments in trust-busting' in the world, which was intended to transform the economic, social, and political structure of Japan (Hadley 1970: 6). This unprecedented policy shift was the reason why Japan developed its highly systematic cartel registration system after the end of the occupation. This case also demonstrates how the gap between the imported policy framework and the conditions of the local society was addressed. The post-war cartel registration in Japan can be interpreted as an outcome of 'Americanisation' and its subsequent 'Japanisation'. It is also true, however, that the longer trends in the rise and fall of cartel registration in twentieth-century Japan are remarkably similar to those of most other nations.

The extant literature on cartel and competition policy in Japan in English and Japanese is quite extensive (Dore 1986; Tilton 1996; Haley 2001; Beeman 2002). The rise of the Japanese economy by the end of the 1980s and trade frictions with its major trade partners motivated a plethora of studies on cartels, cartel policy, and the business-state relationship in Japan (Johnson 1982; Gao 1997; Schaefer 2000). Non-competitive trade practices and cooperation between economic entities were the focus of most English-language studies on the Japanese economy. Interestingly, however, the concept of cartel register was rarely used by researchers and contemporaries in Japan, despite its wide use in practice. Given the post-war anti-cartel legislation in Japan, and the system of a general ban with exemptions, the register nominated all kinds of legitimate cartels. Thus, the register was taken for granted and barely received research attention. In this chapter, we address the gap between the extant literature on cartels and the recent studies on cartel registration from a comparative and long-term perspective.

This chapter is organised into five sections. In the first, we describe the long-term transition and shift in Japan's competition policy, using a conceptual diagram. The second section deals with the developments before the Second World War and the third discusses the impact of the US occupation in Japan. The position of the cartel register as well as the process and organisation of the policy shift will be illustrated. In the fourth section, the framework of the post-war cartel register is analysed using a typology, while the fifth section traces the overall rise and decline of the system.

Swings, continuity and discontinuity of policy: an overview

The development of competition policy in Japan was far from linear. It was marked by swings, especially when one focuses on the formal policy settings. We present a bold simplification via a conceptual diagram (Figure 10.1) to illustrate the long-term fluctuations.

In this figure the vertical axis shows the chronological developments of policy. Major events and background context are presented in the left column. In the central part of the horizontal axis, the direction of the cartel policy is depicted by movements in the line that is drawn following a highly simplified dichotomy of anti-cartel (left) and pro-cartel (right). At the far right, the domain of 'war mobilisation and controlled economy' is a separate section because it went beyond the 'pro-cartel' policy in the market economy.

The bold curved line, partially dotted, shows the transition of the cartel policy in the twentieth century. The line starts from the upper centre, meaning that the policy was neither anti-cartel nor pro-cartel at the end of the nineteenth century. Subsequently, the trajectory shows several swings. Both the rupture in 1945 and the backlash after the recovery of political independence are impressive.

The ellipses along the curve and their titles show the different phases of cartel registration. The following classification of the periods is given in the diagram (with some overlaps):

- A 'Authorised cartels by local trade associations' (1884–1920s)

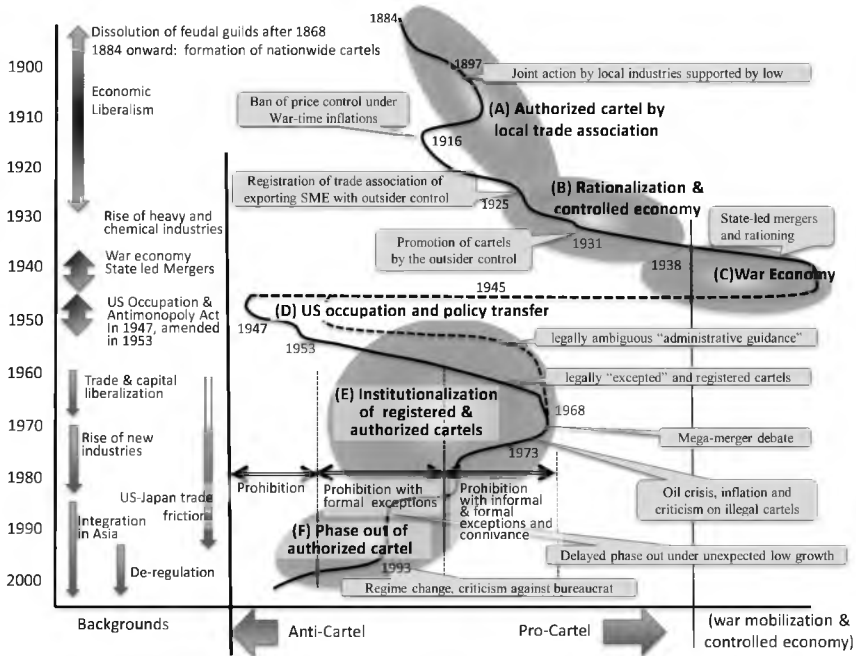


Figure 10.1 Swing, continuity and discontinuity in Japan's cartel policy, 1884–2000.

Note: See text for explanation of labelling used in the diagram.

- B Rationalisation and controlled economy (late 1920s–1937)
- C War economy (1937–1945)
- D US occupation and policy transfer (1945–1952)
- E Institutionalisation of registered and authorised cartels (1953–1970s)
- F Phase out of authorised cartels (1980s–mid-1990s)

The bases of the classification of the periods and the features in each period are explained in the following sections.

There are three points to note about the conceptual diagram. First, a fundamental change in the position of cartels in the mid-twentieth century set a limit on the effectiveness of the criteria based on the pro- and anti-cartel dichotomy. Before the Second World War, there was no general prohibition on cartels. The liberty of contract, including the freedom to make cartel agreements, used to be the principle. Thus, the dichotomy is not applicable during this period. The cartel registration-related policy before the Second World War was introduced to provide local or industry-level trade associations with the legal authority to exercise outsider control, in addition to existing private sanctions. All businesses out of the scope of such special legislations had no duty to report their cartel to the authority. In short, cartel registration was 'optional' for business circles, not a general obligation. In

contrast, after the Second World War, cartels and any other restrictive trade practices were generally prohibited. Hence, all such activities required special legislations or authorisation by the government, which were always bundled with reporting obligation. The cartel registration was no longer an option, but a duty.

Second, the curve in the diagram portrays only the basic settings and orientation of the competition and cartel registration policy. It does not necessarily show the intensity or effectiveness of cartels or any other restrained trade practices. It has been argued that the network among companies, and that between business and the state, were formed and intensified under the war economy and succeeded in post-war Japanese economy (Kikkawa 1994). It is not possible, therefore, to say that the pro-cartel policy during the 1930s was more effective than the one in the post-war era. Similarly, the nation's industrial structure experienced several changes independently from this swing in policy; through mergers under the war economy; the division of *Zaibatsu* (mostly family-owned large corporate groups) under occupation, and because of a dynamic wave of new entries during the high growth period after the war.

Third, the ranges shown by the double arrows in the lower part of the diagram, namely, 'prohibition', 'prohibition with formal exception', and 'prohibition with informal exception and connivance' do not apply to the first half of the twentieth century.

Cartels and cartel registration before the Second World War

Authorised cartels by local trade associations (1884–1920s)

The early history of cartel and related competition policy in Japan bears a significant resemblance to that of other industrial nations, although certain delays and early maturings can also be observed. As early as in the mid-1880s, nationwide trade associations had sprung up in some transplanted large-scale sectors of industries (e.g. paper and cotton spinning). They often worked as a body of cartel agreements (Minobe 1931). Some of these cartels, such as those in cotton spinning, were powerful and others were vulnerable to challenges by outsiders and were short-lived. Given the dominance of economic liberalism, the government had neither the intention nor the tools to be involved in cartels or to control them.

In this context, the first policy on the registration of collective actions appeared not as a policy about cartels, but as part of the legislation on local trade associations. In 1872, soon after the Meiji Restoration, the new government abolished *Nakama* (guild-like organisations). They were classified as feudal and anti-modern, and they were regarded as incompatible with the idea of free trade. A decade later in 1884, however, the Ministry of Agriculture and Commerce announced the Rule on Trade Associations (*Junsoku-Kumiai*), which gave prefectures the administrative power to approve local trade associations. By 1886, there were 1579 authorised associations based on this decree (Shirato 1981: 71). Although the authority of prefectures was indirectly denied for a while by the promulgation of the Constitution (1889), which ensured freedom of residence, it was restored soon

after by another decree in 1891. At the end of the nineteenth century, laws on association for important (exporting) local industries had been enacted (1897/1900). In 1921, there were 1020 associations based on these laws (Shirato 1981: 80).

These associations often set the price, quality, and wage rate in their industry, and the information on such activities was reported to the government. This system, therefore, can be deemed a proto-type of cartel registration. These trade associations had the legal power to control outsiders because membership was compulsory if they organised more than 75 per cent (1884) or 60 per cent (1990) of the business entities in the industry in a given region (Ministry of International Trade and Industry 1964: 17–20).

The main objective of these decrees, however, was not the regulation of cartels but the promotion of collective action for the improvement, standardisation, and inspection of local products. The improvement of reputation in the export markets was particularly important (Hashino and Kurosawa 2012). They were also only applied to small and medium-sized enterprises (SMEs) in the regional clusters.

It is well known that the state played a decisive role in the transplantation of Western culture and the establishment of modern industries in Japan. Following the privatisation of the major state-owned enterprises in 1880, however, economic liberalism was the norm in Japan through the late 1920s. Even the First World War did not change the situation. When the sudden drop of imports led to inflation, the reaction was neither systematic rationing nor adoption of a controlled economy (Yoshino 1962: 99–100). Instead, a decree was passed that suspended the trade associations' powers to set prices for several years.

Rationalisation, controlled economy, and promotion of cartels (late 1920s–1930s)

The idea of cartel registration per se first appeared in the late 1920s in Japan. A reversal of the dominant economic views occurred following a spate of economic crises during the 1920s, with the rise of new and capital-intensive industries after the First World War. The argument to emphasise the superiority of public and national interests over private ones was intensified. It was believed that control of the joint action of private companies, not free competition, would improve public and national interests. The global debate on 'organised capitalism' and rising nationalism were also decisive factors.

The Important Industries Control Law (1931) heralded a new era in Japan (Ministry of International Trade and Industry 1961: 158–169; 1964: 47–76). It was the first cartel registration law targeting large and modern industries. The nationwide geographical scope was also new. The law and related policy had several significant features.

First, all cartels and agreements related to 'control' in 'the important industries' had to be reported to the supervisory ministry if they involved more than half of the business entities in the industry. Thus, registration was not an 'option' for the dominant cartel organisation, but an obligation. If the organisation involved more than two-thirds of the companies in the industry nationwide, the Ministry could

order non-members to comply with the rules set by the dominant cartel. Sanctions against outsiders could be implemented by the state law, overcoming the limits of private contract. A variety of restrictive practices was included in the ‘control’ agreements: production and sales amounts; segmentation of products; price controls; sales channels; and joint selling. Subsequently, the establishment of new firms and the expansion of capacity were added to the issues that required reporting and authorisation, as deemed necessary by the government. This authority was utilised in the latter half of the 1930s, together with the new legislation, to promote specific strategic industries.

Second, the power to select an ‘important industry’ rested with the Ministry. A similar method was in use through the 1925 law (The Important Export Products Trade Association Law; Ministry of International Trade and Industry 1964: 21–25). In the 1925 statute, the Ministry specified special segments and regions, and facilitated cartels and joint projects by dominant trade associations. Dominance was understood as the participation of more than two-thirds of the businesses in the region; this condition allowed control of outsiders. By adopting similar methods and relaxing the requirement to half of the companies (not regionally but nationally), the 1931 law focused on large businesses. It covered exporting industries (e.g. cotton spinning) as well as a wide variety of ‘basic’ industries (e.g. coal mining and pig iron). Starting with five industries, the law was eventually applied to 24 industries.

Third, reflecting the *Zeitgeist*, the law had a clear bias toward the promotion of cartels. One reason for the origin of the policy concerned with exporting SMEs. For policy-makers, this sector was ridden with structural problems; firms were too small, the entry barrier was too low, and massive entries and exits brought about excessive supply, low quality, and low profit. The results were disorder, low productivity, and economic crisis, which triggered price dumping and led to criticism from abroad. The 1925 law allowed regional organisations to tackle this problem. From the mid-1920s, the word ‘rationalisation’ became popular and was seen as a solution to these problems. Simultaneously, the expansion of the pro-cartel policy to include big industries was suggested. In 1930, the Temporary Industrial Rationalisation Bureau was established under the Ministry of Commerce and Industry (Ministry of International Trade and Industry 1961: 12–110). Slightly later, ‘controlled economy’ became the buzzword. The policies to promote cartels and mergers in the 1930s were justified and advertised using such keywords. While the ‘controlled economy’ became unpopular and obsolete in post-war Japan, the notions of ‘excessive’ competition and rationalisation survived and served as an important logic to justify authorised cartels.

Fourth, the other side of the cartel register, namely, the containment of harmful cartels, was explicitly discussed. At a session of the Diet, Shinji Yoshino, the designer of the law, faced criticism from advocates of conventional economic liberalism and standard anti-monopoly theory. Yoshino defended the bill, emphasising that the register of cartels and possible disclosure would deter their abuse (Yoshino 1962: 204–207). The government would have the power to check the contents of restrictive agreements, and if deemed necessary, it could order change or reject granting the authorisation.

The extent to which the law had an impact on the reshaping of industrial organisations, however, remains debatable. With only one exception (cement), all the cartels authorised by the law had influential cartel activities well before the legislation. Private businesses utilised this policy to intensify their cartel and mergers and acquisitions (M&A) activities; however, the drive towards organised capitalism already had its own strong momentum. On the other hand, those sectors where private businesses had strong self-regulation or capability to conduct business on their own, resented the state intervention and distanced themselves from it. Thus, the effect of the law was limited to strengthening the control of outsiders on the existing cartel organisations.

Finally, there were strong international influences. The shift in paradigm in economic and social thought and the transformation of economic organisations in Western countries had a profound impact on Japan. It is well-known that Germany was taken as Japan's model, however, its policy makers' attention was not limited to Germany. Together with the potash cartel in Germany, they studied the coal mining cartel in the UK and various cartel-related legislations in small nations, along with a series of reports by the League of Nations. Interestingly, the Norwegian cartel registration system in existence in 1925 was explicitly mentioned in the debate on the deterrence effect of publicity (Yoshino 1962: 204–208; 1935: 324–338). Both a simultaneity in action (the cartel register in Norway and the SME cartel register in Japan in 1925) and self-motivated international policy transfer from Europe to Japan can be observed.

The war economy (1937–1945)

The war economy transformed the nature of cartels and their registration. The second Sino-Japanese War (July 1937), the earliest phase of the Second World War, was the turning point for the expansion and intensification of the state's control over the economy (Ministry of International Trade and Industry 1964: parts 3–5). At this stage, the control of economic crisis and rationalisation was replaced with a militaristic goal as the reason for state intervention. The National Mobilisation Law of 1937 gave the government significant discretion in allocating natural resources, foreign currency, the labour force, goods, and money. From 1940, the 'New Economic Order' based on the principle of planned economy fundamentally re-organised industrial organisation. First, the 'industrial adjustment' forced small or inefficient companies to merge or exit the market. Second, new intermediate entities were institutionalised to control each industry. Former cartel associations were used as important foundations for such large-scale national organisations.

The associations, however, were no longer self-determining organisations. They served the state as a rationing channel. Therefore, the label of 'cartel' was no longer used. Instead, 'control association' became the norm. The war economy was the end of private cartels, although the principle of private ownership was not abandoned officially until the end of the war.

US occupation and policy transfer (1945–1952)

Policy transfer and cartel register in the international context

The American occupation of Japan after the Second World War fundamentally changed Japan's anti-cartel policy. For the international comparison of cartel register, three elements are important.

First, the direct transfer of the radical American anti-cartel policy made the registration of cartels pervasive. In principle, all cartels were prohibited by legislation as per the Antimonopoly Law of April 1947. This principle is maintained even today. There was, however, a massive contradiction between the new principle and local policy. Hence, as soon as the control of the occupational army waned and eventually ended, the government introduced a range of legal exceptions, while the principle of general prohibition was officially maintained. The government controlled these exceptions through legal and administrative measures. These were essentially 'registered' cartels. The terms such as 'cartel registration,' 'registered cartel' and 'to register a cartel' were hardly used because these were just part of the conditions for authorisation. Instead, these 'exceptions' were called 'exempted cartels' because they were exempt from the basic rule of the Antimonopoly Law.

Second, the anti-cartel and antimonopoly legislation under occupation was the world's most draconian and idealistic at that time. It was even stricter than its model, the American anti-trust policy, which was at its peak exactly in the mid-1940s. The famous (infamous in American business circles) 'trust-busters' were dispatched to Japan in an attempt to build an ideal country with economic democracy (Edwards 1946; Hadley and Kuwayama 2002; Wells 2002). In this context, the 'backlashes' (i.e. series of relaxations after the end of the US occupation) did not mean that Japan became a country with an overly cartel-friendly policy in global comparison.

Third, Japan's situation was different even from that of post-war Germany. The GHQ/SCAP, the US occupation authority in Japan, passed policies related to this subject in their own capacity, with little communication with their government back home and without coordination with their Allied counterparts. Japan's anti-cartel legislation of 1947 came ten years earlier than that in West Germany. This made Japan's anti-cartel policy framework in the first phase of the post-war era far more rigid than that in Germany. The dramatic 'Japanisation' during the 1950s – the swing between sphere (D) and the early phase of (E) in [Figure 10.1](#) – should be interpreted in this context.¹

Process of policy shift and the Antimonopoly Law of 1947

The process of law making and the formation of policy organisation show how reluctantly the Japanese government accepted the unfamiliar policy. The preparation of the Antimonopoly Law started with an order from the GHQ/SCAP dated 11 November 1945. Officials in Japan had limited knowledge and experience with the American anti-cartel policy. Both the government and businesses had no

motivation for a radical change and disregarded it as being harmful and useless. The bills prepared by the Japanese government were rejected every time. Eventually, the government succumbed to the repeated orders from the occupation army and prepared a bill based on instructions from the Anti-Trust and Cartels Division (AC, renamed Fair Trade Practices Division in 1949) of the Economic and Scientific Section (ESS/AC) of the GHQ/SCAP (Office of the History of Finance, Ministry of Finance 1982: 385–455; Nishimura and Sensui 2006).

The Japanese government and the ESS/AC used two documents as the bases for drafting the legislation. One was a report prepared by an investigation team led by Corwin D. Edwards, who was an advisor for the US Department of State. The other was a draft dated August 1946 prepared by Posey T. Kime, an officer at ESS/AC with work experience at the Anti-Trust Division of US Department of Justice (Office of the History of Finance, Ministry of Finance 1982: 401–415).

Edwards's team, known as the 'Edwards Mission' or 'Zaibatsu Mission' had a clear objective; the investigation of *Zaibatsu*, which were presumed to be a source of Japanese militarism. The mission's report proposed policies for dismantling the existing *Zaibatsu*. It also recommended the enactment of permanent and encompassing legislation to outlaw trusts and cartels. In order to deter the revival of *Zaibatsu* in the future, the report proposed a ban on holding companies, a restriction on the holding of other company's shares and of interlocking directories (Office of the History of Finance, Ministry of Finance 1982: 144–168).

Kime's draft codified the basic elements proposed by the Edwards Mission (Office of the History of Finance, Ministry of Finance 1982: 401–415). The draft was very comprehensive, covering all the spheres of three US Anti-Trust laws, namely, the Sherman Antitrust Act (1890), the Federal Trade Commission Act (1914), and the Clayton Act (1914). This shows the ambition of the drafting team. They wanted a powerful and comprehensive law, not a patchwork of bills.

The draft of the Antimonopoly Law prepared according to Kime's draft was submitted to the Diet on 22 March 1947. Without much debate, the draft passed through the Diet on 31 March and was promulgated on 14 April.

In effect, the Antimonopoly Law was meant to be a very powerful anti-cartel and anti-trust law. Despite multiple amendments, the law has retained its three basic principles (Misonou 1987: 20–21; Imamura 1993: 6). First, trusts were banned. Article 3 states that an enterprise must not effect private monopolisation or unreasonable restraint of trade. Second, the principle of banning cartels was introduced. The 'unreasonable restraint of trade', the latter part of the Article 3, meant that cartels *per se* were deemed illegal. Third, 'unfair trade practices' such as boycott, dumping, etc. were banned.

The definition of a cartel was simple and wide in scope. The law prohibited all kinds of cartels and restrictive practices without specifying any types and effects (the principle of '*per se* illegal'). Both vertical and horizontal cartels were banned. Regardless of the nature of the relationship (competitors or supplier-buyer; existing rivals or potential ones) or the level of formality (oral or written; binding or non-binding), all kinds of actions to control or restrain price, amounts, technology, investments, and any other aspects related to competition were prohibited. All types

of business entities, including individuals, companies, and trade associations, were subject to these rules.

The law prohibited cartels and restrictive practices in general and listed few exceptions. The law was not applicable to those entities covered by the laws related to rights under the Copyrights, Patent Law, Utility Model Law, Design Law and Trademark Law. In addition, the laws related to partnership (including federation of partnership) that provided mutual support to small-scale enterprises or consumers (farmers' and consumers' cooperatives) received the same exemption; the critical issue was that the partners could voluntarily participate in, or withdraw from, such arrangements. It is important not to confuse the concept behind the original 'exceptions' with the reasons for 'exempted cartels' following the amendment of the act in 1953, and other special legislation. These are discussed later.

Dualism in policy organisation: FTC versus MITI

A remarkable dualism can be observed in the government organisation engaged in the competition policy in post-war Japan, especially through the mid-1990s. Falling short of the expectations of the 'trust-busters', the newly founded (Japanese) Fair Trade Commission (FTC) failed to 'monopolise' the competition policy, and it had to play constant power games with the associated ministries over the policy. Among these ministries, the Ministry of International Trade and Industry (MITI) was the most important. The FTC and MITI had distinctively different perceptions of the competition policy and the nature of the market; hence, their attitudes toward cartels were contradictory. Registered cartels in post-war Japan reflected the conflicts and compromises between these government organisations in each phase of economic development.

The FTC was founded in July 1947 as the main body for the administration of the Antimonopoly Law. It was born as an independent administrative commission directly reporting to the Prime Minister, and it was meant to be free from political pressures (Fair Trade Commission 1968: 75). The Antimonopoly Law stipulated the establishment and duties of the FTC.

The FTC was the gateway to the policy transfer from the US to Japan. During the early stage of its history, the members of the commission worked under the instruction of the ESS/AC. Even after the end of the occupation in April 1952, the FTC retained its original principles. When two types of cartels (recession cartels and rationalisation cartels) were introduced as legal exceptions, the FTC was reluctant to accept them (Misonou 1987: [ch. 2](#)).

The MITI had a long tradition. Although it was founded in 1949 via the transformation of the Ministry of Commerce and Industry, high-ranking MITI officials during the 1950s and 1960s had work experience at the ministry from before the war (Odaka and Ministry of International Trade and Industry 2013: 252–258). Most of them had knowledge of administration and policy during the age of rationalisation and the controlled wartime economy. Thus, they had little or no difficulty in getting accustomed to the introduction of government-monitored cartels and cartel registration. In addition, their concerns about the nation's economy had continuity

with the pre-war era; the inferiority of the Japanese economy compared to that of Western countries, such as low productivity and the small scale of Japanese companies. Hence, their policy goals were to trim ‘excessive competition’ and improve competitiveness. The authorisation of cartels was perceived as not only acceptable but also desirable or even necessary. Until about the 1970s, the MITI regarded the Anti-Trust Law as an unnecessary impediment and perceived the FTC as a disagreeable counterpart (Misonou 1987: [ch. 5](#)).

The main determinants of the balance between FTC and various ministries were the political environment, the attitude of the Cabinet and the ruling party, and international pressure. Although the FTC’s leverage was guaranteed by the law, the law-makers were the ones empowered to amend or abolish the law after all.

Typology of registered cartels (1953–1990s)

The rise and decline of registered cartels in post-war Japan can be analysed through the application of a typology. Authorised cartels can be classified into three types according to their legal basis. The first type is the registered cartel based on the amended Antimonopoly Law (Type A). The second is based on special legislation other than the Antimonopoly Law (Type B). Cartels based on these two categories are called ‘exempted cartels’ because they are legally exempted from the Antimonopoly Law. The third type is based on the so-called ‘administrative guidance’ received from the relevant ministries (Type C), and not on any of the other such laws.

Exempted cartels

Type A cartels were introduced by the amendment to the Antimonopoly Law in 1953. They had two sub-categories: recession cartels and rationalisation cartels (Fair Trade Commission 1968: 134–152). In the first, a group of producers and other economic actors in the recession formed a cartel according to the rules prescribed by the law. This type of cartel required the FTC’s approval. The cartels’ objectives could include control of price, the amount of production or shipment, or scale of capacity. The rationalisation cartel had similar objectives regarding capacity, technology and quality. A group of enterprises with special needs for ‘rationalisation’ applied for this category.

Type B cartels were also important. Defining specific aims and policy fields, the ministries passed a series of acts that explicitly permitted special types of cartels. These acts were regarded as a convenient tool for customising specific policy goals. The laws were usually for a specific duration (1–5 years), and any extension required the Diet’s consent (the Statute Book of Japan, annual versions; Misonou 1987).

At the peak of this trend, there were over 30 laws that introduced a variety of ‘exempted cartels’ ([Table 10.1](#)). The top three laws that permitted the largest number of cartels were the Export and Import Transaction Law, the Law on Organisations of Small and Medium Sized Enterprises, and the Law on Proper Management in Environment- and Sanitary-Related Businesses. The first statute dealt with export and import associations, and other issues related to fair trade,

Table 10.1 Legal bases of ‘exempted cartels’ (Type B).

	<i>Related laws</i>	<i>Industries applicable</i>	<i>Year of legislation</i>	<i>Year of abolition</i>
1	Law concerning organisations of small and medium enterprises	SMEs	1957–1964	1997
2	Export and import trading law	Importer and exporter	1952–1961	Present
3	Law concerning provisional measures for the stabilisation of specified depressive industries	Specified industries	1978	1983 (→ no. 4)
4	Law on temporary measures for the structural improvement of specified industries (structural improvement law)	Specified industries	1983	1988
5	Law on temporary measures for the promotion of machinery industries	Machinery	1956	1971 (→ no. 7)
6	Law for temporary measures for the promotion of electronic industry	Electronics	1957	1971 (→ no. 7)
7	Law for temporary measures for the promotion of designated electric and machinery industries	Electronics and machinery	1971	1978
8	Temporary measures law for the ammonium sulfate industry rationalisation and export adjustment	Fertiliser industries	1954	1964 (→ no. 9)
9	Law on temporary measures for the stabilisation of fertilizer prices	Fertiliser industries	1964	1989
10	Sugar price stabilisation law	Sugar industry	1965	1997
11	Law on temporary measures for textile industry equipment	Textile	1956	1964 (→ no. 12)
12	Law on temporary measures for textile industry equipment and related equipment	Textile	1964	1970
13	Law on temporary measures for the structural improvement of specified textile industries	Spinning	1967	1972
14	Law on temporary measures for raw silk production equipment	Raw silk	1957	1959
15	Law concerning liquor business associations and measures for securing revenue from liquor tax	Brewery and liquor sale	1953	Present
16	Law on temporary measures for the rationalisation of coal mining industry	Coal mining	1955	1992
17	Law on temporary measures for the stabilisation of metal and mining related industries	Metal mining	1953	1968

Table 10.1 Continued.

	<i>Related laws</i>	<i>Industries applicable</i>	<i>Year of legislation</i>	<i>Year of abolition</i>
18	Fisheries production adjustment cooperatives law	Fisheries	1961	1997
19	Exporting fisheries development law	Fisheries	1954	1997
20	Law on special measures concerning the promotion of fruit-growing industry	Fruit-related production, process and sales	1961	1997
21	Law on temporary measures for pearl aquaculture adjustment	Pearl aquaculture	1969	1997
22	Law on special measures concerning fisheries reconstruction	Fisheries	1976	1997
23	Law on organisations of small and medium sized enterprises, and law on proper management in environment and sanitation related businesses ^a	Environment and sanitation-related industries	1957	Present
24	Copyright law (amendments of the copyright law in 1899 for the commercial secondary use of music records)		1970 ^c	Present
25	Wholesale market law	Food wholesale	1971	1997
26	Port transportation business law	Port business	1951	1998
27	Road transportation law	Road transportation	1951 ^d	Present
28	Civil aeronautics law	Aviation	1952 ^d	Present
29	Law for small-sized shipping trade associations ^b	Domestic maritime industry	1957	Present
30	Marine transportation law	Maritime industry	1949 ^e	Present
31	Law on non-life insurance rating organisation	Insurance	1948 ^e	Present
32	Insurance business law	Insurance	1996	Present

This table contains only those laws for which the FTC has the numbers and contents of cartels. Laws related to cartel activities by cooperatives are excluded (which are subject to the Antimonopoly Law). Laws lacking obligations to report to or consult with the FTC are excluded. (In this case, the FTC does not seem to have information on the cartels, and often, there is no statistical data available from the FTC.)

^a By the amendments in 2000, the law was renamed as Law Concerning Coordination and Improvement of Environmental Health Industry.

^b By the amendments in 1964, the law was renamed Coastal Shipping Associations Law.

^c There is no obligation to consult with and report to the FTC. The number of related cartels appears in the FTC's annual report.

^d The law was amended in 1997, and consultation between the relevant Minister and the FTC was introduced. Since then, the number of related cartels have been included in the FTC's official statistics.

^e The law was amended in 1999, whereby consultation between the relevant Minister and the FTC was introduced. Since then, the number of related cartels have been included in the FTC's official statistics.

such as rules about the place of origin. Export cartels were used to maintain product quality and 'orderly' exports. Import cartels were driven by the introduction of foreign patents. The Act on Organisations of Small and Medium Sized Enterprises opened a way for SME associations designed for collective business. The SME cartels were frequently a form of political compensation to firms whose upstream suppliers were often dominated by bigger companies that had authorised cartels. The last type of statutes regulated restaurants, cafés, processed meat sales, hotels, barbers, public bath, cleaning, etc. The law allowed concerted action for improving sanitary conditions in the associated businesses.

Type A and Type B cartels had a number of processes and features. First, the relevant laws were based on compromises between the FTC and the ministries concerned. Second, the laws specified the scope of the target businesses (industries or type of business) and the types of actions and aims (types of cartels, concerted actions, or joint projects) that could be exempted from the general ban. Simultaneously, the necessary procedure (notification to or approval by the authority) was defined. Third, a group of businesses (trade associations, group of companies, or business units) applied for the law to apply to them. All information related to the 'exempted' actions by the individual applicants had to be reported to the authority (the FTC or relevant ministry) according to defined limits. Even in the case of Type B cartels where ministries, instead of the FTC were in charge, the respective ministries were obliged to report each application to the FTC. Two-thirds of the laws required ministries to get the FTC's consent for authorisation (Fair Trade Commission 1977: 765). In those cases, the FTC could order either modification or ban of the agreement, which the ministries had to respect. Thus, both ministries and the FTC were able to gather all the relevant information on legally authorised cartels.

Control of outsiders, the main reason for the authorisations under the pre-war cartel register, was no longer the general rule. Type A recession cartels and rationalisation cartels were explicitly prohibited from actions meant to eliminate outsiders. In contrast, half of the Act covering Type B cartels had clauses that enabled outsider controls. In the two fields of export cartels and cartels in the transportation sector, many laws stipulated a clause to control outsiders.

The publicity principle, a social tool to deter the abuse of (exempted) cartels, can be observed to some extent. In case of Type A cartels, the FTC disclosed information about the registered cartels in the Official Gazette or other media. The reason for authorisation and the particular cartel activities allowed (targeted products, type of action, how to control amount or other elements, and the authorised period) as well as the names of the individual companies applying for authorisation were often officially announced. The companies and people concerned, including 'outsiders', were allowed to file a complaint regarding the judgment. In such cases, the FTC organised public hearings. Hence, the procedures were publicly known and likely had announcement effects. It also aimed to deter secret cartels.

In contrast, in most of the cases of Type B cartels (where ministries are in charge, not the FTC), the principle of publicity was not stipulated by the law. Even so, it was relatively easy to identify the contents and membership of a cartel because the exercise of the exemption clause was often reported in the mass media.

Almost all trade associations, the most important basis of cartel activities, kept a list of their members, which was usually accessible to the public. Although the discretionary nature of the publicity policy made room for secretly authorised cartels, private businesses were aware that their actions could be disclosed to the public at any time.

Cartels by administrative guidance

Cartels in the third category (Type C) were authorised not by laws but by the so-called ‘administrative guidance’ (*Gyosei-Shido*) of the MITI. Administrative guidance is a general term for diverse forms of instructions by the government. It was widely used by ministries, and its use has been positioned as an important feature of Japanese industry policy. While some of the administrative guidances had clear legal foundations stipulated by the relevant laws, others lacked such foundations. The MITI’s instructions on competition policy-related issues were based on a single sentence of the Ministry of International Trade and Industry Establishment Law, which defined the aim of the ministry. In addition, it had a serious conflict with the FTC’s authority and the clauses of the Antimonopoly Law. Thus, some scholars and the media frequently questioned the legitimacy of its actions. The MITI, however, asserted and successfully defended its position, especially through 1970s (Misonou 1987: ch. 5).

The logic behind administratively exempting these cartels from general prohibition under the Antimonopoly Law was that they were *de jure* not a cartel, but a concerted action ‘recommended’ by the government. In most of the well-known cases, however, the business circle (companies and trade associations) initiated the request to the ministry to take action on their behalf. Intensive communication and feedback between the businesses and the government were the very conditions of this provision. Thus, this category can be clearly positioned as an ‘authorised cartel’.

The dualism in policy organisation and the element of compulsory policy transfer were reflected in the different attitudes towards this policy (Misonou 1987: ch. 2). The MITI favoured this provision because they could mobilise it highly flexible and swiftly. For the FTC, such a provision involved the sheer denial of its authority and the spirit of the Antimonopoly Law. Thus, the FTC resisted the introduction of this policy. After a series of retreats and compromises in the 1950s, the FTC recovered the authority to be consulted before the implementation of this provision. The private business circle welcomed the speedy measures, although their attitude towards cartels was heterogeneous, and there was a sense of caution against too much state intervention.

These authorised cartels can also be regarded as a form of registered cartel. By its nature, this category lacks clear formality and standardised procedures, and there are few official documents that directly attest to the scope of the reporting. It is almost certain, however, that the authority had deep and extensive information about individual cases. First, in order to claim that the concerted action was not a private cartel but a state-led action, the MITI required sufficient data to convince

other stakeholders, including the FTC. Second, the companies involved had a good reason to provide information. They wanted to control (potential) outsiders using this provision and they supplied comprehensive information to MITI for this purpose. Additionally, they wanted to ensure adequate cooperation with the MITI to safeguard themselves from prosecution initiated by the FTC. Third, the announcement effects to stabilise market conditions were an important reason for their concerted action. The mass media reported the details of individual cases regularly. Fourth, the official history of the MITI and the FTC contain detailed information about several cases that became open disputes or led to official prosecution because of the infringement of the law. They reveal that the MITI was informed in detail of those actions. Finally, the FTC maintained official documents about cases involving infringement by the cartels.

Rise and fall of post-war registered cartels

Japanisation and institutionalisation (1950s–1960s)

The first two decades after the end of the US occupation was the age of ‘Japanisation’. During this period which has been described as the ‘stagnation age of antimonopoly policy’ (1952–1960), the rules defined by the Antimonopoly Law, as well as the existence of FTC, were under threat (Fair Trade Commission 1968: 121). As early as in February 1952, the first post-war authorised cartel (Type C) was implemented in the form of a MITI-led curtailment of production in the cotton spinning and chemical fibre industries. Subsequent amendments to the Antimonopoly Law in 1953 marked a major backlash against the strong anti-trust ideology initiated by the Americans, with the introduction of the two kinds of registered cartels (Type A). This amendment, however, did not decrease the number of cartels or concerted actions based on legally ambiguous administrative guidance (Type C). On the contrary, this practice mushroomed. The dotted bold line in [Figure 10.1](#) shows this gap between the legal framework of the Antimonopoly Law and actual policy. Given the scarcity of foreign exchange and the authority to allocate it, the MITI could easily enforce the administrative sanctioned guidelines.

In 1953, the measures introduced to deter the possible re-establishment of *Zaibatu*, were also eased. Pure holding companies, however, were to remain forbidden for almost a half century, until 1997. Together with the partial easing of rules on the holding of shares by financial institutions, this change led to the formation of a new type of business group (*Kigyo Shudan*), which has a horizontal relationship centred on major banks (Shimotani 2010: 24–25). Thus, a competitive industrial structure appeared. In most of the key industries, a relatively large number of major players (around six to twelve) of similar size, competed with one another.

This period was also characterised by progressive institutionalisation. In parallel with the use of discretionary measures, the MITI expanded its authority by introducing a variety of ‘exempted cartels’ (Type B). Increasing numbers of SME policy cartels and export- and import-related cartels were the main contributors to

the rise in the total number of registered cartels (Figure 10.2). From the mid-1950s, the legislation on manufacturing and mining industries followed the same approach, and the number of registered cartels in these fields increased during the 1960s.

The rapid growth of the economy from the mid-1950s to the early 1970s was an important element behind the rise in cartels and their authorisation. Despite cyclical recessions and losses in this phase, new entries continued and capacity grew because of the widely shared expectation of the long-term expansion of the market. The process industries were especially vulnerable to the cyclical recession and became a hotbed for cartels (Tilton 1996). For example, during the short depression in 1964, the petrochemical industry introduced a production capacity cartel for new investments in ethylene plants, guided by a shared expectation of future demand based on discussions between the government and the business leaders

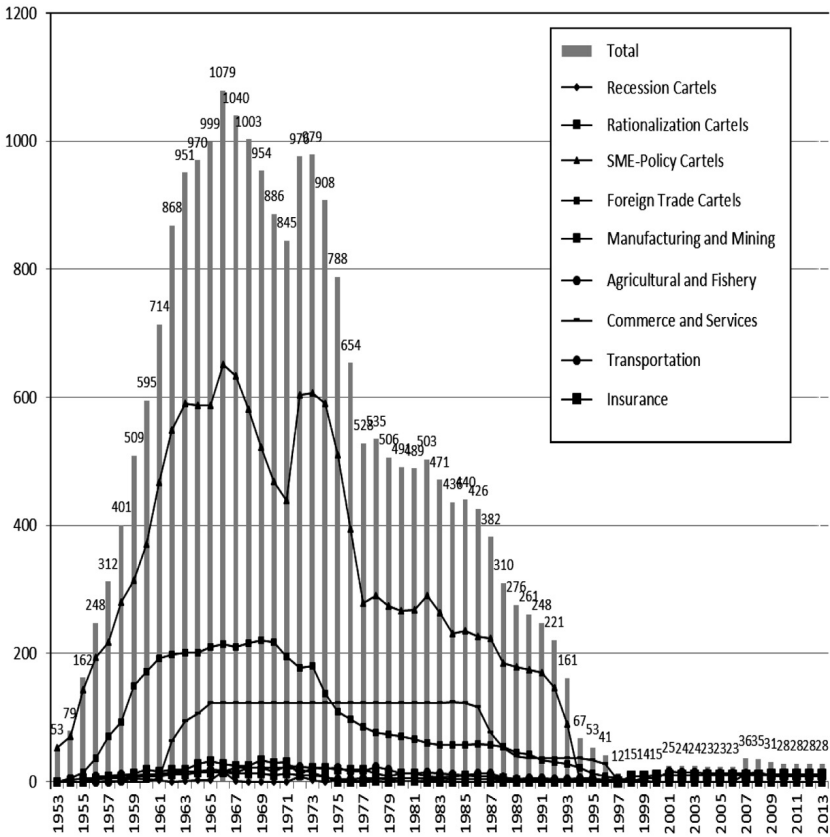


Figure 10.2 ‘Exempted cartels’ in Japan (registered Type A and Type B cartels).

Note: The numbers in the graph show the total number of existing ‘exempted cartels’ (all of them are registered) at the end of March of each year.

Source: FTC Annual report 1954–2013.

(Hirano 2011). This state-led investment cartel model was also adopted by the pulp and ferro-alloy producers. In the case of the self-confident steel industry, the business leaders disliked state intervention and introduced a self-regulated capacity cartel with *ex-post* approval from the MITI. In all cases, the authorisation of the cartels stemmed from the notion of excessive competition and concerns about future over capacity.

In the 1960s, policy-makers focused on capital and trade liberalisation under the framework of the General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF). Competition and industry policy were affected in three ways. First, the most powerful tool for the enforcement of Type C cartels, the control of foreign exchange, was removed from the government. Recognising the implications of this, the MITI compromised with the FTC in 1964. Henceforth, authorised Type C cartels were basically replaced by Type A cartels, which had greater transparency (Misonou 1987: 168–173; Fair Trade Commission 1997a: 8; Okazaki and Ministry of International Trade and Industry 2012: 231). This was a part of the institutionalisation process. Second, the MITI was deeply concerned about the competitiveness of Japanese industries and in 1962 tried to pass a law for state-led mergers and acquisitions. It was a typical strategic targeting policy and was touted as the ‘new industrial order’ with some resemblance to the wording used during the 1930s. This ambitious plan, however, faced strong opposition from private businesses. Big banks were already forming their horizontal business groups and did not wish to be disturbed. Many manufacturers were developing self-confidence in international markets and resented the revival of state intervention. Thus, the bill was scrapped. Third, this challenge demonstrated MITI’s power and the fragility of the Antimonopoly Law. The FTC had to concede, and it became more lenient towards Type A and Type B cartels.

Transformation and inertia (1970s–mid-1980s)

The late 1960s and early 1970s were the turning point of the post-war cartel register system. The number of cartels peaked in 1966, though there was another spike during the early 1970s (Figure 10.2). Legislation on exempted cartels slowed. This period was marked by both transformation and inertia in policy.

The transformation is evident. First, a nationwide debate on the role of the Antimonopoly Law and competition policy took place for the first time. Against the backdrop of the MITI’s pro-merger attitude and economic liberalisation, the re-merger of Fuji Steel with Yawata Steel to form Nippon Steel was announced in 1968 (Misonou 1987: 193–211). These two companies had their origins in the Japan Iron and Steel Corporation founded in 1934, which had been divided during the occupation. Almost simultaneously, another plan was disclosed to re-merge three successor companies of the pre-war monopolistic giant Oji Paper. The news triggered extensive debates among economists and met with some public resentment. The mass media reported this debate intensely. Suddenly the FTC was in the spotlight. While the merger in the steel industry was realised, the plan for the paper industry was dropped.

Five years later, the oil crisis led to a further re-evaluation of the FTC as well as changing perceptions about the lenient anti-cartel policy (Misonou 1987: *ch. 5*). Inflation, tactical buyouts by suppliers, and panic buying by consumers, as well as the disclosure of an illegal cartel of oil products, fuelled nationwide criticism of the existing policy. The FTC seized the opportunity and filed a criminal complaint against the oil refiners for violating the Antimonopoly Law. The MITI lost face and part of its authority because it emerged that the MITI itself had been involved in this secret and illegally formed cartel. Private companies were prosecuted, but the MITI and its officials were not. The public criticism was enormous. The ambiguous boundary between Type C, legally authorised cartels, and purely illegal cartels was a major point of discussion. The contradiction between the Antimonopoly Law and ministries' discretionary policy became obvious. After this case, informal authorisation and connivance related to illegal cartels gave way to more institutionalised processes.

The transformation in policy was rooted in the environment as well. The slowdown in growth delayed the implementation of the policy (Fair Trade Commission 1997b: 327). Authorised cartels tended to restrain exits from the market, contrary to the original policy goal. The prices of materials converged increasingly with international price levels following trade liberalisation. The domestic state-led or state-sanctioned cartels significantly lost their effectiveness. The transformation of the country's industrial structure was also decisive. The foundation of the Japanese economy shifted from capital-intensive process industries to knowledge-intensive assembly industries (e.g. electronics and automobile). In the latter, product differentiation was possible, and harsh international competition improved their position in the international market. Meanwhile, international pressure also increased. The trade frictions between Japan and the US became a serious national concern from the late 1960s through to the mid-1990s.

This period is also marked by a strong inertia in policy (Okazaki and Ministry of International Trade and Industry 2012: 227–277). First, a series of external shocks (the oil crises in 1973 and 1978, and waves of appreciation in the Japanese yen after 1971) and the unexpected slowdown of growth resulted in an unintended extension of the existing policy. Exempted cartels were mobilised through the early 1980s both as an emergency rescue measure and as a convenient tool to allow the 'soft landing' of declining industries (the so-called industry adjustment policy). The number of exempted SME cartels rose once again (Figure 10.2). Second, even after the official abolishment of Type C cartels in 1964 and the shift to a stricter attitude by the FTC against Type A cartels in the 1970s, the MITI did not give up its role of 'guiding' the market. The ministry introduced the so-called 'guideline method' in 1975. According to this new scheme, the MITI announced its prediction of demand for specific products on a quarterly basis and prompted private companies to voluntarily reduce production. Compared to the previous approach to Type A cartels and the compulsory nature and feature of state-authorised cartels, this policy was weaker. However, this action could easily induce companies to undertake concerted action or create implicit cartels. Thus, the FTC intensified its surveillance in these areas.

Phase-out of authorised cartels (mid-1980s–mid-1990s)

The era since the mid-1980s was the final phase of authorised cartels and the cartel register in Japan. First, the international climate changed. The global shift towards stricter anti-cartel policies, increasing trade frictions with US and Europe, and trade surpluses against major trade partners played an important role. In the early 1990s, the MITI made its final step towards terminating the system. The MITI ceded its authority on competition policy to the FTC by shifting its activities to the newly defined field and requirements of industrial policy (Kurosawa 2009).

Second, since the 1980s, ‘developmentalism’ was criticised intensely in Japan. The cartel policy reflected these changes, and the MITI started to alter its views. The ministry recognised the system’s limitations and sought an exit strategy from the policy. The debate on the amendment of the Depressed Industries Stabilisation Law (1978–1983) is an example. The law had previously been in place to authorise cartels to scrap excessive production capacities and to promote consolidation in specified industries that suffered ‘structural’ depression (Type B). On its expiry, a bill for a successor law was debated. Yamanaka, the Minister of MITI, made it clear that the new law, The Industry Structure Law [1983–1987] (Type B) should become the final one of this kind (Okazaki and Ministry of International Trade and Industry 2012: 248–257). In fact, in the second half of the 1980s, the number of manufacturing-related exempted cartels was halved. In the early 1990s, SME-related exempted cartels disappeared.

In the 1990s, this movement towards phase-out of registered cartels escalated for three reasons (Fair Trade Commission 1997b: 485–571; Okazaki and Ministry of International Trade and Industry 2012: 277–318). First, the FTC was always unenthusiastic in the authorisation of cartels. The registered cartels were a reluctant compromise. Riding on a fundamental change in the political and economic climate, the FTC took a bolder stance. Second, since the 1980s, international criticism about the ‘lenient’ cartel policy in Japan intensified. Japan–US trade friction peaked in the early 1990s, especially because of the huge trade surplus of Japan against US. Third, in the domestic policy, public opinion about the bureaucracy and the existing system became very harsh. In the field of competition policy, this resulted in a shift in the anti-trust and anti-cartel policies. On the one hand, the anti-trust policy was relaxed to facilitate M&As, and eventually, pure holding companies were legalised. On the other hand, the anti-cartel policy was intensified.

The phasing out process began with the most opaque of the registered cartels, namely, the ones based on administrative guidance (Type C). As an authorisation tool of cartels, it was abandoned in the mid-1960s, although the use of ‘guidance’ continued in various other fields of the MITI’s policies. Ironically, the few remaining cartels in the late 1980s and early 1990s were the ones that maintained the import and export quotas imposed by the US; these were based on a series of ‘voluntary’ agreements.

For the Type A registered cartels, the 1980s also represented the final period of phase-out. The last ‘rationalisation cartel’ was implemented in 1982, followed by the last recession cartel in 1989. Eventually, in July 1999, the legal framework for

the two oldest pillars of registered cartels was abolished following a fundamental amendment of the Antimonopoly Law.

Type B registered cartels were to be abolished in the 'Plan for Deregulation', which was approved by the Cabinet in March 1995. In July 1997, around 20 Acts related to exempted cartels were abolished or amended. The reduction continued even later. After the mid-1990s, only a few categories of exempted cartels remained. They were based on five laws in the following fields: insurance (around 8–9 cartels); shipping (5–10); road transportation (3); earthquake insurance (2); and domestic shipping (1). Almost all of them deal with services related to public goods, and they are often not considered cartels. The contents of these rules show significant homogeneity with the practices in the US and Europe.

Conclusion

The history of competition policy and cartel register in Japan is a remarkable example of policy transfer. During the first half of its history, the transfer took place through Japan's own initiative, although it was triggered by a strong sense of crisis under the threat of colonisation. The economic thoughts, legal system, and policy tools were imported, together with other elements of Western civilisation. As happened in Europe, feudal guilds were dismantled, and economic liberalism became the dominant economic perspective of the time. This development suggests a degree of affinity between the transferred elements and the needs of local society.

The policy to register cartels emerged in the mid-1920s, following the emergence of large corporations and modern cartels. Such laws mainly aimed at facilitating cartels, though the policy-makers eyed both authorisation and containment. Since the 1930s, new trends towards rationalisation and a controlled economy appeared. This was an effort to address local problems by adopting 'progressive' models from abroad.

The process of transfer had its limit. In almost all cases, selection and localisation were the norm. More importantly, home grown policies played a considerable role. The authorisation and register of local trade associations was a typical example. Parallel development (not transfer) in the same direction as that occurring in Western countries often explains the similarity.

The policy transfer under the US occupation was compulsory and had a profound impact. Coupled with the subsequent backlash, it resulted in very uncommon swings of policy, which is the most prominent feature of Japan's experience. Even when compared to the German experience, the passing of the relevant anti-cartel laws ten years earlier and the local reaction to it during the 1950s made the Japanese case unique.

The extensive cartel register system in post-war Japan was a reaction to address the gap between the previous historical trajectory on cartels and the transferred system. Two types of dualisms were at the root of the system. One was the dualism of the relevant policy organisations, namely, the FTC and the ministries, especially the MITI. The other was the dualism in policy implementation. While the core

principle of *per se* illegality under the Antimonopoly Law was maintained, numerous statutes and administrative provisions were introduced to ‘exempt’ various practices from the principle.

This system had two functions. On the one hand, it authorised cartels and strengthened their function. On the other hand, it worked to control the cartels for public or national interests. The boundary between the industrial and the competition policies was not clear. Thus, it can be argued that the core of the transferred policy was challenged. Nevertheless, it is important to note that both the FTC and the Antimonopoly Law survived a series of challenges and eventually established the sole basis of the competition policy. In this respect, the Americanisation following the occupation had a long-lasting effect on the competition policy of Japan.

From a long-term perspective, the swings in policy from the late 1930s to the mid-1960s can be positioned as a deviation from a century-long historical trajectory. This is evident in any international comparison. It also opened the way for the highly institutionalised cartel register system in Japan. While the Japanese story is unique, the basic trends in the development of competition policy, the rise and decline of cartel register, and the reasons for these trends in Japan are similar to those in the other nations.

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Note

- 1 In his intensive study of US antitrust legislation and its impact, Wyatt Wells concluded that, ‘If deconcentration and decartelization in West Germany rated as qualified success, then in Japan the program was as qualified failure’ (Wells 2002: 186). This assessment has some validity. Germany had *Ordoliberalism*, Ludwig Earhard and the integration in Europe, while Japan did not have their counterparts. This made the backlash in Japan look more impressive. This contrast should not be overemphasised, however. If the significance of the event is not measured by the gap between the goal and the results, but by that between the previous situation and long-term outcomes, the impact of policy transfer in Japan should be greater than that in Germany.