



**Asia-Pacific  
Economic Cooperation**

**Advancing** Free Trade  
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# **FTAAP Capacity Building Workshop on Competition Chapter in FTAs/EPAs under the 3rd REI CBNI**

Port Moresby, Papua New Guinea | 11 August 2018

**APEC Committee on Trade and Investment**

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# **FTAAP Capacity Building Workshop on Competition Chapter in FTAs/EPAs under the 3rd REI CBNI**

**11 August 2018, International Convention Centre  
Port Moresby, Papua New Guinea**

## **Project Final Report**

### **I Overview**

On 11 August 2018, the **FTAAP Capacity Building Workshop on Competition Chapter in FTAs/EPAs under the 3rd REI CBNI (CTI 03/2018T)**, initiated by Japan and co-sponsored by Australia, Canada, Chinese Taipei, Korea, Papua New Guinea, Philippines, Thailand and Viet Nam took place.

This workshop was conducted as one of the activities under the Action Plan Framework for Regional Economic Integration (REI) Capacity Building Needs Initiative (CBNI) initiated by Korea since 2010, and was aimed at in-depth capacity building for negotiators and policymakers on competition area through sharing the best practices and experiences of negotiations.

Thereby, the workshop attempted to equip FTAs/EPAs negotiators to enhance their knowledge on competition policies, leading to a desirable competition chapter in future FTAs/EPAs. The workshop also served as a basis for APEC economies to cooperate further in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices.

This workshop was participated by **51 attendees from 17 member economies including 11 speakers**, from Australia, China, Japan, Malaysia, New Zealand, Singapore and academia (Nagoya University and Shumei University in Japan). The details of speakers are as follows;

- **Mr Justin Allen**, APEC Committee on Trade and Investment (CTI) Chair (Senior Policy Officer, Ministry of Foreign Affairs and Trade, New Zealand) (Opening Remarks)
- **Mr Hiroshi Kudo**, Negotiator for Economic Partnership Agreements, Ministry of Foreign Affairs, Japan (Moderator)
- **Mr Edward C Willett**, Associate Commissioner, Papua New Guinea Independent Consumer & Competition Commission (Former Commissioner, Australian Competition and Consumer Commission)
- **Mr Shuya Hayashi**, Professor, Graduate School of Law, Nagoya University, Japan
- **Mr Chen Kening**, Deputy Director, Anti-monopoly Bureau of State Administration for Market Regulation, China



- **Mr Tatsuro Masuda**, Deputy Director, International Affairs Division, Fair Trade Commission, Japan
- **Mr Hideyuki Shimozu**, Senior Planning Officer, International Affairs Division, Fair Trade Commission, Japan
- **Mr Arunan Kumaran**, Senior Principal Assistant Director, Ministry of Domestic Trade, Cooperatives and Consumerism, Malaysia
- **Mr Wee Guan Teo**, Director, International & Strategic Planning Division, Competition Commission, Singapore
- **Mr Koki Arai**, Professor, Faculty of Comprehensive Management, Shumei University, Japan
- **Mr Grigory Karakov**, Deputy Head of the Department, Department for Control over Foreign Investments, Federal Anti-monopoly Service, Russia

This workshop comprised of three sessions. Session 1 '**Update the Current Situation surrounding the Competition Policy and the Chapter on Competition in FTAs/EPAs**', Session 2-1 '**Exchange the Information of Essential Elements on Competition Chapter in FTAs/EPAs**', Session 2-2 '**Explore Desirable Elements of a Competition Chapter in FTAs/EPAs**' and Session 3 '**Discuss the Relation between Investment and Competition Policy including Chapters on FTAs/EPAs**'.

We 1) examined the current status of a competition chapter in FTAs/EPAs to promote better understanding regarding the benefits of the establishment of the chapter on competition in FTAs/EPAs through the review of recent studies and practices in Session 1, 2) explored the essential elements of competition chapter in FTAs/EPAs considered to be indispensable through exchanging the information and knowledge from the negotiators' experience in Session 2-1, and then 3) explored the desirable elements of a competition chapter which could be accepted by many participants, which may serve as guidelines for future FTAs/EPAs negotiations in Session 2-2.

Also since now the examination of impact on and implications of the investment aspects of the Next Generation Trade and Investment Issues (NGeTIs) is implemented in Investment Expert Group (IEG), in order to support this work, we 4) discussed the relation between investment and competition policy, specifically, how competition policy affects investment activities in Session 3.

Through this workshop, the following 3 points were highlighted.

1) Through the update of the current situation surrounding the competition policy and the chapter on competition in FTAs/EPAs, we shared the view that **international cooperation and harmonization in the field of competition law is crucial**.

2) We explored and managed to share the views on the desirable and optional elements of a competition chapter which may serve as guidelines for future FTAs/EPAs negotiations. In the end, we shared the views that **1) Objectives, 2) Basic Principles including i) Addressing Anti-competitive Activities, ii) Non-discrimination, iii) Transparency and iv) Procedural Fairness as well as 3) Technical Cooperation**

are desirable elements of a competition chapter in FTAs/EPAs, whereas 1) Private Rights of Action, 2) Notification, 3) Cooperation in Enforcement Activities, 4) Coordination of Enforcement Activities, 5) Confidentiality of Information, 6) Consultation/Regular Meeting between Competition Authority, 7) Dispute Settlement, 8) State Owned Enterprises (SOEs), 9) State Aids & Subsidies, 10) Consumer Protection as well as 11) Review Mechanism are optional elements of a competition chapter in FTAs/EPAs. We also shared the views that 'no one size fits all' approach is important and these elements apply in accordance with the counterparty's status.

3) Regarding the relation between competition policy and investment, we shared the view that **there seems to be little relation between competition agreement and foreign direct investment; however, the role of competition policy has increased in the NGeTIs, specifically in how competition policy affects investment activities.**

## **II Background**

This project was designed to put into action APEC Ministers' instructions to build capacity to strengthen and deepen the regional economic integration, and to facilitate the realization of a Free Trade Area of the Asia Pacific (FTAAP) (APEC 2011 Ministerial Meeting statement).

Accordingly, Korea as a leading economy of the REI CBNI initiative and other interested APEC member economies have made efforts in developing a detailed work plan to implement APEC Leaders' instructions. The results of the REI CBNI survey conducted by Korea and APEC member economies' inputs have highlighted the needs of building and enhancing preparation capacities in this field.

From 2012, under 1<sup>st</sup> REI CBNI by the leadership of Korea, several economies conducted the series of Capacity Building Workshop or Seminar with the variety of themes in 13 times, namely, FTA Utilization (Japan), Rules of Origin (ROO) (Korea), Environment (Viet Nam), Sanitary and Phytosanitary Measures (SPS) (Viet Nam), FTA Implementation (Korea), E-commerce (China), Labor (United States), Dispute Settlement (Korea), Government Procurement (Viet Nam), Safeguard (Indonesia), Presentation of Negotiation (New Zealand), Intellectual Property Right (IPR) (Viet Nam), and Service and Investment(United States).

In their 2013 Declaration, APEC Leaders insisted that '*APEC has an important role to play in coordinating information sharing, transparency, and capacity building...*' and '*agreed to ...increase the capacity of APEC economies to engage in substantive negotiations.*' Furthermore, APEC Ministers 'encouraged officials to advance the REI CBNI Action Plan Framework as a key delivery mechanism for the technical assistance needed to one day make the FTAAP a reality.'

APEC Economic Leaders agreed to continue the capacity building activities in pursuit of the eventual realization of the FTAAP under the Action Plan Framework of the 2<sup>nd</sup> REI CBNI (as appeared in Annex A of APEC Economic Leaders' Declaration on The Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP in November 2014). They encouraged economies 'to design and conduct capacity

building programs for specific sectors as lead economies.’

REI CBNI also conforms to the instructions of APEC Ministers. At the APEC Ministerial Meeting of 2014, APEC Ministers welcomed the progress achieved under the Action Plan Framework on REI CBNI and endorsed the Action Plan Framework of the 2<sup>nd</sup> REI CBNI. They instructed Senior Officials to take steps to ensure the effective implementation of the 2<sup>nd</sup> REI CBNI.

Since the initiation of 2<sup>nd</sup> REI CBNI in 2015 until 2017, totally 13 workshops have been conducted including this workshop, namely, ROO/Trade Facilitation (Korea), Technical Barriers to Trade (TBT) (Viet Nam), International Investment Agreement (Peru), Negotiation Skill on Environment Phase 2 (Viet Nam), Scheduling in Trade in Services and Investment (Korea), Services Chapters with a Negative List Approach (Peru), Negotiation Skill on IPR Phase 2 (Viet Nam), E-commerce (Japan), Trade Remedy (Korea), Competition (Japan) and so on.

As an active economy in joining the REI CBNI, Japan also proposed the area of competition as one of the sectors to be explored in the 2<sup>nd</sup> REI CBNI, and held the workshop on competition chapter in FTAs/EPAs in Ho Chi Minh, Viet Nam in August 2017.

Through the workshop, the following 3 points, **1) Growing significance of competition policy and the meaning of establishing competition chapter in FTAs/EPAs, 2) Concerns of discriminatory application of competitive law, jurisdiction over subsidies, and 3) the significance of ‘exchange of information’ were highlighted and shared among all the experts and participants.** For details, refer to the Summary Report on APEC website.

<https://www.apec.org/Publications/2017/10/FTTAP-Capacity-Building-Workshop-on-FTA-Negotiation-Skills-on-Competition-under-the-2nd-REI-CBNI>

2017 APEC Economic Leader’s Declaration stated that *‘We commend the efforts of economies to advance work related to the eventual realization of an FTAAP, including capacity building initiatives and information sharing mechanism. We encourage economies to make further progress and to develop work programs to enhance APEC economies’ ability to participate in high quality, comprehensive free trade agreement negotiations in the future.’* More specifically, 2017 APEC Joint Ministerial Statement also says *‘We look forward to the implementation of the Action Plan Framework for the 3rd REI CBNI and the RTAs/FTAs Information Sharing Mechanism.’* REI CBNI will continue to serve as a solid stepping stone for the realization of the FTAAP.

This workshop which was held in Port Moresby, Papua New Guinea in August 2018 was planned as a second one on the same theme under 3<sup>rd</sup> REI CBNI. Based upon the discussions and outcomes achieved in the first workshop in Ho Chi Minh, Viet Nam in August 2017, this workshop was aimed to offer an opportunity of sharing the further understanding and experiences among trade policy makers and FTAs/EPAs negotiators on this area.

### **III Discussion**

#### ***1. Opening Remarks***

In his Opening Remarks, **Mr Justin Allen, CTI Chair** (Senior Policy Officer, Ministry of Foreign Affairs and Trade, New Zealand) mentioned as follows;

APEC is an incubator of ideas. In the regional economic integration space it has no greater idea than the FTAAP. It is CTI's role to work towards this long term goal. It is not yet clear exactly what FTAAP will be or how we will realize it, but we have been collectively exploring a range of issues from free trade agreements in the region to help provide pointers.

At the same time, since 2012, APEC has been carrying out the REI CBNI as part of its efforts to strengthen member economies' capacity for FTA negotiations. Since 2015, when the second phase began, the Initiative has been more directly linked with APEC's drive towards the eventual realization of a FTAAP. In 2018, we have moved into the third phase of the Capacity Building Needs Initiative. All up, more than 30 capacity building workshops have been held since 2012 under the three phases of this Initiative.

Better competition policy fosters and improves the efficiency of competition in markets. When combined with trade policy that facilitates greater access to markets by more firms, it is clear that trade and competition policy share the common purpose of benefiting consumers and businesses. Good competition policy drives efficiency and consumer welfare. It is also good for our economies.

In APEC, as far back as 1995, the Osaka Action Agenda (OAA) included competition policy as one of the areas that economies should take action on, particularly on the development of national competition policies. Arguably, this issue is even more important now, more than 20 years after the adoption of the OAA.

Our latest work in APEC to review progress towards the Bogor Goals has found that many recent initiatives in the area of competition policy implemented by APEC economies involve policies to 1) prevent abuse of market power, 2) promote competition practices, 3) make notifications mandatory for mergers and acquisitions above certain thresholds, and 4) deter malpractices by establishing higher fines and imprisonment. In addition, some APEC economies have reported an increased number of reviews related to mergers and acquisitions, as well as cases of possible anti-competitive behavior.

Competition policy today also needs to take account of the growth in trade. Businesses today increasingly trade. As border barriers - tariffs - have decreased and market access was improved, firms are increasingly engaged in conducting their activities across borders. Anti-competitive behaviours behind borders can reduce or prevent the potential gains made in the area of market access.

Provisions on competition policy in FTAs and RTAs help create a predictable, facilitative business environment. Through such provisions, the benefits of free trade are not undermined by behind the border public or private sector actions.

A decade and a half ago, WTO members agreed to exclude competition policy from the Doha Round. The issue has not been picked up at the multilateral level since. Therefore, it is no surprise that - in lieu of multilateral action - many FTAs and RTAs have included competition policy chapters as a way to create internationally recognized rules in this area.

A 2015 paper by the International Centre for Trade and Sustainable Development and the World Economic Forum reported that 88 percent of FTAs in force in 2015 devoted specific provisions or entire chapters to competition-related matters.

Competition chapters are therefore, obviously, an important component of modern, comprehensive trade agreements. Trade agreements are not the only means to agree provisions on competition policy at a bilateral or plurilateral level - there are other treaty level mechanisms, as well as non-legally binding Memorandums of Understanding.

Whatever the mechanism, international cooperation on competition policy is important for creating the type of predictable environment for business and consumers and that can help boost growth.

This second workshop on competition policy which Japan has organized will look into the current state of play of FTA practice in the area of competition policy provisions. Japan has lined up a number of experts and practitioners from around Asia-Pacific region who will address, among other things the overall role of competition chapters; the basic elements of competition chapters, as well as extra, more desirable elements; and the role that competition chapters play in encouraging investment.

Those participants who have considerable experience in this area will be able to contribute to the discussion, and those that are relatively new, or delegates from economies that have less experience in enforcing competition policies, can learn from their peers. The hope is that participants will leave with a better understanding of the range of approaches to this topic and the benefits that FTAs can deliver in the area of competition.

Importantly, when we think about the future realization of a FTAAP, today might also provide insight on what is the gold standard of competition policy that we should be aiming for at the bilateral and plurilateral levels. I look forward to a productive discussion today. And the ideas it will generate.

## **2. Introduction**

Following CTI Chair, Mr Allen's Opening Remarks, as the Moderator of the workshop, **Mr Hiroshi Kudo, Negotiator for Economic Partnership Agreements, Ministry of Foreign Affairs of Japan** welcomed attending guests and speakers.

Mr Kudo is in charge of the negotiations on competition chapter and legal and institutional issues for Regional Comprehensive Economic Partnership (RCEP), competition chapter for Japan-China-Republic of Korea FTA, as well as competition chapter as well as SOE chapter for Trans-Pacific Partnership (TPP).

After then, Mr Kudo introduced the summary of the first workshop which was held last year and all guest speakers in today's workshop, and explained the agenda of today's workshop, especially that the main aim is to explore desirable elements of a competition chapter in FTAs/EPAs.

### **3. Workshop's Sessions**

Experts provided presentations using the attached documents on the following topics in Session 1 and Session 2-1:

#### **1) Session 1**

##### ***'Update the Current Situation surrounding the Competition Policy and the Chapter on Competition in FTAs/EPAs'***

i) Firstly, **Mr Edward C Willett, Associate Commissioner, Papua New Guinea Independent Consumer & Competition Commission** (Former Commissioner, Australian Competition and Consumer Commission) made a speech as follows;

Sometimes the discussion on competition policy was focused on anti-trust and that is clearly a strong focus of discussions in the context of the competition chapters. But from my point of view, competition policy goes much further than Anti-trust Laws. And typical FTAs/EPAs often include provisions which are composed of competition policy elements that go far beyond competition law.

It is important to recognize that social policy elements are important for competition policy and they can sometimes make some tensions between social policy and competition policy. But there is a recognition that the best way often to deal with social policy priorities is not to restrict competitions through various mechanisms more than it is absolutely necessary and to consider what the best approach to those social policy obligations might be.

The notions of trade liberalization of economic participation internationally and competition policy are very similar concepts and certainly consistent with each other. The market access and competition also really are very similar, if not the same sort of concept. Because they are all about maximizing the participation in markets by people who want to supply and consume in those markets. Therefore, both are going to maximize the access to markets by all suppliers to promote competition in the interest of the consumers.

They heightens the three types of the efficiency, firstly technical efficiency which is lowering the cost of production, secondly allocated efficiency which mean resources going to be most fair reviews and thirdly innovation or dynamic efficiency imperative. The competition policy and the interest of the consumers are beneficial to economies as a whole and beneficial to society.

In the past international agreements in liberalizing trade and economic participation have focused on international trade and competition policy is tended to focus on domestic market reform issues and competition policy being drawn into most international agreements and trade issues being drawn into competition policy issues. Indeed reducing barriers to trade can be seen as a part of an unilateral competition

policy reform because restrictions on imports are restriction on domestic competition for each economy. Therefore there is the proposition that since market access promotes competition, it is also part of domestic competition policy reform as well as international policy.

Competition law and anti-trust law are the cornerstone of this set of policies supporting competition. Consumer protection is another element of competition law that is distinct in its objectives but nonetheless an important part of a group of regulation called pro-competitive regulations, the regulations that are designed to facilitate and promote competition in markets.

Another important element of competition policy is having a look at reviewing an appropriate reform of legislation that actually restricts competition, because just as it is important to have laws to promote competition. If your economy have industry policy and regulation that actually restricts competition in those markets and counters the beneficial effects of the procompetitive regulation, these sorts of anti-competitive legislation can be extensive throughout some economies, perfectly just about every sector of the economy, professional services, primary production, retail trading, transport markets, food standards, controlled substances regulation, gambling, banking, planning and approvals processes and restrictions in competition in other utilities markets. It is important that a component of the domestic competition policy equals to the role of the international agreements, and it is important to at least recognize that these domestic policy issues can have the impact on market access and economic participation.

There are list of things that recognize that, in the utility sectors in particular many economies have had a traditional approach of using SOEs to supply utility services very often on a vertically integrated basis. An important part of the competition policy is actually to look at SOEs and the role they play and what they do and how they governed and particularly in the context of utilities markets, to test whether the competition can be enhanced by reform of those existing arrangements. So that includes four elements, the structural reform of natural monopolies, especially public monopolies prior to privatization, access arrangements, network regulation for natural monopoly networks, that is to promote competition in the contestable dependent markets, reform of the SOEs' governance and operations so that they are more businesslike and that facilitate more of the markets and notions of competitive neutrality between public and private sector businesses, there are equal opportunities for all to participate in those markets. Institutional arrangements are critical to ensuring that competition policy particularly procompetitive regulation works well.

The notions of the competitiveness of anti-trust regulation focused on three elements in particular; anti-competitive mergers and acquisitions, the anti-competitive use of market power or monopolization of market by large entities and anti-committee of agreements inclusion and they are three core elements of anti-trust law that are part of the most competition laws. Some competition anti-trust laws also prohibit or regulate other forms of anti-competitive practices. These sorts of provisions that are subject of FTAs and EPAs, Australia and Chile are example, the extensive engagement the Japan has had with their three categories of economies, type 1, 2 and 3 depending on the level of existing sophistication of competition law within those types of economies.

Almost 130 economies now have anti-trust laws of some type and it is growing rapidly. The anti-trust law are domestically should be applied uniformly to all market participants, including individuals, corporations and other business association and SOEs. For various reason, that is not always done and that is an important area of reform. There is an important parallel between the inclusion of competition chapters in the FTAs/EPAs and the growing international cooperation between regulators on a bilateral and multilateral basis in anti-trust law and enforcement and this is particularly prominent.

Consumer protection which is one of the other elements of competition law sounds like people see consumer protection as a form of social regulation, but well-designed consumer protection law constitutes laws that empower consumers to engage in market effectively. They will make markets more effective, and it is another form of procompetitive regulation. They include one of the key consumer protection provisions is the prohibition on misleading and deceptive conduct. That is the cornerstone of the competition of consumer protection legislation. Then other provisions include; minimum product standards through product liability laws that are part of consumer protections laws, labelling standards, production origin, requirements. These elements often appear in international agreements and examples in between the Australia and Korea and Australia and Japan.

There should not be some regulation of surgeons for example, some barriers to entry. But, that's an area where some restrictions on competition are well and truly justified, but it is worth looking at those sorts of arrangements to ensure that the restrictions are actually designed to protect consumers in the interest of society rather than not protecting producers and sometimes that line is crossed and it is worth considering.

The point is whether the restrictions are necessary and whether they erupt in the community interest. That is usually set up with the review and reform of legislation. What we consider is a clear public benefit, net benefit from the restriction on the competition and that benefit can only be achieved by legislation and the restriction competition generally in competition policy. There is parallel process for proposed new legislation that should satisfy the same test and while the net benefit test is an overall welfare of economy wide test, it does include a competition test component, because the focus is on impacts on the competition.

In domestic economic policy, restrictions on importing goods and services can be viewed as a legislation restricting competition, plus domestic competition policy can lead to an unilateral free trade initiatives and that what is the Austrian experience under its competition policy reform program that the review of legislation restriction competition include reviews of remaining input tariffs that is existed in that economy.

Structural reform of natural monopolies is also an important component of competition policy reform. It is one of a set of proposals that are designed to regulate effectively, monopoly elements particularly in the utility services but also facilitate competition in markets, where competition is viable. What we have to do is separate that element of utilities and network supplies that requires a regulatory focus because they do constitute natural monopoly elements and so that the there is a limit on the degree in which those entities might discriminate in dependent contestable markets. For examples, electricity network business, separating those from potentially competitive generation of retail operations, gas transmission, pipelines - distribution pipelines, separating those from gas supply and marketing operations, communication via



networks separated from core services and marketing which are contestable. Questions about mobile and networks which are generally regarded to be contestable and although inevitably it is a fairly concentrated mobile networks but generally the approach is that they are natural monopolies and they are actually capable of competition.

Rail network businesses, separating those from train and logistics operations, there is some contention about whether that is in the interest of the community, given the synergies between trains and networks that require some coordination between those operations. And probably the area of least advancement in the most economies is in terms of generating competition in the water sector. We still have in many economies politically integrated supply but at least potentially things like waste water treatment, recycling and water supply are contestable and that leads to question about whether there should be some separation between the pipelines and the natural resource.

It can be challenging to impose structural separation when businesses are already being privatized and operated commercially, often some significant resistance to that proposition. When effective regulation is applied to those networks that commercial enterprises see that, there is not much value to be gained by combining network businesses with contestable businesses, because they have very different focus than commercial interest, their rate of returns are much higher than the competitive area and increasingly even voluntary separations between networks and contestable businesses, particularly in the electricity and communications areas.

This is different types of regulation to anti-trust regulation, but the objective is similar. The difference is that anti-trust generally ceases to promote competition in all markets. It means promoting viable competitors and promoting lots of competitors to provide services to consumers. Utility regulation recognizes that some sectors are not amenable with the competition. There are natural monopolies, but there is certain going to be one of them or certainly going to be efficient to have one of them. Therefore they are inevitably going to have some significant market power in order to promote competition in independent markets which the competition elements come into this form of regulation. Some guarantee of access to players who want to compete in those competitive areas of the markets need to be provided.

It provides the right of access on reasonable terms to monopoly services, needed to compete in upstream or downstream markets. It is usually supported by some form of regulatory enforcement, such mandatory arbitration of access to negotiate arbitrate model, sometimes the utility is obliged by legislation to submit an access undertaking to the regulator and sometimes the regulatory simply opposes the terminations and there are other mechanism but basically it is a fairly intrusive form of regulation because this is a substantial area of market power.

There are a number of international agreements that have some market access obligations in the utility services that might not propel the competition chapters but they do touch on this issue, especially in telecommunications. Telecommunication sector in order to enable interconnectability on an international basis is an important area of cooperation and perhaps that has a spinoff, but also stimulated this move towards access guarantees in telecommunications.

Generally these obligations are in the national agreements. It is necessary in terms of effective regulation of utility networks. They tend to be assurances rather than guarantees of regulated access and this is important and difficult area of regulation to get right and it is asking a lot of international agreements to provide that assurance of access if there are similar guarantees on the effectiveness of the domestic access regulation in similar terms to assurances on the effectiveness of anti-trust regulation.

SOEs in many economies to varying degrees and again it does not make much sense to have procompetitive regulation, and anti-trust regulation in an economy if that competition is then distorted because the prevalence of SOEs means that competition is not going to be effective in the first place. This area of reform is on to complement the other areas and such structural reform of SOEs and also obligations on competitive neutrality. An example of how these governance and operations of SOEs are reformed is through the corporatization model. SOE corporation law and the domestic cooperation law have regulated exactly the same way as private businesses.

The overall objective is to ensure that SOEs are subject to the same arrangements as regulatory arrangements and in positions as to the private sector. These reforms are such especially important if the SOE is monopoly in the utilities sector and these measures include consideration of looking at the appropriate commercial objectives of the SOE and the separating out regulatory function of the SOE might have had, because it is inappropriate for the SOEs competing with private sectors to be actually responsible for the regulation of that market.

Community Service Obligation (CSO) often involves market restrictions, we should be careful about what CSO you will impose on a SOE and how they fund it. The price and service regulations that are applied to the industry and the appropriate financial relationships between the owner of the SOE, the government and the enterprise itself, including dividend arrangements, rate of returns, targets, capital structure and funding arrangements. It is important that the SOE does not have the advantage but funding guarantees provided by government and there are various mechanisms that can accommodate that. Again this area of competition policy reform has been a focus at least in part of many negotiations and clearly it is a key issue where there are negotiations between economies which have a different mix of public and private enterprises in their economies.

Competitive neutrality is important if gaining access to markets is meaningful that the market is dominated by SOEs with the competitive advantage by virtue of their ownership. In the Australian competition principles agreement, it is quite a narrow definition of the notion of competitive neutrality, that is focused on ensuring a level playing field between a SOE and business that is in competition with the SOE. It was seen as the most pressing issue in terms of competition policy reform and SOEs and similar provisions have been included in the international agreements by the Australia and Japan, Korea and the United States, this notion of competitive neutrality in between SOEs and private sector competitors is equally important in the context of international economic agreements as it is for domestic economic policy. It is possible to take a much broader view and in many respects, it can be quite useful.

There is another set of policies they involve government in the new markets that does not involve legislation. It is possible to develop a principal of competitive neutrality that touch on all those public non-legislative interventions in market to think about how they

might work in the context of overall competition policy. The OECD has have worked on competitive neutrality and well their overall work was focused on that narrow concept of competitive neutrality. This broader definition was quite useful that competitive neutrality occurs where the operating in the economic market is subject to undue competitive advantages or disadvantages.

The forms of interventions that governments can undertake in market that do not involve legislation, those can be categorized in the four groups. The first is the traditional SOE group where an SOE is providing products to consumers often in competition with private sector. The second group is where government's byproducts for their own use including procurement processes and contracting out and this is a very broad range of interventions in markets that can range from office supply to major infrastructure projects and governments facilitating those sorts of private sector involvement in government operation can be important opportunity for the economic participation.

The third category is where governments seek to ensure the third-party provision of products that are available to the particular consumers and this is usually to promote social policy outcomes and guarantees in the provision of health, education, housing services through for example purchaser provider model with providers private sector entity, again an important area of government intervention in markets that involve some potential for market opening and increased potential for both domestic and international business and the fourth area is where government seem to influence health, goods and services are traded without being directly involved in the trade, generally through subsidies, concessions or taxes to encourage consumption of products, some products and deter others. They usually do this because there are some externalities, social externalities associated with consumption of product, such as the taxing gambling and alcohol.

All of these interventions by government are likely to impact on trade and economic participation opportunities and some of these are already such as procurement processes and contracting are already the focus of some international agreements. And the objective is to maximize to ensure opportunities for all providers both domestic and internationally.

Institutional arrangements is common and should be uncontentious that international agreements require domestic competition laws to be applied consistently in accordance with the principles of transparency, timeliness, non-discrimination, procedural fairness. Institutional arrangements are keys to that. Competition regulation should be competent, independent, well-resourced and accountable. The same principles should apply to utility regulators in economic regulation, but different economies have different approaches to how they structure regulators. Sometimes competition and consumer protection regulators are combined, sometimes competition and utility regulators are combined and sometimes they are all combined together sometimes, utility regulators are separate. In Australia and the economies are closely involved in Australia and New Zealand and Papua New Guinea by and large those entities are combined and there are some benefits to combining the resources for all those areas of regulation. There are certainly some synergies in the competition focus and it is important to make the best use of scarce resources.

Judicial processes and arrangements are also very important where courts play a role in the competition law enforcement. The statutory independent regulator model is an effective model involved statutory office holders, as decision makers who are not only independent from markets but also independent from governments but there is no absolute and that sort of proposition. People from the anti-trust division and justice department, in the United States for example, who are part of the executive would argue very strongly. They have a strong culture of independence.

Public interest test is the process by which social policy interest is considered in the context of competition policy. Therefore the governments will always want to reserve the right to breach competition policy principle where they see a need, but the proposition is that, the public interest test should be a robust process that applies to the broad community economy wide test rather than focus on particular industry or sector, and there should also be rules about how a public interest test is applied and satisfied process and so it should be objective, robust, transparent and thorough.

While competition policy has traditionally had a domestic focus, it is increasingly part of international agreements and they are seeking to mesh these domestic focus policies with the international engagement. Competition policy principles are entirely consistent and indeed complementary to the interest of the international economic participation and maybe competition policy principles in the international agreements in a more compressive holistic manner, perhaps certainly consider that outside the competition chapters of international agreement, there are competition policy provisions that touch on competition policy issues that might be brought together in a more comprehensive way.

In conclusion, competition policy can be divided into three broad categories for consideration. One is procompetitive regulations, competition laws that are designed to promote the competition whether it is anti-trust, consumer protection or regulation of utilities. Second is the review and reform of laws and regulations that restrict competition as the counterpoint to the procompetitive regulation. And finally government, non-legislative measures that impact on competition along the lines.

**ii) Subsequently, Mr Shuya Hayashi, Professor, Graduate School of Law, Nagoya University, Japan** made a presentation as follows;

I will introduce Japan's experience of technical assistance of competition law area and some agenda on competition law harmonization and diversities.

I got the opportunity to support registration in several Asian economies in the last few years. In these economies, the stage of economic development is very different from developed economies and the knowledge and experience on market competition seem to be more serious than those developed economies. While the introduction stage and degree of experience of competition law also diverse.

Market competition is a beneficial social mechanism also for Asian developing economies to achieve efficiency in resource allocation. However, in fact, there were many phases in which competition was restricted from the viewpoint of fairness of distribution at the public policy decision places. The economic system and policy management also cause a new unfairness between economic agents with the

background of favoritism and cronyism. In Japan, there are problems of heavy bid rigging in public procurements. This problem is considered as corruption and is treated as a big social problem in the developed economies.

Since the modernization of industries was achieved at a later stage by the state, resistance to government intervention was poor, and the exclusive and discretionary nature of administrative power remained small especially in developing economies in Asia. In addition, social buffer and control against consumer exploitative abuses by domestic big enterprises and conglomerates called zaibatsu are still weak. The jurisdiction would be also weak with corruption problems, and it has difficulties to defend citizen's rights. As the social and political problems are relevant with the Asian economic law development support, when we discuss competition policy, the perspective of international cooperation also should be focused.

Japan has the competition authority with the longest history and enforcement experience at least in Asia, and also has been implementing large technical support to Asian economies. The issue is how to construct effectively and have effective technical support based on the needs of the recipient economy. In the East Asian region, because the needs of support are diverse among economies and the stage of development of the economy, I will present it separately economy by economy.

Firstly the Korea and the Chinese Taipei has sufficient experiences and long history in enforcing competition law. Therefore it is necessary to cooperate among providing economies as well as between donors and recipient. We must avoid competition for legal development support among donors because Japan's technical assistance support and Korea's one is very close and similar in some parts of them.

In Thailand and Indonesia, many major operational rules and guidelines have already developed for 15 years since the introduction of the competition law. For such economies, it is important to close to practical application and technical cooperation in actual enforcement is required.

Viet Nam and Mongolia also have major operational rules and guidelines and have also been developing them. However not only rules and guidelines themselves but enforcement performance would be still insufficient comparing with the developed economies, such as the United States and Japan. Therefore technical assistance for these economies will be required full-fledged operation of competition law. Many students from Viet Nam, Magnolia and Cambodia are studying in our university and some of them are dispatched by their government. They say that competition law is already existed and many guidelines are established, but on the same time, they also recognize that some problems on the independence of the competition authority or some actual enforcement is relatively not sufficient.

In case of Philippines and Cambodia, these economies are very new competition law economies so the overall technical cooperation such as legal theory or enforcement system improvement would be needed as a support for formulation of the draft of the guideline of legislation.

Japan's Fair Trade Commission (JFTC) undertakes the technical cooperation with Japan International Cooperation Agency (JICA) and overseas competition authorities. For the planning of the technical cooperation, JFTC has formulated and implemented

the program, but the program is ad hoc basis for each economy's need for individual training and can be changed in the process.

However the ad hoc response and ad hoc basis technical cooperation has not been working well. The effective implementation of the technical cooperation, in other words, it is needed that JFTC should build up strategies of legal assistance in the medium to long-term technical cooperation. That will be including legal cooperation to determine and demand from the recipients and the kind of vision that should be carried out. Based on the strategies regarding the planning and designing of individual project, it is necessary to consider the best program designed in accordance with the needs of the assisted and cooperated economies. Because the capacity of staffs at the competition authorities in the developing economies who participate in the training program to Japan is tremendously increasing and Japan's training program is very high level in every year.

From the above perspectives, the following four points for the technical assistance would be critical. One is that we must grasp needs of the developing economies and second is we well analyze the type of the technical cooperation of Japan and third is we analyze the coordination of needs of the developing economies as well. And finally we should have good relationship with the initiative of another legal assistance, for example Europe and the United States and so on.

At least in Asia, the competition law and policy that only focus on free competition do not seem to be able to get the citizen's big support. In the past, As Adam Smith ever said, efficiency could be achieved as if led by an invisible hand of the god, with individuals pursuing their own interest. However, Smith did not say that social justice could be attained through the market and market competition. What he contended was merely that market competition contributed to the achievement of market economic efficiency. Therefore when we are considering the future of competition law in Asia, it cannot be discussed without the context of the fairness of competition. Because, it took more than thirty years to have the Anti-monopoly Law in Japan took the root, because citizens understood the value of the fair competition. In Japan, the unfair competition regulation such as the regulation of superior bargaining powers is very important area when we consider competition policy. The counter-regulation is important but the regulation of the unfair trade practices is also as important as or more important than it.

One of the features of the competition law in Asia is the emphasis on the regulation on unfair trade practices. Likewise the regulation on the abuse of dominant position which focuses on exploitative abuses is another distinctive feature. Therefore there is a long tradition that the maintenance of a fair trade is much more understandable and preferable than the maintenance only for free competition in Asia.

With regard to the cross-border competition law cases, a conflict is likely to occur when one side of the competition authority adopts the universalism point of view and the other side adopts the particularism point of view in competition law, but this concept is very controversial. The global harmonization might be essential to the outline of the legal system of where two views are integrated. After all the current anti-trust thought which neglects fair trade and free trade is something inherent we cannot say it is universal. In the history, medium or small size producers were considered important role to protect social stability. And the some of the United States' historian say that the Jeffersonian democracy even in the United States. From the historical point of view, we

can never say that the standpoint of fair trade was something particular in the United States.

In conclusion, the following three aspects are essential to the stability and the fixation of competition culture in Asia. First is that the efficiency supremacism in competition law is being relativized from the area, the case study on of the competition law in Asia. The second is that emphasis on fair competition and fair trade should be given positive evaluation, instead of being removed of something indicating the backwardness of Asian competition laws. The third is that Japan's past experience of regulating unfair trade practice is essential to the social stability and the fixation of the competition law in Japan and it should be passed on as required in the competition law legal assistance in Asia.

## **Q&A**

### ***(Question from Mr Shimozu to Mr Willett and Mr Hayashi)***

**Mr Shimozu:** Just a quick comment on JFTC's technical assistance. I would like to share the JFTC's experience here. JFTC has provided technical assistance for quite a long time. Purpose of such technical assistance is very consistent i.e. to raise awareness of significance of developing and enforcing the effective competition law and policy in the area of concern. And we focus on mainly the ASEAN economies recently. For that purpose, we cooperate with JICA or other international institutions like UNCTAD. And in some projects we utilize the Japan-ASEAN Integration Fund (JAIF). Also in some projects, the JFTC actually sends the JFTC's expert staff to the competition agency to work inside that competition agency to help for two or three years, quite a long time and those kinds of technical assistance cannot be provided ad hoc. I totally understand people have different opinions but some of the slides of Mr Hayashi's presentation is a little bit misleading or I dare say they are wrong.

And one question to Mr Willett. About the public interest test, you mentioned that competition policy principles should include the public interest exemptions. But I think it is a kind of international standard to make exemption for the competition law to a minimum necessary and minimum to the object. And I am just wondering then, when you say "public", as in public interest exemption, do you have anything particular in your mind like in the economics sense, consumer surplus or producer surplus or total surplus?

**Mr Willett:** I should have mentioned in my presentation that, in the context of competition law, anti-trust law in particular it is typical to have an authorization process which is a form of exemption from the competition laws, which is equivalent to the public interest test that I spoke about in the context of the broader competition policy principles. So what is the ultimate test is the consumer interest test, is a test of economic efficiency. Some people argue, in the long run those two things are the same. It is a very technical argument. I am comfortable with a consumer interest test, long-term interest of consumers in the environments that I have worked in has generally being regarded as the right test for any sort of authorization or exemption process.

**Mr Hayashi:** The fact that Mr Shimozu pointed out may be right as an official remarks. But in my frank view as a non-governmental advisor, I do not see yet the deliberate philosophy for the technical assistance in Japan or as JFTC. I understand well the JFTC has long experience and detailed knowledge of the competition law in each recipient economy because the JFTC studied well and the other economies' experts who have been to the recipient economies told it them. But a long term perspective about what the technical assistance should be, and/or the JFTC's sophisticated strategy about it should be critically important. And the vision why many economies including Japan and the Japanese expert should provide and undertake the technical assistance is also very important. Anyway, what I would like to say is that competition among the competition authorities for technical assistance and competition to make influence on competition law regime of the recipient economy through the technical assistance activities should be avoided. I would like to emphasize that those points should be well considered and focused.

***(Question from the floor to Mr Hayashi)***

**Participant:** What is your opinion on the certain government policies that created or encouraged the monopolies?

**Mr Hayashi:** Regarding the policy and law for the encouraging monopoly, I think competition culture is also important. In many economies, competition law is very similar. Indonesian law and Japanese law will have the mainly similar law regime. But the competition culture will be different. The regulating the monopoly situation which you said is also essential. So there were very monopolistic situation by many conglomerates called zaibatsu in the industry even in Japan in the past. I think that not only the exposed regulation but also the merger of the structure reform to divide the big conglomerates is also important. As it is very conglomeratic and monopolistic nature in some industry in Indonesia, so I think that not only some kind of acts on the regulating the export but also the structure reform should be done. For that, reform of the competition law is important but collaboration work with the other relevant authorities will be much more important.

***(Question from the floor to Mr Willett and Mr Hayashi)***

**Participant:** I have a question first for Mr Willett, I am aware of the public anti-trust and concept of anti-dumping measures. I am not sure how to have an evaluation will be structured in the case of competition. I was wondering it if you could provide some examples you know of Australia and New Zealand and so on. And I appreciate it if you could show the how to apply it?

And regarding Mr Hayashi's presentation, I wanted to provide for our economy's experience. For example, leniency program was implemented but it was a bit controversial. But once would you saw the rise of the many cases that there were effectiveness of the program, then it was publicly okay for them to accept it and maybe that is an also a good way to have public acceptance of some competition regulation tools.

**Mr Willett:** Anti-dumping is one area where at least potentially there is some tension between principles of competition policy and the objectives of anti-dumping and the main reason for that I think is anti-dumping tends to have a very industry focus. It



focuses on a particular sector. It does not necessarily look at the broader implications to the economy whereas as I said the public interest test, the authorization test in competition law, they are called, what it is called the economy-wide test. So you not only look at the industry that might be the main focus of the provision, but you also look at the broader implication of the economy recognizing that there are clear flow and effect sometimes.

I will give two examples, those are very diverse examples of the application of the public interest test and one is in terms of terrorists. The existence of the terrorists can provide some benefits to the industry that the terrorists provide some protection for. So you are like to get more resources flowing into that sector, but of course other businesses use those products as input to their businesses and the higher prices, the higher cost for those businesses. And so the economy wide test seeks to consider both the beneficial effects of any intervention and the detrimental effects of any intervention against all industries that might be effective and the net outcomes of that.

Now principles of economics tends to suggest that, in terms of allocated efficiency and dynamic in particular, there need to be some is strong case for an intervention like tariff protection to overcome the likely detriments in terms of resources flowing to the area of most productive use. Because if that industry was the most productive use of the resources, it uses within an economy it is likely that – it would need tariff protection to survive and thrive. So there is some basic principles of economics, you can apply but you even also have a look at whether there are particular factors that might need to be taken into account. There are industry arguments, for example there are arguments of that market failure that might justify some form of intervention at least on a transitional basis.

The other example just gives a taste of how broadly these tests can be applied. When you look at the consideration of the regulation of surgeons in Australia now, clearly surgery is a very highly skilled profession and consumers want to have some satisfaction that is going into an operation, they are going to be treated by someone of some skill that is obvious I think it is fair to say, but questions arose when we looked at the regulations of surgeons in a way that the standards of training of surgeons was so incredibly high that there was not enough, and this is on-the-job type training under the guidance of an experienced surgeon.

The suggestion was enough operations being done to train as many surgeons want to be trained and that means to the standards that is what said, so the question about is there a trade-off between having a very high level of skilled surgeons but having waiting list because there are not enough surgeons against having somewhat less high standard and being able to get surgery immediately. Now there are cost to delay of surgery particularly if it is a life-threatening illness, so there is some clear cost and benefits in that and getting where that line should be drawn is an extremely difficult thing to do, but again it is sometimes a matter of trade-offs between cost and benefits and coming to a view on where best line should be drawn.

**Mr Hayashi:** I understand your question will be about the effectiveness of technical assistance and public awareness in the competition law system. You mentioned about the leniency program. 10 years ago, Japan introduced a leniency system. In that time, many people felt that leniency never be functional in Japan. But JFTC did a strong advocacy. The leniency is indispensable for Japanese healthy competition business

culture, so now the leniency program in Japan is very actively functional. The advocacy of competition culture of competition system is very important. Many people emphasize the effectiveness of technical assistance as you mentioned. I think the review system for technical system is needed in many economies through technical assistance support, because the review system is still not sufficient, so improve the cycle of review system functionally would be important.

***(Question from the floor to Mr Hayashi)***

**Participant:** In Mr Hayashi's presentation, you have reached into an interesting conclusion that the people's perceptions of market competition in Asian economies are more serious than those of developed economies. I guess that it is based on your experience. From my own experience, it is more prominent than the concept of competition from the traditional public story or the socioeconomic conditions in some Asian economies.

**Mr Hayashi:** The unfairness of trade practices should be regulated. Competition law is also based on this background. For example, the auto manufacturer, Toyota has many trading companies and the subcontracting companies. Therefore it has closely relations to subcontract law which is one of the most important areas of competition law. Peoples strongly support the competition policy by JFTC, which competition authority should intervene this kind of unfairness of trade practices.

If competition authorities emphasize this kind of regulation of unfair trade practices, people's support or awareness on the competition would be more increasing. Your economy and Japan might have very similar market structures that there are many SMEs or franchises, I think the Asian economies' competition authorities is focusing on not only merger regulation or counter regulation, but also unfair trade practice regulation. This intervention might be part of the background. My view is public support of competition law culture is essential to develop the competition law in the future.

***(Question from the floor to Mr Willet)***

**Participant:** I think the competition is important but there are times when compromise is also needed because the government still needs to protect the weak sector which still cannot compete and give by transition.

**Mr Willet:** It is a difficult question. To my mind, an analysis would want to consider why a particular sector is not capable of competing at the moment. Is they have particular weaknesses in terms of inputs, availability of services, etc. and a more comprehensive policy would then consider how you address those weaknesses and that might require some level of assistance in that transition, that is entirely possible. But I think you have to think very carefully about what sort of measures you put in place and whether you are putting measures that are going to address, identify efficiencies and improve them or simply render them entrenched and something that is not going to improve at all.

I certainly need to know much more about that particular area to give a more detailed answer, but I think the approach needs to be one that ultimately leads to a sector or industry becoming capable of standing on their feet and capable of competing and becoming strong by that way rather than having markets dedicated to it through some

sort of trade restricting mechanism or competition restricting mechanism, that in my experience is not going to advance the interest of consumers certainly and probably not the sector itself because it will not face the incentives and the disciplines to grow and become stronger.

## **2) Session 2-1**

### ***'Exchange the Information of Essential Elements on Competition Chapter in FTAs/EPAs'***

**i) Firstly, Mr Chen Kening, Deputy Director, Anti-monopoly Bureau of State Administration for Market Regulation, China** made a speech as follows;

This year is the 10 years anniversary for the Enforcement of the Anti-monopoly Law in China. We have just experienced the internal adjustment of the agencies, which has already brought 3 agencies into one department, the State Administration of Market Regulation.

In the past 10 years, competition and anti-monopoly have been becoming more and more important topics for FTAs in China. The Anti-monopoly Bureau of the State Administration for Market Regulation (SAMR) have actively participated in the negotiations of competition chapters in FTAs. As for myself, I have been engaged in several negotiations. With the hard work from my colleagues and our counterparts in related economies, there are competition chapters or articles in the seven FTAs/EPAs with Costa Rica, Iceland, Switzerland, Australia, Korea, Georgia and Chile respectively, and in the economic and trade cooperation agreement with Eurasian Economic Union (EEU).

The negotiations on competition policy and anti-monopoly enforcement are substantially completed under the RCEP and the FTAs with Singapore and the Cooperation Council for the Arab States of the Gulf (GCC). The Chinese anti-monopoly enforcement agencies have actively advanced the negotiations on competition policy and anti-monopoly enforcement under the several FTAs/EPAs with Japan-Korea, Norway, Panama, Mauritius, Moldova and New Zealand, respectively; and the feasibility study of the upgrade of the FTAs with Peru and Switzerland. From 10 years hard work, we have had some experiences and views on competition chapters in FTAs.

Today I would like to share our views and experiences. My presentation today is divided into 4 parts. I will begin with the development of the FTA competition chapters in China. Actually there is no competition chapter or article in early FTAs in China, such as the FTAs between China and the Association of South East Asian Nations in 2002. Competition is rarely mentioned in these early FTAs because these FTAs are mainly focused on market entry and tariff cutting. And another reason is that there was no anti-monopoly law in China at that time.

On 1st August, 2008, the Anti-monopoly Law of China entered into force. From that day on, the anti-monopoly authorities in China have been actively engaged in the negotiations and competition chapters or articles. This 10 years can be divided into 3 periods.

In the early stage around 2008, competition is scattered in other chapters. Although, we have already realized the importance of fair competition for FTAs at this stage, but we still have not figured out how to put it into FTAs. At that time, competition is

mentioned in 'Objective' chapters or 'Service trade' chapters. In the FTA between China and New Zealand, in Article 2 'Objective' mentioned 'promote conditions of fair competition in the free trade area'. In the FTA between China and Peru, Article 1 mentioned 'promoting fair competition in the parties' markets'. In the FTA between China and Singapore, Article 70 mentioned 'The parties recognize that certain business practices of service suppliers, may restrain competition and thereby restrict trade in services'. In a word, we have realized the importance of competition for FTAs at this stage, but haven't figured out the method and content. And thus, there are no independent competition article or chapter at that time.

The second stage is around 2010. Independent competition article appeared gradually. With the enforcement of the Anti-monopoly Law of China, it is widely accepted that fair competition is very important for promoting economic development, safeguarding consumers' interests, maintaining public interests. We have paid more attention to the role of competition in FTAs. At this stage, we used competition article in FTAs. In the FTA between China and Costa Rica, we adopted an independent competition article. This article is mainly about competition cooperation. Although it is only one article, its contents are very extensive. The competition chapter is beginning to take shape. 'Cooperation' in competition shall include, among others, activities to: (a) promote the implementation of enforcement mechanisms, including 'Notification', 'Consultation' and 'Exchange of Information' between the authorities in charge of competition. In particular, to prevent or proscribe anti-competitive practices or economic concentration that discourages competition; (b) promote capacity building in the field of competition; and (c) promote the exchange of experiences, technical assistance and training of human resources, in order to strengthen and effectively enforce the competition laws in areas such as anti-trust, merger and subsidies, competition advocacy, intellectual property, market access, jurisprudence, among others.

The third stage is around 2014 and until now. Independent competition chapter becomes more and more popular in FTAs. Over the past decade, the Chinese anti-monopoly agencies have engaged in enforcement cooperation with the competition authorities in jurisdictions such as the United States, EU, Germany, Russia, Canada, India and South Africa. We have benefited a lot from the cooperation which makes us realize that it is necessary to set up an independent competition chapter for FTAs. We have tried this in several FTAs with the cooperation from our counterparts, such as Chapter 5 of the FTA between China and Iceland, Chapter 10 of the FTA between China and Switzerland, Chapter 8 of the economic and trade cooperation agreement with EEU. Competition chapter covers more content and strengthen its operability in FTAs. The economies involved with this negotiations have reached consensus that competition chapter is quite necessary for FTAs and played an important role for the whole agreement. In the second part, I would like to make a brief about the role of FTAs competition chapters.

Taking into account the importance of fair competition in trade and investment relations, anti-competitive practices will hamper the trade and investment cooperation and the efficiency from trade and investment liberation. FTAs competition chapters can prevent these negative effect caused by anti-competitive practices. And thus, competition chapters are introduced into FTAs by more and more economies. There are 3 roles that FTAs competition can play:

First, competition advocacy. Competition chapters can help to foster competition spirit and culture in related economies, encourage these economies to improve its competition legislation. It can help us to create an open market and improve our competitive landscape. Secondly, competition chapters can ensure the effective enforcement of FTAs. Competition chapters will let related economies aware the harm of anti-competitive practices and encourage related economies to compete fairly in trade cooperation. And thus, competition chapters can ensure the effective enforcement of FTAs. Thirdly, competition chapters can boost competition cooperation through FTAs. Because of the differences in legal systems of related economies, there are many differences in competition laws between related economies. This situation will have negative effect on trade and investment liberations. If we reach an agreement on FTAs competition chapter, it will be a great help to narrow our differences and boost our cooperation in competition area.

Next I would like to analyze the key elements of FTAs competition chapters. After a review of the FTAs between China and other economies and organizations, we summarized that the key elements of FTAs competition chapters are 'Objectives', 'Definitions', 'Principles in competition law enforcement', 'Transparency', 'Cooperation', 'Information Confidentiality', 'Consultation', 'Dispute Settlement', 'Independence of competition law enforcement' etc.

'Objectives' are mainly focused in three areas. The first is to ensure trade and investment liberalization. This is the most important objective for competition chapter. Because this is a chapter in FTAs, it must respond to the need of FTAs such as: Preventing the benefits of trade liberalization from being undermined (China-Korea), Prevent and proscribe anti-competitive practices that affect trade and investment between the Parties (China-EEU). The second objective is to promoting economic development. This is what we want get from FTAs. There are different expressions for this objective, such as promote economic efficiency, promote proper functioning of markets, promote sustainable economic development. The third objective is to promote consumers welfare. This is common objective for most economies' competition laws. Many negotiations put this as an objective for competition chapter. Personal speaking, I think this objective is a little bit irrelevant to FTAs. But many think that promoting consumers' welfare is the ultimate aim for FTAs, therefore it is reasonable to list it as an objective.

'Definition' is not a necessary article for competition chapter. There are some differences in some basic definitions or authorities between economies. In this way, sometimes we need this article to clarify them. The common definitions are as follows: anti-competitive practices, competitions, competition authorities. In China's case, we used to have three agencies, undertakings etc.

'Principles in competition law enforcement' is one of the most important articles for competition chapter. And the principles frequently mentioned are transparency, non-discrimination, procedural fairness, the guarantee of the right to defense and reconsideration. This article is very important to enhance the transparency and prediction of competition law enforcement and ensure consumers which is including foreigners' legitimate rights and interests. Most negotiations will pay much attention to this article.

Regarding 'Transparency', there are two aspects for it. The first is transparency in legislation which requires related economies to make public its competition laws and regulations in English on open websites. The second aspect is transparency in law enforcement which requires all final decisions finding violations of competition laws and regulations, and the decisions must be made public in writing, must contain relevant findings of fact and legal basis on which the decisions are based.

'Cooperation' is becoming more and more important. As I have mentioned, one of the important roles for competition chapter is to boost cooperation in competition area. In this way, this article is getting more and more detailed. There are two kinds of cooperation here. One is cooperation in competition law enforcement, the other is technical cooperation. Cooperation in competition law enforcement usually refers to information exchange, consultation, initiating law enforcement activities on the request of another party etc. Technical cooperation includes training programs, workshops and research collaborations and other activities for the purpose of enhancing each Party's capacity on competition policy and competition law enforcement.

'Information Confidentiality' is not necessary but sometimes appears. The main purpose of this is to ensure all the parties maintain the confidentiality of any information provided as confidential. Because there is usually a special Information Confidentiality article for the whole agreement. Actually there is no need to set up this article.

'Consultation' sometime is included into 'Cooperation' article. Matters which can be consulted are strictly restricted to matters arising under competition chapter. The procedure and responsibilities of the parties are also provided in this article such as a request for consultations shall be submitted to the other party's contact. The requested party shall accord full and sympathetic consideration to the concerns raised by the other Party.

Regarding 'Dispute Settlement', usually there will be no separate dispute settlement mechanism for competition chapter. This article's main purpose is to make it clear that any matters arising under competition chapter shall not recourse to dispute settlement mechanism of the FTAs.

Regarding 'Independence of competition law enforcement', competition chapter should not intervene with the independence of each party in enforcing its respective competition laws and regulations.

Above are the elements existing in FTAs between China and related economies and organizations. Although articles sometimes will change a little bit, almost all negotiations are under this frame.

The last part I want to mention is the trends of FTAs competition chapters. In my opinion, there are three trends for competition chapters. The contents of competition chapters in FTAs are getting more and more extensive. The operability will be greatly enhanced. The role is getting more and more important in FTAs.

**ii) Secondly, Mr Tatsuro Masuda, Deputy Director, International Affairs Division, Fair Trade Commission, Japan made a speech as follows;**

Before I begin my presentation, let me tell you that the government of Japan and the EU signed agreement between them for an economic partnership last month. The agreement includes competition policy chapter. In this chapter we stipulated for example each parties shall take appropriate measures against anti-competitive practices for fair and free competition in their trade and investment or we cooperate or coordinate between the competition authorities with regard to developments in competition policy and enforcement activities. With this agreement, we are expecting the cooperation between or among competition authorities are promoted more and more. Now Japan has concluded 16 EPAs which include the competition chapter, and JFTC has concluded 11 MOUs with other competition authorities. I would like to introduce the elements of those EPAs and so on, including Japan-EU EPA.

Firstly I will focus why international cooperation frameworks are needed in competition area. Then I will overview the Japan's international cooperation frameworks. After that, I will explain the elements in EPAs competition chapter Japan has concluded. Then I will explain the trend or feature of those elements. Based on those understanding, I will focus what kinds of elements are necessary for the competition authorities.

The globalization of the economic activities has been making supply chains increasingly globalized and the number of international mergers has been increasing. With the globalization of economic activities, the anti-competitive practices also globalized. Competition authorities should react to those changes timely and effectively. For the authorities to do that, we need to achieve global convergence of the competition policies and, at the same time, to promote cooperation between or among authorities in enforcing competition law. Each economy or region has their own competition laws or regulations. And they are not exactly the same. In such circumstances, the competition authorities need to make sure the common belief on competition, and to consider the principle to apply the competition law, and to cooperate with each other. The international cooperation framework on competition is one of the methods to achieve those.

In Japan there are three kinds of international cooperation frameworks in competition area, FTAs/EPAs, anti-monopoly cooperation agreements and MOUs. Japan has signed 17 EPAs so far and we are working on EPA with Turkey, FTA with China and Korea, RCEP and others as of July 2018.

16 EPAs have competition-related provisions. Only EPA with Brunei does not have competition-related provisions.

Japan has concluded the anti-monopoly cooperation agreements with the United States, EU, and Canada. Also, JFTC has signed MOUs with 11 competition authorities, and about half of them are with Asian competition authorities. In addition, 5 of 11 economies have EPAs with Japan too. One of the trends of JFTC's cooperation framework is the number of cooperation agreements get decreased, and the number of EPAs and MOUs get increased.

The difference of each framework, which results in the difference of legal effect, depends on counter authorities. FTAs/EPAs and anti-monopoly cooperation agreements are concluded between economies or governments, and these are legally binding. These are called 'international agreements' in practical.

On the other hand, MOU is a memorandum which shows common understanding between parties concerned, and it doesn't have legally binding power.

Japan has concluded anti-monopoly cooperation agreement with the United States in 1999. This is first cooperation framework in the competition area. After that, Japan aimed to conclude the anti-monopoly cooperation agreements with economies which JFTC had already built deep relationships, such as economies we had held a periodic consultation or regular meeting and economies we had an experience to cooperate in enforcing competition law. As a result, Japan has concluded anti-monopoly cooperation agreements with EU and Canada.

On the other hand, Japan concluded the first EPA with Singapore in 2002. After that, the Japan has started negotiation of EPAs with mainly East Asian economies. Taking advantage of the opportunity, JFTC has worked to put a competition chapter in these EPAs.

These international agreements have a legally binding power, but it takes time to conclude in general. Therefore JFTC has utilized the style of MOU as a cooperation framework after signing with the Philippines Department of Justice in 2013.

Articles in cooperation frameworks are broadly categorized into three groups. The first is articles for basic principles in enforcing competition law. Hereinafter, I am going to call this 'Element I'. The second is articles for 'Cooperation' between competition authorities in enforcing competition law and hereinafter I am going to call this 'element II'. The third is other articles, hereinafter I am going to call this 'element III'.

For example of element I, 'Principles of non-discrimination' means that each party shall apply its competition laws in manner which doesn't discriminate between persons in like circumstances on the basis of their nationality. 'Principles of transparency' means, that each party shall promote transparency of the implementation of its competition laws. 'Principles of procedural fairness' means that each party shall implement administrative and judicial procedures in a fair manner to control anti-competitive activities, pursuant to its relevant laws.

'Non-discrimination', 'Transparency' and 'Procedural Fairness' are sometimes called 'core principles' in competition policy. Element I is basic principles in enforcing competition law, so is stipulated in many EPAs. And there are some new elements in CPTPP and Japan-EU EPA which were signed just recently.

As for examples of element II, there are 'Notification', 'Cooperation' and 'Coordination of Enforcement Activities' and comity. The contents of the Element II are different depending on economies in EPAs Japan has signed. For example, there is no element II in Japan-EU EPA, but Japan has concluded anti-monopoly cooperation agreement with EU and element II are already stipulated in that agreement. That is why there is no Element II in Japan-EU EPA. Element II is stipulated in MOU between a part of competition authorities.

I will explain the contents of element II.

'Notification' is to notify the counterauthority its enforcement activities that may affect the important interest of the counterparty. For example, assuming 'Notification' provision is stipulated in a cooperation framework with Japan and economy A, JFTC



notifies the competition authority of economy A when, for example, JFTC has conducted the dawn raid on a branch office in Japan of economy A's company, or merger review involving economy A's company enters the second stage and so on. 'Notification' makes the notified party aware of the notifying party's enforcement activity and trigger subsequent cooperation activities.

Cooperation in enforcement activities seems to include broad cooperation, but in practice, it is done by assisting the other competition authority in its enforcement activities by providing information, within its reasonably available resources in practical. For example, JFTC provides information with respect to anti-competitive activities which may be relevant to the enforcement activities of the competition authority of economy A. Or JFTC provides information upon the request of the competition authority of economy A. Cooperation in enforcement activities helps competition authorities to access information which would be otherwise difficult to obtain and effectively enforce their competition law in their respective jurisdictions.

Coordination of enforcement activities means to consider coordination of the enforcement activities, where the competition authorities of both economies are pursuing enforcement activities with regard to related matters. For example, JFTC and the competition authority of economy A coordinate the timing of dawn raid in international cartel case. Or JFTC and competition authority of economy A coordinate the remedies in international merger case.

I will explain the example of the possible enforcement cooperation activities in practice in the international cartel case investigation. At pre-investigation stage, coordination of timing of dawn raid, coordination of target products or coordination of target company are taken place. At investigation stage, competition authority can exchange information about progress of investigation. Lastly, we can provide information about measures against the case.

Comity has been seen as a means of tempering the effects of the unilateral assertion of extraterritorial jurisdiction. There are two kinds of comities, negative comity and positive comity. Positive comity may be a little complicated to understand. For example, if the competition authority of economy A believes that the anti-competitive activities within the territory of Japan may affect the important interests of the economy A or the competition authority of economy A, the competition authority of economy A may request the JFTC for initiation of appropriate enforcement activities. On the request, JFTC considers whether or not to initiate enforcement activities. JFTC is also expected to notify economy A in each step.

For examples of Element III, 'Technical Cooperation', 'Consultation', 'Confidentiality of Provided Information' and 'Review of Articles' can be considered. We find the contents of Element III depend on economy, and are stipulated in various frameworks.

I would like to introduce the trend of elements in competition chapter in FTAs/EPAs. The difference among each cooperation framework comes from the meaning of each cooperation framework. FTA/EPA is an agreement on economic field overall, so competition chapter can stipulate widely. Anti-monopoly cooperation agreement is an agreement of cooperation on enforcement of competition law, so it stipulates mainly enforcement cooperation. MOU is a memorandum of cooperation between competition authorities. Cooperation means not only enforcement cooperation but also cooperation

overall, so it stipulates cooperation overall, for example, technical cooperation and so on.

16 EPAs which Japan has concluded have a competition chapter. The situation of counterparties are various, but the counterparties can be classified into three groups. Contents of element II are almost same in each group. The framework with economy type 1 contains all the elements of cooperation. This is just like the anti-monopoly cooperation agreement. One with the economy type 2 contains only limited elements, which are written in general and brief description compared to economy type 1. Economy type 3 contains no element of cooperation. In contrast to economy type 1, economy type 2 and 3 contain technical cooperation.

The economy type 1 is the counterparty which has a comprehensive competition law and enough enforcement experience. In this case, we aim to realize high level of cooperation framework as prescribed in the anti-monopoly cooperation agreement. Economy type 2 is a counterparty which has a comprehensive competition law but less experience of enforcement. In this case the competition chapter prescribes only limited elements of cooperation such as 'Notification', 'Cooperation' and 'Coordination'. Those elements are written in general and brief description. For example, they don't refer to the timing of notifications, which are mentioned in the competition chapter in EPAs with economy type 1. Also, positive or negative comities are not contained. Review article is stipulated so that each party will review and enhance cooperation as appropriate in the future. Economy type 3 does not have a comprehensive competition law. In this case, most of the elements of cooperation are not contained. Like economy type 2. We provide the review article so that each party will review and enhance cooperation in the future. However, in this case, the review will be considered after the counterparty adapts a comprehensive competition law. These are just broad classifications and we are considering elements tailored for the counterparty.

I would like to introduce new elements in TPP and Japan-EU EPA which were signed recently. At first 'Operationally independent competition authority', is stipulated in Japan-EU EPA. Since the competition authorities should enforce the competition law without political influence, this article is important especially when we conclude the EPA with competition authority which has less experience of competition enforcement. 'Procedural fairness' is stipulated concretely in TPP. Before TPP, the article of 'Procedural fairness' is not concrete but rather general term. By contrast, specific contents are stipulated in TPP. The first is to ensure that before it imposes a sanction or remedy against the person for violating competition laws, it affords that person a reasonable opportunity to be heard and present evidence in its defense. The second is to provide a person that is subject to the imposition of a sanction or remedy for violating of competition laws with the opportunity to seek review of the sanction or remedy in a court or other independent tribunal. The third is to authorize the competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. These are the recent trends of the elements.

At last I would like to consider that essential elements of competition chapter in FTAs/EPAs. From Japan's experience, most of the EPAs include the following elements. Element I includes 'Addressing Anti-competitive Activities', 'Non-discrimination', 'Transparency' and 'Procedural Fairness'. Element II includes 'Notification', 'Cooperation and Coordination of Enforcement Activities'. Element III includes 'Technical Cooperation' and 'Consultation'. When JFTC considers the

necessity of each element, it is necessary to check the counterparty's situation. For example, we should make sure the existence of comprehensive competition law, level of competition policy, enforcement of the competition law and other domestic law and so on. Moreover what we have to do is to grasp the current task, and figure out what you can do by EPAs and then consider the elements for that. For example, if the counterparty has enough experience of international cartel cases, we should consider the elements related cooperation in enforcement activities. If the counterparty does not have enough experience of the enforcement, we should consider the elements related technical cooperation. It is the possibility to change the necessary elements after the effect of EPAs. Therefore we should uninterruptedly review the necessary elements.

iii) Thirdly, **Mr Arunan Kumaran, Senior Principal Assistant Director, Ministry of Domestic Trade, Cooperatives and Consumerism, Malaysia** made a speech as follows;

Malaysia has already signed and concluded 13 bilateral and regional FTAs/EPAs, namely with Japan, Pakistan, New Zealand, India, Australia, Chile and Turkey, and as for regional FTA with ASEAN, it's with China, Korea, Japan, Australia, New Zealand and India. We have some part which is signed but yet to implement which is TPP now which has been incorporated in the comprehensive partnership agreement for TPP. We have signed this agreement and we are in the process of verifying it. The other trade agreements that we are currently negotiating is with the EU, with the European Free Trade Association and also Regional Comprehensive Economic Partnership Agreement (RCEP).

I would like to introduce Malaysia-Japan EPA, Malaysia-New Zealand FTA, ASEAN-Australia and New Zealand FTA, Malaysia-Australia FTA, CPTPP and RCEP briefly.

We have entered into many FTAs/EPAs in the past, but we have always taken the approach to avoid a competition chapter, because we just had a competition law in effect from 2012. Prior to that whatever FTAs/EPAs that we negotiated or concluded we tried not to have competition chapters, of course, for fear of not being able to implement the specific obligations or provisions in the FTAs/EPAs or in the competition policy chapter. We have always a very cautious approach and also had minimal commitments to undertaken mainly in the context of our cooperation focused specifically on technical cooperation and so on. The technical cooperation part prior to the law assisted Malaysia in developing a policy, in developing a comprehensive law that we have today.

The first FTA that we have had with competition chapter in it is the Malaysia-Japan EPA where we agreed to have cooperation and technical cooperation in the context of measures against anti-competitive practices. This was not a hard obligation, is something that we could do at that time and to review that is why you can see the obligations are specific to review or to adopt laws and measures to control anti-competitive practices. Also to cooperate in controlling anti-competitive practices and there was no dispute settlement provision. It was not something that we were comfortable with at that point in that time. It is very specifically written that it is measures against anti-competitive practices because prior the law, we had not decided and there was no specific direction as to what would entail, how we would counter anti-competitive practices, when it is true a specific measure or whether it is going to be

specifically on legislation. That is why it was far enough to give flexibility for Malaysia to move ahead in developing its own model to come to the anti-competitive practices.

We also have the Malaysia-Australia FTA. We saw more substantive provision on competition related matters where we agreed on the adoption, to maintain and to enforce measures against anti-competitive practices, where we have gone a step further on the issue of commercial activities to be subjected to the measures, exemptions which is to be transparent and public policy and public interest. The reason is we were developing the law. When we were negotiating, our trade partner was concerned as to how we are going ahead. There were specific concerns on how we would be addressing exemptions, how we should address exemptions and how we should address scope of the law. That is why you see specifically there are issues like all commercial activities should be subjected and exemptions are to be transparent. This points towards some parts of whether certain group or certain activities would be excluded even at the outset from the development of the law.

Similarly with Malaysia-New Zealand FTA, the elements are the same as well there. We began to focus on obligations such as the anti-competitive practices and also the exemptions. This was during a similar time and the elements were also similar. We were comfortable at that point in time with a non-application of dispute settlement and with the other partners as well.

With regards to ASEAN-Australia-New Zealand FTA, this is more in terms of cooperation in promotion to enhance efficiency, consumer welfare and also the curtailment of anti-competitive practices, exchange of information, technical cooperation. The focus was more on cooperation and technical cooperation. We were as a whole with regards to ASEAN comfortable with elements which were not so imposing because we are new and young as a competition agency.

At the post competition act, we were considering broader approaches to competition chapters as a whole. After our competition law was enforced in 2012, we started taking a broader approach. We were considering commitments which were more than what we have already committed or comfortable to commit. We were even considering cooperation on enforcement. Prior to that, we were reluctant to considering any cooperation on enforcement. This is a process of how we have moved from not be able to consider, and now considering on a broader approach. Even with all these technical cooperation remains important, many experts will agree that even though it has only been six years, it is considered a very young, even for 15 years, we are considered a competition agency and technical cooperation is of importance to us.

TPP and CPTPP is a 21st-century agreement and Malaysia is proud to be part of it. It took us a step further from where we were and CPTPP is considered a full-blown chapter when it comes to competition. The commitments that we have under the CPTPP, it is very strong even though it is competition chapter, but the commitments are quite expensive. It is quite prescriptive and to an extent it is onerous, especially when it comes to cooperation and enforcement and so on, but we have taken this step to consider these on a broader perspective for the betterment and the development of law and also to the betterment of the economy as a whole.

I would like to brief CPTPP competition chapter and highlight what are the important elements. It applies to all commercial activities in Malaysia regardless of ownership.

Basically it applies to all entities having regard to ownership. I believe this is an important element when we look at competition chapters because there can be a scenario where in certain economies an approach can be taken to exclude companies, which is owned by the state. Having a specific mention on commercial activities, regardless of whoever owns it, that is an important element that should be contained in any FTAs with any provisions of competition chapter.

Secondly, it is important that the elements of maintaining a competition law is contained in the competition chapter because they are having law and also to maintain the specific law is one that would ensure that your market remains competitive. Also when it comes to exemptions, it needs to be transparent. It needs to be adhered to public policy and public interest. When it comes to Malaysia, we have taken a step further where we conduct public consultations where you give exemptions, for example, individual exemptions, block exemptions, all for that matter the ministerial discretion to provide exemptions are subject to public consultations.

The element requires parties to have authorities to specifically enforce law. Also to ensure that it is independent. We have always stated in any forum that the independence should not be an issue of structural independence but it is independence in decision makings. Some economies have commissions or competition authorities which are linked to a specific ministry and that could be considered as not independent but what is important when it comes to independence of the regulatory authority is the independence in decision-making. The operability of the independence in the context of the operations is one that is important.

Next is the non-discrimination for enforcement policies. When we have enforcement policies it needs to be equal and should not discriminate when it comes to nationalities.

Procedural fairness is also important. It is quite an extensive element under the competition chapter. This is important so that industries or people out there would have certainty that when they are being investigated they have certainty of what is the process that is being used. How they go about it if they are investigated and what can they do to defend themselves or to go through the process when the case or an issues being investigated. There are specific provisions which touch on opportunity to be represented by a council, opportunity to hear or present evidence whether it is written or whether it's oral, the opportunity is there for them to provide or to make submissions for that matter. Competition is very complicated economics and law, it involves many issues, so to allow analysis of a qualified expert to cross examine the witnesses, they should be with an investigation procedures because there have been cases where when some parties are investigated they are faced by the procedures which are only being used by the authorities themselves. They are not written and it possess a very difficult time for parties who are investigated.

It is important to review sanction or remedy in courts and tribunals. You need to have a separate entity to review cases that has been adjudicated by the commission themselves or by the authority themselves. In the context of Malaysia, we do have the competitions appeal tribunal which is apart from the competition commission themselves.

The settlement mechanism is to provide for leniency programs such as leniency regime so that you have opportunities for people to come forward and assess in cases. The

notion of competition law is not so much as to punish people but is to correct what this law in the market itself.

'Private Rights of Action' is a provision to provide for private rights of action and it is to be available to all parties. 'Private Rights of Action' is necessary to ensure that the affected parties have a mechanism for regress, have a mechanism to - apart from going to the commission, they can go directly to seek regress for the losses that they have suffered. This is an important element in any competition chapter because it provides for affected parties to break directly their cases, not necessarily through the commission or the regulatory authorities themselves.

'Transparency' is important as well. Enforcement policies that we have should be transparent. We need to maintain a central electronic database where it contains basic information on your all laws and policies. APEC has got that database. All of the competition law enforcement activities including exemptions and immunities need to be published. It gives a confidence to the public out there. The decisions need to be published and legal and economic reasoning. When there is no reasoning there is an appeal process that we can go through to a tribunal and so on, that cannot be carried out if there no proper legal and economic analysis. This is important element though it is a little small but it has value to the industry or the people.

'Consultation and Cooperation' is very important element for competition chapters. Consultations can be carried out between parties on matters that affect trade and investment. Anything that affects the interest of one party, the other party can seek for a consultation and the consultation which is a form of discussion or a dialogue needs to be held.

'Cooperation and Coordination' is more focused on 'Notification', 'Exchange of Information' and when it comes to enforcement. You would notify your trading partner if there are specific issues that you are investigating which affects them or you would coordinate the enforcement action if there are cases of mutual interest and that would include exchange of information and so on. Cooperation agreement between competition authorities is also important, especially for young agencies where they would need to develop them and cooperation agreements help them to develop apart from having a competition chapter in FTAs/EPAs.

Normally when we carry out public consultations, we carry out more on a broad basis. It includes measures on anti-competitive practices, specific focus on procedural fairness as well, cooperation, confidentiality of information, more on what are the procedures that are involved when you share information, what it is to be used for and etc., and also technical assistance, capacity building and a new issue at least in the context of Malaysia, which is consumer protection.

CPTPP included these elements that I have explained. CPTPP's competition chapter is one of biggest one in any FTAs/EPAs. If we can basis on that it would give us a good framework as to how we can develop a competition chapter in any of our negotiations with our trading partners.

We have also emerging issues under the FTAs/EPAs with the generic competition chapter. These emerging issues are under the competition chapter in some scenarios, where focus is on SOEs and consumer protection.

Increasingly there are some proponents who focus on SOEs in the competition chapter. When we talk about SOEs in the competition chapter, there we have to differentiate with subjecting SOEs to the competition law that is a generic competition issue and has always been the case. When we discuss SOEs, all issues are focused on discipline on SOEs and competitive neutrality. I personally see as an additional discipline on SOEs. We have some disciplines such as GATT article 17 on state trading enterprise. It is mentioned that state trading enterprise shall in its purchases of sales, either imports or exports, act in a manner consistent with general principle of non-discrimination at item (a), and it is also mentioned that the commercial consideration when they make purchases or sales at item (b).

We do have some form of provisions when it comes to SOEs. When we look at subsidies for that matter, there is also WTO Agreement on Subsidies and Countervailing Measures. There are specific issues on subsidies which are prohibited subsidies, whether they are what the definition of subsidy is, whether it has caused aggressive practices or prejudice, whether any specific subsidy is prohibited. I am not saying that is specifically for SOEs, but it also applies to SOEs. There have been some forms of prohibition when it comes to SOEs and subsidies. Whether it is new or not, but it is still something that is shocking to many persons.

If there are disciplines on SOEs, some of the possible elements that there is by virtue of a company being SOEs, it is needed to get non-discriminatory treatment or commercial considerations when you purchase or sell your goods and services. This is basically not to choose any specific party when you deal with exclusive dealing with specific parties or you should buy from the best. That is the general notion that it comes to non-discriminatory treatment and commercial considerations. We also have provisions on subsidies. These are very technical. It is just subsidies where we are not to provide to SOEs, and the government needs to ensure that SOEs do not behave in a manner that will affect the competitors in the market, when it receives government assistance or subsidies. They should not cause adverse effects to the interest of another player in the market when they are competing. The government should ensure that when we provide the assistance to SOEs this does not happen.

It is also another possible element is impartial regulation. It is where the government should ensure that all regulations that there should be applied equally to SOEs and the private entities. Also courts and administrative bodies, this is pertaining to the courts hearing cases when it involves the SOEs because in some jurisdictions they explicitly buy or invoke immunity from being challenged or for being sued. The other parties delegated authority where the government would not be able to get away from obligations in FTAs/EPAs by giving the authority to SOEs. If so, the obligations in FTAs/EPAs still apply even though they have delegated the authority to SPEs. It is also an important part on transparency to ensure that SOEs operate in a very transparent manner.

Regarding disciplines on SOEs, we will have to look at an overall basis whether in the context of efficiency, whether by having SOE disciplines linked to the competition chapter, this is going to ensure an efficient and competitive market. Secondly by having disciplines to ensure that SOEs act in a commercial manner, not to discriminate or to behave when they receive government assistance, is it pointing towards better governance. It is also a question that we should consider by having proper governance in place. Thirdly, transparency would point towards accountability. When you have

extensive transparency requirements, it would point towards to an extent accountability but all these three would have to be taken in context when you have too much of transparency or prescriptive. Transparency would pose a problem for the entities themselves. We would also have to consider government policies, socioeconomic development, the roll of SOEs in national building because SOEs do not operate in the same manner in all economies. In one economy, it can be very commercial in nature, in the other economies, it has got a socioeconomic or national development role. In some economies, they assist in terms of building the nation. We have national oil companies where they are devoted to implementing projects of the economy. We would need to look at specific and there is no one size fits all. If there is going to be one size that fits all, that would need to be economy specific flexibilities. That would need to be considered as well and this is not easy. That needs to be considered by parallel analysis and balance whether it is needed or not.

Finally on the issue of consumer protection, we do have provisions to maintain consumer protection laws to address fraudulent and deceptive commercial practices and to corporate in enforcing these laws. Increasingly as you have seen in all the FTAs/EPAs, you might have some parties have it as a civil law, and some have in combinations as in civil and criminal because some only have false and misleading when it comes to deceptive commercial practices. It is more in the context of fraud and will be under the penal code.

In conclusion, I would say Malaysia's approach we have taken a progressive step. We have been very cautious in FTAs/EPAs, but we have had CPTPP, one of the biggest FTAs/EPAs, and we are going to have more FTAs/EPAs soon. Our approach is still and always cautious and on a case-by-case and to ensure the market is efficient and competitive. That is our ultimate goal. We will assess the needs of stakeholders because the consultation with stakeholders is important to gauge the readiness and to ensure what they need and with that. We can formulate our position and assessing approach to FTAs/EPAs themselves is very important because you cannot run away anymore from FTAs/EPAs chapter. We would need to be open to consider new issues. All the new issues are needed to be opened. We need to identify the new issues in a positive and holistic manner. You need to depart from a defensive mode and consider the best interests of your economy.

**iv) Finally, Mr Wee Guan Teo, Director, International & Strategic Planning Division, Competition Commission, Singapore** made a speech as follows;

I would like to share the Singapore's perspectives on the certain elements of the competition chapter in FTAs/EPAs, how we look at them and also as the chair of the working group on competition for RCEP competition chapter.

We will talk about having competition law, have to enhance economic efficiency, and to make economy more competitive, and why competition chapter is needed to be put in FTAs/EPAs specifically. We address what we call as 'beyond the border' or 'non-tariff' barriers. As Mr Alan mentioned in opening remarks, anti-competitive have a serious adverse impact on market access because it can be prevented players from coming into the market or even for existing players and prevented them from growing and expanding. Therefore it is really important issue which is closely to market as beyond



the conventional understanding of what market access means, typically in trade negotiation.

Besides facilitating trade and investment flows, we have to promote economic integration. Singapore which is a member of ASEAN also places quite a lot of emphasis on competition chapter in FTAs/EPAs. It will make ASEAN as a whole more competitive vis-à-vis other regional markets like for example EU, MERCOSUR and GCC. ASEAN as the economic block is also competing with other regional economic blocks.

And also the other important point is competition law and enforcement is no longer just about one economy. Now more than 130 economies have competition law. Competition law applies to international businesses as well.

It is important to ensure that when the competition law is enforced in an economy, it is done in consistent, predictable manner. Competition chapter in FTAs/EPAs ensure that there is some common or essential principles and framework to govern how each economy will administer and enforce their competition law.

It is to provide trans-national businesses with greater certainty and also reduce regulatory burden for them because if you have many different requirements operating in different economies. It can add to the cost of the running businesses and also the point of regulatory arbitrage, meaning that when a economy have all different standards when it comes to administering and enforcing the competition. As the businesses sometimes can exploit the loopholes and strategically position themselves, the enforcement of the competition law is actually the most effective for their activities. And also it paves the way for effective cooperation of cross-border competition cases across jurisdictions if there is a common framework.

Singapore has over 22 implemented agreements. Some of them are bilateral and some are regional. Why we have such extensive network of FTAs/EPAs. Singapore is a very small open economy without natural resources. We rely very heavily on trade both imports and exports as well as investment both outward as well as inward for our survival. FTAs/EPAs are instrumental in facilitating trade and investment flows among economies and also deepen the economic linkages between economies.

We will go into the typical structure of competition chapter in FTAs. Some of the early FTAs that we started off in other economies only had three bullet points, 'Objectives', 'Basic Principles' and 'Measures to proscribe anti-competitive conduct' but subsequently several elements are added more and more into the competition chapter. The amount, the content, the level of commitment and ambition, how prescriptive they are depend on the trading partners and often are linked to the stages of their economic development.

Some of the elements are regarded as optional. Quite a number of them have been covered by Mr Kumaran's presentation. Some of the FTAs/EPAs are those where Singapore has entered into other economies and they contain all those provisions. It depends on really trading partner whether it is optional or not because some of your trading partners, for example, Europe try to place a lot of emphasis on state aids and subsidies and what have you. They place a lot of attention on SOEs as well as public

enterprises. I will not draw very sharp and clear and hard distinction on what is essential or optional.

'Procedure of Fairness' is one of the so called essential elements, but it depends whether the FTAs/EPAs are high level or not. CPTPP which is very prescriptive and comprehensive we can call gold standard for the 21st century has it. 'Procedure of Fairness' consists of three parts. The first part will cover the entity. Before a sanction or remedy is imposed, the entity concerned is given the necessary information/grounds for the alleged violation and a reasonable opportunity to be heard and present evidence. It is very detailed. You will realize that it is difficult for FTAs/EPAs negotiation to strike the right balance among the three dimensions which is commitment, ambition and how prescriptive do you want it to be. All the bullet points which are presented as the essential elements on my slide are quite typical but in the more detailed comprehensive kind of competition chapter you will see that is not good enough.

Second part of it has got to do with when after the entity is actually imposed for sanction or remedy. It is including affording the entity that is subject to the imposition of a sanction or remedy with the opportunity to seek independent review of the decision, including review of the sanction or remedy, as well as any substantive or procedural matters.

The third one is on the investigative process itself which is like they will require you to maintain written procedural rules that apply to investigation as well as enforcement proceedings. They made a distinction between investigation and enforcement. Investigation is describing about the process of enquiry about facts and evidence gathering. Enforcement got to do with the decision making part, pertaining to imposition of a sanction on a remedy. They will require you to inform parties, what is the legal basis to commence investigation, what is the thing that you have found objectionable about the conduct under the law. And they will also require you to observe timeliness in terms of the investigation and enforcement proceedings. And ensure that there is this conflict of interest thing.

Regarding independent of authority, it is a bit different from Mr Kumaran's point. It is about the institutional setup and design of the competition authority itself. Sometimes they will refer that it must be cut off from political influences, and must be an independent body but it is more addressing the issue of objectivity, means the one who is actually making decision about a case they should not be conflicted. They may sound similar but these fine differences and nuances that as a negotiator must be aware of some of the things. There will always be this part about allowing for voluntary settlement or commitments which is also something quite new. Some economies do not have such a thing as settlements or commitments. Some of the advanced economies are pushing for such things to be built in as part of procedural fairness.

Regarding 'Transparency', first of all your competition law and regulations must be made publicly available and also that is not good enough because usually the law is quite broad. For instance, your law may not define what market power means when we talk about abuse of dominance, what anti-competitive conduct means. Then you need to maintain guidelines which further elaborate on your law, how they will be enforced or applied. And then you will also require to maintain and to publish procedural rules on relating to your investigation and possible proceedings.

This is to help parties know what their rights during the investigation phases and during the enforcement phases are. They can also know what they can do, what their rights are, and what their entitlements are as well. They sound easy but as I mentioned, actually depending on the economies or trading partners that you are dealing with. It is not that inside their competition law or regime.

Regarding 'Private Rights of Action', Singapore is also developing. We can do a little bit better which is to have private enforcement to supplement public enforcement. This is about allowing a person to seek redress from a court or an independent tribunal for damages or injuries that you suffer as a result of competition law violation. It may not just be brought on by the competition authority but any entity can also self-initiate case to a court or a tribunal. It is a kind of self-litigation and is allowed. And for Singapore, we have not gone very far in this area except that we allow party to seek damages or claims from a court after the competition authority has made a ruling on competition law violation. This is more like following on 'Private Rights of Action', the independent 'Private Rights of Action' is still not quite there yet. Only more advanced economies will look into it.

Regarding 'Confidentiality of Information', it is involved exchange of information but what is typical is dealing with this confidentiality element or provision in the competition chapter. It can be easy exchange of confidential information shall be based on mutually agreed terms between the parties.

It can be as simple as just a 2-3 liner, or it can also be mentioned what are the things that you need to do when you ask for information from another party .

Competition law violations in certain economies attract criminal sanctions whereas in other economies. It is not a criminal violation and attracts criminal sanctions and therefore exchange of information with economies where you know criminal proceedings are involved can be a bit tricky.

I will share with participants as a negotiator and as a chair some of my personal experience and takeaway involving in the negotiation of the competition chapter in FTAs/EPAs. Mr Kumaran has pointed out there is no one size fits all approach for competition chapter, but I think it depends on the trading partners because there are simply too many differences. Especially, one of the key difference lies with the competition law regime itself in various economies. Competition law itself although they usually cover three types of conduct, if you are talking about competition law dealing with cartels, dealing with abuse of dominance, dealing with anti-competitive mergers and acquisition. But the thing is that the law itself when you look at it in terms of the substantive part as well as the procedural part of the law.

They actually differ from one economy to another a lot. For example, one definition and assessment framework, legal regime itself can be very different. Some have common law versus the civil law traditions and in terms of the enforcement model, you have the administrative versus prosecutorial models as well.

You have to know that it is difficult to go into the negotiation on the competition chapter in FTAs/EPAs and cannot run away from some of these legal issues. It can be quite complex which is why quite typically you will find lawyers sitting inside there. There are

not only lawyers but also economists, the competition experts as well as foreign affairs representatives as well.

When you are involved in the negotiation, you have to bear three things in mind. One is commitment level. It can range the use of words like 'may', 'shall' and 'shall on a best endeavor basis', and the level differ. Another one is ambition level. Everyone can have a text on transparency, can include an element on procedural fairness but ambition level is the one that determines the scope how much of it you want to cover under this element of transparency and procedural fairness. The last one is the prescriptive level. The text itself will become very wordy. There is less flexibility, and is less discretion but greater certainty. There are always trade-offs involved. You always have to grapple with and try to calibrate and find the right balance where you want to strike for these three things.

I also find that sometimes negotiation breaks down or progress very little is really, due to a lack of trust and understanding among the trading partners. They are genuinely conflicting interests at play, but I think that it is not that costs the negotiation to stall or slow down. Consultations, frequent engagement of the trading stakeholders on the issues involved is actually very important.

'Beggar thy neighbor' mentality quite often breaks down to the negotiation table. Actually, certain economies' law has quite a bit of grey area. Therefore at least in terms of the procedure aspect of how you carry out administering the law, there is quite a bit of flexibility. But there is some rigidity in parties sometimes not willing to change things, not willing to do a little bit more even though there is nothing that is really stopping them from doing so. The parties should seriously focus on and see how they can tweak some of those things just to move things forward. Of course things that require you to amend your law something which is far more substantive and can be far more challenging and difficult, so that you can leave it maybe something towards the end or the latter part of the negotiation. The actual negotiation is really both a science and an art. Why I call it science is because we really need to know the content well because competition law is quite technical and it is not just the understanding about your own economy's competition law regime, if you are negotiating and especially if you are the chair, you really need to have quite a good mastery of the competition law regime in other economies. You have to know why there are differences and how some gaps can be closed.

I think why I say it is an art is because I think a good negotiator needs to have very high Emotional Intelligence Quotient (EQ). It is not just having that you know requisite knowledge to be able to connect with your trading partners connectively, emotionally and even culturally.

You realize that different people approach issues very differently even for certain trading partners they tend to be very open with their problems. Sometimes you must understand their cultural context. And of course the personality of the negotiators around the table as well it can be very different. Therefore ultimately I think it is not just the science, is really more the art.

Finally, the most key point is that you always try to view shared understanding, try to go for common denominator, go for low hanging fruits, because that will actually make the team feel good and help them to see that there is progress made.

## **Q&A**

### ***(Question from the floor to Mr Shimozu, Mr Kumaran and Mr Teo)***

**Participant:** I have a question for Mr Shimozu (who was changed from Mr Masuda from this Q&A part). What is the value having a distinction between MOUs and FTAs/EPAs. If you have already a FTA/EPA, why will you need to conclude MOUs separately? Also a question for Mr Kumaran, we are dealing with progressions regarding SOEs and subsidies. I am sure that it is not strictly within the competence of the competition agency. What do you think are the other agencies that the competition agency should engage in dealing with negotiations regarding SOEs and subsidies? Finally for Mr Teo, do you think that there should be a model chapter on the competition in FTAs/EPAs similar to our model chapter EPAs, do you think what the practical area is?

**Mr Shimozu:** FTAs/EPAs, MOUs and cooperation agreements are a little bit different in terms of binding or nonbinding or concluding parties. FTAs/EPAs and cooperation agreements are economy to economy or government to government and MOUs are agency to agency, which are not legally binding. MOUs have an advantage in that resources required to conclude is relatively smaller than one for FTAs/EPAs, because it is agency to agency. The contents of MOUs could be in detail. Implications of MOUs could be very flexible because it is nonbinding.

Therefore, the content is different between FTAs/EPAs and MOUs. We conclude FTAs/EPAs, MOUs or cooperation agreement to make our cooperation relationship with other competition agencies more effective. You might think that JFTC or Japan is doing some kinds of a duplicate work, but actually it is not.

**Mr Kumaran:** I believe the obligations on SOEs are not very much related to the competition regulator itself. In negotiating or in coming up with positions on SOEs, it is important to look at the overall government policies including industrial and economic ones of a particular economy. Because in some cases these state enterprises are very much concentrated to the Ministry of Finance, but in certain economies, it is with the Economic Planning Unit or the Ministry of Economic Affairs.

I don't think there is one specific agency that we can consult with, but it is more dependent on how it is structured in your economy, but generally speaking there are multiple types of state enterprises. Some with the direct control by specific ministries, but there are some which operate on an independent basis. Though the government has shareholding with the particular entity, but there is no control in the overall operations. For example, you have the likes of sovereign wealth fund, the pension funds etc. These are the considerations that you have to take before engaging to an overall consultation. Also you have government policies that directly affect SOEs, whether they are concentrated with the specific ministry or not that would really affect the SOEs disciplines proposed would directly affect government policies or industrial policies for that matter. Therefore the holistic consultation would have to be carried out.

**Mr Teo:** I don't think there is so called modern text of the competition chapter as a whole, but I think CPTPP corresponds to it in general. In particular, the provisions relating to procedural standards and transparency, I think they are pretty

comprehensive. I can also understand why the CPTPP focused quietly on this because as you know this was actually led by the United States. The United States has a very strong proposal on issues related to procedural fairness and transparency. These two elements are actually important because they differ in terms of legal regimes and consumer models. But essentially many of the provisions can be adhered by the parties because they are just mentioned about some application of consistent principles, relating to procedures fairness and transparency.

I think that it is important because it helps in terms of promoting consistency in application of the law and predictability as well. Personally, if you want to go for transparency and procedural fairness, you will go for CPTPP, but if you want to look at confidentiality of information, that practice actually is not there. ASEAN also has quite a good text on technical cooperation as well as cooperation.

***(Question from the floor to Mr Kening and Mr Shimozu)***

**Participant:** The first comment is about dispute settlement. The competition chapter of the vast majority of the FTAs/EPAs and RTAs that we had observed so far has no application of the general dispute settlement. The fact that very few chapters included the overall dispute settlement should be recognized and should be emphasized. Personally, it is quite difficult to imagine a scenario in the future FTAs/EPAs that general dispute settlement mechanism could be applicable to the competition chapter.

The second comment is that I very much agree with Mr Kumaran's explanation that disciplines on SOEs have arisen from the competition policy chapter, but throughout the negotiations and the development of recent FTAs/EPAs, we see that the discipline on SOEs became a separated chapter. In the future, this also had to be assumed the disciplines on SOEs could be included as a part of the competition chapter. In the future, I think that this one could be another topic for discussion alongside with the traditional elements of competition chapter.

I will ask to Mr Shimozu. It seems that you have not talked about provisions on private licensed actions. Can you elaborate a little bit more about JFTC's position on that, and recent developments on that specific provision? What kind of obligations have JFTC introduced into your domestic law? When a person think that they are ruled by violation of the national competition law, he can seek redress or remedies from that violation in court?

**Mr Kening:** I completely agree with you about your two comments. For the competition chapters in FTAs/EPAs, I think the most important role of this chapter is to serve for FTAs/EPAs, not serve for any economy's domestic competition law. That is very important because we cannot put so many things that shall be dealt by our domestic law, put these into competition chapters. If we put too many things into this chapter, it will be quite similar with the things we want to put in the MOUs between our law enforcement authorities.

**Mr Shimozu:** Regarding the private right against anticompetitive conduct, in Japan, there are mainly three kinds of anticompetitive conduct. The first is private monopolization, second is unreasonable restraint of trade and third is unfair trade practices. In terms of unfair trade practices, people can sue the company which is conducting the practices to stop those kinds of conducts. Talking about relation

between the private right and the elements of FTAs/EPAs, the related element will be transparency. We opened the whole document such as the Antimonopoly Act in English on our website. We introduced the system that private entities can sue the companies who is conducting unfair trade practices to stop in Antimonopoly Act which is competition law in Japan.

I would like to mention a quick comment to your first comment on dispute settlement. We should maintain the independence for the decision making of competition authorities. Therefore applying dispute settlement procedures to competition chapter have problems with the independence of professional agencies, so the elements of non-application of dispute settlement are quite important to secure it.

***(Question from Mr Hayashi to Mr Shimozu and Mr Kening)***

**Mr Hayashi:** Some business companies sometimes say that they are very concerned about the leniency program and merger regulation. The leniency program is desirable that the number of competition authorities which introduce leniency system is increased, but if the number of economies to be applied is too large, there is a possibility that incentive to apply for the application will be overly burdensome for the business companies. In merger cases, 'Notification' is a desirable element of competition chapter. 'Notification' may be required in several companies in the international mergers, but the criteria in the examination review processes are a little different by economies. The different authorities may make different remedies as a result of review of merger remedies. There is some kind of conflict and very burdensome problems for the companies.

In order to prevent such problems, it is important to strengthen the corporation system among the competition authorities to promote the convergence of the system and strengthen the transparency for competition authority system. But I would like to know whether these kinds of problems are solved by introducing such kind of elements to competition chapter in FTAs/EPAs. Transparency and procedural fairness are important but what do you think how these kinds of elements function for the actual review or actual enforcement, especially leniency and international merger review?

**Mr Shimozu:** Actually the point you just mentioned is kind of a hot issue in international fora. We often discuss about it in OECD or International Competition Network (ICN). There would be no conclusive solution for that. In a practical way, I think the most important thing is convergence of competition law and competition policy among competition agencies. FTAs/EPAs have two kinds of scheme of the cooperation, one is cooperation in law enforcement and another is a technical cooperation. I think the technical cooperation part would contribute to promote competition law and policies.

**Mr Kening:** Accidentally, I am from the merger review section. I have heard many complaints every year about the efficiency and the timing of our review. I think there is something we can do to solve this problem. As to China, we have had MOUs with many anti-monopoly authorities. These MOUs are really useful when we review the cases. We will carry out department cooperation. We exchange our views on the timing and the remedy proposals about the case. We have carried out very efficient and successful cooperation in the case about the merger between Dow Chemical and DuPont. It is a very big merger case globally. We have exchange of information about

twenty times with EU counterparts and two times with our counterparts from the United States, and also our counterparts from Australia and South Africa. These communications are very useful. The efficiency and timing are greatly improved through this communication. I think maybe we can put more things into this kind of MOUs, especially between the authorities, and it will not solve this problem completely but time would be reduced and efficiency will be improved.

### **3) Session 2-2**

#### ***'Explore Desirable Elements of a Competition Chapter in FTAs/EPAs'***

**Mr Kudo:** The second part of the session 2 which is to explore the desirable elements of a competition chapter in FTAs and EPAs. We would like to share views that those elements were considered as desirable elements. And, based on the discussion, we will have some kind of summary report later. I listed some of the elements which were raised in the first part of this session.

- 1) Objectives
- 2) Basic Principles
- 3) Addressing Anti-competitive Activities
- 4) Non-discrimination
- 5) Transparency
- 6) Procedural Fairness
- 7) Private Rights of Action
- 8) Notification
- 9) Cooperation in Enforcement Activities
- 10) Coordination of Enforcement Activities
- 11) Confidentiality of Information
- 12) Technical Cooperation
- 13) Consultation/Regular Meeting between Competition Authority
- 14) Dispute Settlement
- 15) State Owned Enterprises
- 16) State Aids & Subsidies
- 17) Consumer Protection
- 18) Review Mechanism

Those may be the elements which we had until now in the existing EPAs/FTAs. Some of them are really not included until now but there are some cases where some of the agreements are included in those elements such as the SOEs or the state-based subsidies or consumer protection reviewing mechanisms. It may be a little bit misleading if we say this is a desirable element but maybe we can separate those elements like desirable and optional elements to divide. There were some concerns raised from our colleague from Viet Nam.

What we intended to do here is to raise some of the desirable and some of the optional elements which can be included in the future competition chapters in FTAs/EPAs. If we could share the views here, that would be kind of useful indicators for the future negotiations on competition chapters for FTAs/EPAs. I would like to ask the speakers or from the floor, some of your views or comments on those issues which could be desirable and optional elements in the future competition chapters in FTAs/EPAs.



**Mr Shimozu:** I totally agree that no one size fit all elements, which were raised through the presentations. Having said that, if I force myself to separate those elements into two groups, desirable and optional, I think the purpose or the meaning of competition chapter in EPAs/FTAs is to protect the merit of free trade or investment from being impaired by anti-competitive conduct. For that purpose, the elements of 'Addressing anticompetitive activities' will be very basic elements.

Concerning the desirable elements, considering the elements of 'Addressing anticompetitive activities', I think the 'Nondiscrimination', 'Transparency' and 'Procedure fairness' are related to the 'Addressing anticompetitive activities'. So the basic principles would include 'Addressing anticompetitive activities', 'Nondiscrimination', 'Transparency' and 'Procedure fairness'. I guess the basic principles should be the desirable elements. The other elements are like optional. Of course, it should be case-by-case. If we should decide whether the other elements should be included into the competition chapter, it really depends on the parties' situations such as the existence of the competition authority or the competition law or the degree of law enforcement in the counter economies.

**Mr Kening:** I would like to summarize the consensus we have reached this morning. The first consensus is that we want to explore the desirable elements for this chapter because the competition chapters are important and necessary for FTAs. The second is that the developments of competition laws are different in APEC economies. So, the competition chapters must take this fact into consideration when we want to explore the desirable elements. I think competition chapter in FTAs/EPAs must serve for FTAs/EPAs and must respond to FTAs/EPAs. If anything that is irrelevant with FTAs/EPAs or will not helpful for the effective enforcement of FTAs/EPAs, we shall put that content into MOUs or anti-monopoly cooperation agreement between different authorities.

I think it is a good idea to draft guideline for competition chapters but there is still one problem. We must take this fact into consideration, that the differentiation and different stages among economies, with the development of the competition law or anti-monopoly law. It is really a hard job to draft guideline that one size can fit all APEC economies. So I suggest we can start from a low point and buildup it gradually, so I would like to raise a simple but acceptable plan.

'Objectives' would be desirable elements for competition chapters. 'Objectives' can be a very important element for competition advocacy. I think basic principles are a little bit overlapped with 'Non-discrimination', 'Transparency', 'Procedural Fairness' and 'Private Rights of Action'. These four are all basic principles. 'Addressing the Anti-competitive Activities' is also should to be included.

'Notification', 'Cooperation in Enforcement Activities', 'Coordination of Enforcement Activities', 'Confidentiality of Information', 'Technical Cooperation' and 'Consultation' are the contents of about collaboration. I think we can merge these into one article. Regarding 'SOEs', 'State Aids & Subsidies' and 'Consumer Protections', personally speaking and from my experience of negotiation, they are quite different in APEC economies. If we put these kind of things into guideline, it will make it a little bit difficult for some economies to accept or to use this guideline. As Mr Shimozu mentioned, they should be optional, and it depends on case by case.

**Mr Kumaran:** As for the desirable elements of a competition chapter, we have a long list there. We take the point that we are looking at some of the basic elements to be there. We add this to be optional. Just to touch on the basic elements, when we have a competition chapter in FTAs/EPAS, it's important to look at 'Objectives'. That is one that is very important because it will give you a perspective of what the chapter would be. It also serves to confine the chapter to specific issues, and you can have very broad objectives. My take on chapter is not only to address anti-competition issues but also other issues such as 'State aids' or 'SOEs'. So, very specific objective is very important. 'Basic principles' is very closely related 'Objectives' but there are some differences where in 'Basic principles', you get to state what are the core things that you would like to see addressed in the chapter. For example, 'Timeliness' and 'Procedural fairness' are some of the basic core issues that you can address through this provision.

The other issues can be categorized, especially through the law and the institutions or the law and the agency itself. You would need some form of provisions on adapting or maintaining laws. As to how the workings of the competition agencies themselves, I think this is important. The other cluster could be on the enforcement part. When you enforce the law and you enforce other measures is where the issues such as 'Procedural fairness', 'Timeliness' and so on would kick in. That is all closely related to enforcement of the law. I think that could be clustered in one side.

The other issues on enforcement which is more extensive, which is listed out here, which is 'Cooperation', 'Coordination', 'Confidentiality'. Of course, this is dependent on who are we negotiating with, whether it is a young competition agency or whether it is an advanced competition agency. If it is an advanced competition agency, you might have it there or you might have it through an MOU on enforcement. So that is I would say not so much as optional but optional in the sense that who you are negotiating with. It is important to have that basic criteria stated when you do the reports, so that these options are related to your negotiating partners or who you are negotiating with. Of course, one of the basic element again who you are negotiating with is technical cooperation. I think 'Technical cooperation' has served well for many parties. I believe that it should be a core element of the competition chapter.

On the issue of 'Dispute settlement', at least something it is a given thing that should not be subjected to dispute settlement. There were comments that 'Dispute settlement' should not appear in the competition chapter at all for fear of confusing the stakeholders. I agree to an extent because when you have reconciled with stakeholders. That is an issue for the legal working group if they can include it in 'Dispute settlement' mechanism chapter. There are confusion out there but I think that could be resolved and the core issue.

Regarding 'SOEs' and 'State aides' are something that I personally believe that it should not be optional under competition chapters in FTAs/EPAs. They are introduced through the competition chapter, and as a competition issue. But when you negotiate this, then it is very difficult to confine this to one or two paragraphs. There is bound to be very extensive provisions on 'SOEs' because it would need to be defined and need to be clarified in many aspects. Therefore, it is my personal opinion that it should not be an optional element under the competition chapter. But if it is an important issue, it should be addressed but not under the competition chapter.

**Mr Teo:** I agree very much with what Mr Kumaran said, but I think 'Objectives' should be there but be highlighted what should go under 'Objectives'. We sometimes say that the promoting competition and high economic efficiency facilitate investment. All these are fine but from my own personal experience, promote consumer welfare usually can create other contention. It is not that I am against consumer welfare, but the whole idea of a competition is that firstly it improves efficiency and has value about total welfare.

Consumer welfare has more got to do with sometimes the distribution side of things, so the total welfare can be improved but it does not mean that the benefits will definitely go down to consumer. It can mean that business entity can keep everything by as their profit. It could be a point of competition but, agency that takes on dual function both competition and consumer protection is a little bit easier because you can have some views on how some of these gains can cascade down to consumer, but it is not that all competition agencies are mandated to do so, in that case, they need to clear the conduct on notifications.

I think some of 'Basic principles' are being taken care of under 'Transparency', 'Procedure fairness', and maybe you can include 'Timeliness'. That is usually not mentioned but is important principle in terms of your investigative as well as enforcement proceedings. Also they have differences in terms of socioeconomic development. Therefore, you have due regard for these differences when they implement and develop their law. It is what we respect that they have the sovereign right in terms of developing and implementing competition law in their economy.

Regarding 'Non-discrimination', I just want to mention that we have to be a bit careful that it is really about the law itself as well as application. The problem is that each economy is equal. Competition law itself is really discriminate because when you talk about abuse, dominance, merger and acquisition, you are really tackling businesses of a certain size. It is not a prohibition that applies across all business entities but usually only the big ones. The small ones can get away with exclusive dealings. They also can merge and acquire any company they want. They are unlikely to run about with the competition law. When we talk about application of the law itself, you will not discriminate the foreign firm versus a local firm. In terms of ownership, whether it is a privately owned or public owned or government owned, we need consider it when we talk about non-discrimination. It is just a term but such understanding is important.

'Procedural fairness' is quite important to have three aspects. Before entity is imposed, remedy intention, after an entity is imposed remedy intention as well as the investigative processes itself, I think that is actually important.

Regarding 'Cooperation in enforcement activities', as I mentioned, it is up to you how you want to put in competition chapter in FTAs/EPAs. Actually under ASEAN FTA, we have included 'Notification', 'Exchange of information', 'Consultation' as well as 'Coordination of enforcement activities', all group under this thing called cooperation in competition enforcement because you realize that these four forms of cooperation pertain to between competition authority, and it's always in relation to any investigation to investigate these enforcement proceedings.

But what I should treat in competition chapter is implementing in areas of 'Procedural fairness', 'Transparency' and 'Confidentiality'. You have to cut down the uncertainty and have to improve on the consistency, predictability. Actually they should be complied

with different requirements but they will help you to ensure that you are not unnecessarily held up. It may not address all of your problems but at least it will be a relief.

As Mr Kumaran said, 'Technical cooperation' is very important and is also linked to principles. If you recommend the economies have different development stages, they have different needs. It definitely will go hand in hand to see that and is not just applications but is also technical assistance that economies can help each other. They are able to implement all those complements under the chapter effectively.

'Dispute settlement' is a standard element, but I agree that it should not be holding subject to dispute settlement. In fact, if you look at the FTAs at Singapore, it is not totally excluded from dispute settlement. For example, Singapore-United States FTA (USSFTA) has very big provision on SOEs and that part itself is not cut down, it is subject to dispute settlement.

In FTAs that Singapore concluded with EU and United States, the part on subsidies is also not covered as well on dispute settlement line. It is something important to them and I agree it because there is a good reason why we did not apply dispute settlement in a blanket fashion. We cannot touch the procedural aspect of the law because it is also tied to how the economy actually enforce and administer the law. The competition chapter actually goes just beyond all these.

'SOEs' and 'Subsidies' are not necessarily covered under the law. This is also linked to the point that Mr Willett mentioned about competitive neutrality extending beyond just SOEs. We are looking at government measures at this core competition. They are not necessarily to touch the other economy's law schedule.

## **Q&A**

### ***(Question from the floor to Mr Kumaran and Mr Teo and Mr Shimozu)***

**Participant:** Today's workshop highlighted some elements including 'SOEs' in competition chapters. Speaker noted that while SOEs are emerging issue, disciplines are not new. I am interested in the panelists' perspective of how you see SOEs provisions emerging in current FTAs/EPAs negotiations noting that the CPTPP has its own chapter. Is that an approach others are taking? How can APEC contribute to understanding and development of these disciplines and related competition chapters?

**Mr Kumaran:** I briefly highlighted that there were some disciplines that touch on commercial considerations, non-discriminatory practices when it comes to state trading enterprises and that has been there and again. Regarding 'Subsidies', we do have the Agreement on Subsidies and Countervailing Measures (ASCM) or the agreement on subsidies and countervailing measures and that is across the board and not only to ease, but increasingly in FTAs/EPAs. You do SOEs disciplines being introduced. This is something that is new, and is emerging. In some FTAs/EPAs between some economies, it is just very small. In the other some ones, you can see a full-blown text.

As I have explained, I think we would need to be objective about who you negotiate with. They are really to commit to the obligations. SOEs chapter in CPTPP was negotiated taking into account all factors that affect the parties. It is very extensive and

prescriptive text when it comes to the SOEs chapter, and I think that is the most prescriptive disciplines on SOEs.

But in the second tier of several contentious issues, you would need to take into account the development of each economy, the policies of each economy. The socioeconomic role played by SOEs are different each economy. In one economy, they might be purely commercial, but in another economy, even though they operate in a commercial manner, they have to fulfill the other roles such as nation building, implementing government policies to help SMEs and affirmative action etc. Imposing a discipline which is very standard on this kind of entities would pose a problem. Therefore, they would need to be specific treatment or specific flexibility accorded to these economies or for these SOEs, so that they can continue to operate on a commercial basis without affecting the market as stipulated by disciplines on SOEs. But at the same time, they can continue also to implement government policies, and carry out their role in nation building, I think it is also very important. We will need to strike that fine balance if provisions on SOEs are to be considered with your negotiating partners.

**Mr Teo:** I totally agree with Mr Kumaran on that. If you are taking about SOEs provisions, you will be good to have separate section or chapter because usually the text will be issue. They are quite extensive. When we talk about the competition chapter in FTAs/EPAs, majority of the people will agree that minimally we are talking about the competition law itself. It should basically address three types of anti-competitive conducts, but sometimes there are participants that look at the competition chapter beyond competition law, and that is why the word 'competition policy' comes about.

Now competition policy is definitely much wider than competition laws, and it can include a lot of things. Therefore, when we say that competition law applies to SOEs, it just means that it applies to all entities engaged in commercial activities. It does not matter that these all entities is regardless of their ownership, nationality, whether they are foreign companies or local companies, whether they are privately owned, publically owned or government owned. It is important how we will apply competition law. For example, USSFTA mentions that competition law will apply to these entities.

If you will have certain things like the GATT principles, WTO principles on subsidies, GATT principles on non-discriminatory treatment in sales and purchase of goods, you can recall Mr Kumaran's presentation. When it comes to transparency, sometimes the trading panel requires you to publish information of SOEs which is about the ownership structure, the shareholding etc. SOEs relate issue is pretty extensive and is involved some other parties not only competition authorities but also Ministry of Trade and Industry and Ministry of Finance.

I understand why people want to include SOEs because it is true that you do not want SOEs to be had an unfair vantage but on the other hand, I think there are certain really objective justifications why SOEs are needed. I think that is when you need to work out what are these justifications, exemption or even exclusion. It is same, even for the Singapore-EU FTA prohibited subsidies. It's nothing that all subsidies are wrong, there are certain subsidies that they recognize that is their objective justification for those subsidies. For instance, if there is a disaster they have burned, and then you need to subsidize to get certain things going, essential groups going or what you have to sort of

actually work out a very comprehensive list of the subsidies which are actually exempted. Because of that, it makes more sense for this whole entire section to be taken out.

**Mr Shimozu:** The subject of Japanese competition law is both private companies and SOEs. It will be important to secure the competitive environment equally between SOEs and private companies. In that sense, I think it is significant that FTAs/EPAs include the discipline of SOEs. I understand that there are discussions to introduce the discipline of SOEs in competition chapter. For example, the Japan - EU EPA has a chapter of SOEs, which is separated from the chapter of competition policy. But keeping that discussion aside, it is very important the discipline of SOEs is included in FTAs/EPAs.

*(Question from the floor to Mr Shimozu, Mr Kumaran and Mr Kening)*

**Participant:** Our economy has 26 FTAs/EPAs and agreements. As some of them are very old, we have been modernizing them. In this context, we have been revising some of the provisions we have had regarding competition or competition chapters. One of the issues that we have been facing and I wanted to share our experience, for example, for the 'Notification' provisions, we have seen that it is very rare application, although it is very useful in practice. It is very hard I guess for competition authority to consider other economy's interest while investigating. At the same time, especially trade interests because it is not something I guess that are undermined when competition authorities investigating. Actually in our latest, we have seen that 'Notification' is not included. I do not know if you have other experience regarding this.

As for consultation, at least we had some experiences because we see value in consultations. I mean consultations not the regular meeting between competition authorities because there would be if in the case that there are trade interests being involved in a competition-related issue, then you had consultations in order to have a channel to speak with the competition authority. Therefore you connect trade authority with the competition authority or other economies, at least in that sense, it is useful.

**Mr Shimozu:** Regarding 'Notification', as explained in the previous session, Japan concluded 16 EPAs which included competition chapters. Among them, 10 EPAs have stipulated notification articles. I think notification is quite important because it is the beginning of other cooperation parts in law enforcement. Parties can cooperate in enforcement activities or coordination of enforcement activities or positive comity or negative comity. The notification is a kind of the basement of all those cooperation. It also guarantees opportunities for the other party to ask for considerations of its' important interest before the other counter party make a definitive action.

I was a senior officer for leniency program before. Sometimes I got notification from other economies or competition authorities. I cannot tell in detail but sometimes the contents of notification are something we do not know. This is kind of like opportunity for us to think if the same conduct is happening in Japan too. In practical sense, I think notification is quite useful. But, if it is essential or desirable, I think it really case by case.

**Mr Kumaran:** I do agree that it is very beneficial one. I think of course it could be included as an element but more in the context of optional because it goes to one step

further as to one of the advanced element, and it serves well. You do have provisions the way which it is worded is you can request for the consultation and sympathetic consideration. I am always pretty interested in the word 'sympathetic consideration' with your negotiating partner, but that is designed in a way that not to burden the authorities that are involved. It serves well to resolve issues that affect trade and investment. I think there will be no parties that would simply invoke this consultation mechanism just for the sake of invoking it. There must be something that is seriously wrong and people would invoke this, and this I believe is a very good mechanism to be part of the chapter as an optional or advanced element.

**Mr Kening:** I completely agree with you about the notification. In China, we do not have 'Notification' articles in our competition chapters in FTAs/EPAs. As to consultation, I do not remember it very clearly. We might have this in some new FTAs/EPAs, but until now it is never used. Sometimes consultations are oriented but not under the competition chapters in FTAs/EPAs, it is under the MOUs. Therefore I agree with you that this is an optional item.

***(Question from the floor to Mr Teo)***

**Participant:** I just have an additional question for Mr Teo. Regarding pretty disciplines and subsidies in SOEs, what are the considerations whether or not there should be subjected to their dispute settlement mechanisms like the one in the USSFTA or should this be subjected to best efforts basis like most FTAs/EPAs?

**Mr Teo:** I think it really depends on who is your counterpart. Bilateral agreements for SOEs are really the part where we really have quite extensive. As I mentioned, it is not something that is amenable to the other side because they are strong proponents of. The United States pay quite a lot of attention to SOEs and EU really focus to subsidy more.

We are quite comfortable. The point itself is pretty confident that we are able comply. It can be honored. We have assessed that overall we are able to comply and unlikely that parties are going to raise a lot of issues including the disputes with us. Actually for the USSFTA, I do not think they have raised any major dispute with us. There are a few incidences where they come back to us who carried on a few things, but not to the extent whereby you really need to activate the dispute settlement mechanism to resolve those issues.

***(Wrap Up of the Session)***

**Mr Kudo:** I would like to suggest that as for the desirable elements, we have shared view to include 1) Objectives, 2) Basic principles which include 'Addressing anti-competitive activities', 'Non-discrimination', 'Transparency' and 'Procedural fairness', and 3) Technical cooperation were highlighted by some of the colleagues. Rest, we can put it to the optional elements, with the condition that no one size fits all approach is important. Those elements will apply in accordance with the counterparties' situation status.

**Mr Shinya Fujita, Director for APEC Division, Ministry of Foreign Affairs, Japan (Organizer):** We heard an interesting discussion on desirable elements of the competition chapter. I found it interesting to hear opinions about what elements are

essential and what are optional. This is the essence of the capacity building workshop. When we think of high level, comprehensive FTAs/EPAs or FTAAP, the number of elements included will be bigger. They must be more than the desirable elements which Mr Kudo just summarized. In today's discussion, we also heard interesting opinions about issues related to new or emerging issues, especially SOEs. It was interesting to hear that some said that they should not be included in the FTAs/EPAs or FTAAP; others said they are desirable elements in FTAs/EPAs; still others said they could be mentioned in another independent chapter. It is up to what kind of FTAs/EPAs or FTAAP we think of, or of how high level it should be. Whether SOEs etc. are mentioned in such an agreement will be up to the aspirational level of the negotiators.

### **3) Session 3**

#### ***'Discuss the Relation between Investment and Competition Policy including Chapters on FTAs/EPAs'***

**i) Firstly, Mr Koki Arai, professor, Faculty of comprehensive management, Shumei University, Japan** made a speech as follows;

Mr Willett and Mr Hayashi have already mentioned the key components of the competition policy or competition policy. I would like to review the competition policy essentials. Competition between firms is usually the most effective way of allocating economic resources and achieving consumer and producer welfare. There's a balance to be struck; firms must be, must not be overregulated, but neither must they be completely free to create a monopoly or oligopoly giving them super-competitive profits or a 'quiet life' as Mr John Richard Hicks said. Therefore the role of competition policy is to maintain a balance by using the collaborative economics.

My presentation will analyze the relation between investment and competition policy based on the knowledge and experience of Japanese and international anti-monopoly law and enforcement in cases. The JFTC implements a competition policy, primarily through the enforcement of the anti-monopoly law which promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition according to that ensuring economic vitality and consumer benefits. It is important to understand the competition policy from the point of view of Asia Pacific businesses.

Regarding regulation of the anti-monopoly act, Mr Masuda and Mr Shimozu have already mentioned that anti-monopoly act have four pillars. One is prohibition of private monopolization. If any entrepreneurs exclude or control competitors from the market by means of unjust low price sales, discriminatory prices, etc., such acts are prohibited as private monopolization. Second is prohibition of cartels. If any entrepreneur has consult with each other to jointly determine product prices, sales and production volumes, etc., such acts are prohibited as unreasonable restraint of trade. And the prohibition of unfair trade practices and merger control are also essential elements.

Two recent developments of the anti-monopoly act should be focused. Both of them are very interesting cases. The first is music copyright management service provider case. Japanese music copyright management service provider granting blanket authorization to exploit musical works under its management in broadcasting, concludes a license agreement with almost all broadcasting organization wherein fees are to be collected by a method on the basis of the amount calculated by multiplying



the income from broadcasting business in each fiscal year by a predetermined rate on the basis of a predetermined amount and collects fees under such agreement, given the factual circumstances indicated in the judgment, such practice of the current music copyright management service provider has the effect of making it extremely difficult for other service providers to enter the market for licensing the use of musical works in broadcasting which constitutes the element of excluding business activities of other enterprises, referred to in private monopolization of the anti-monopoly act.

It should have been difficult in the market for broadcasting organization to think of not concluding a license agreement based on blanket authorization with current service provider. And if broadcasting organizations pay broadcasting fees to other management service providers, the total amount of broadcasting fees payable thereby would increase. And the current service provider's practice as described above continued for more than seven years. This is the Supreme Court of Japan 2015 cases, the private monopolization case.

The other recent development of the anti-monopoly act Japan, a kind of international case, but is not of the external territory other case. In this case, where a cartel conducted by businesses operator engaged in the manufacturing and setting of cathode-ray tubes (CRT), in relation to the sales prices of CRT for subsidiary companies of business operators engaging manufacturing and selling of televisions in Japan that was located outside of Japan, was agreed upon outside of Japan, under the circumstances held in the judgment such cartel infringed on the order of the free competition economy in Japan.

The business operators engaged in the manufacturing and selling of televisions in Japan 1) controlled the business of the manufacturing and the selling of CRT televisions conducted by them and their subsidiary companies, 2) determined important trade terms and conditions, such as suppliers, purchase prices and purchase volumes and etc., and 3) conducted negotiations directly by themselves pertaining to trade terms and conditions for CRT in televisions with business operators. This is also the Supreme Court of Japan 2017 cases. Not only competition policy but also anti-monopoly act enforcement has been developed gradually day by day.

As Mr Hayashi, Mr Masuda and Mr Shimozu have already explained today, 14 EPAs including Australia, Peru, Viet Nam, ASEAN, Indonesia, Thailand, Chile, Philippines, Malaysia, Mexico and Singapore, and, 3 Antimonopoly Cooperation Agreements with Canada, EU and the United States, and 11 MOUs including Singapore, Canada and China, Australia, Philippines, Viet Nam and Korea were concluded and effective.

I will show changes in FDI in Japan from 1983 to 2017. FDI in The movement seems to be little relation between competition agreement and FDI. Competition agreement shows the vertical line from 1999 to 2017. It seems to be not so great relation between the competition agreement and FDI.

However, the role of competition policy has increased in NGeTIs, specifically in how competition policy affects investment activities. I break out two questions. The first one is whether it is enough to have an investment treaty, the second one is whether it is enough to have a competition law.

I would like to introduce one of the research result of analysis of factors of internal and external investment by Cabinet Office of Japan in 2008. The factors of FDI are explained by the ratio of experts and managers in the business through the Knowledge-Capital model analysis and the economy that has a large percent of internal direct investment has higher cost for investment than other economies. For the enhancement of investment in developed economies the ratio of experts and managers in the business as well cost reduction are especially important.

(<http://www5.cao.go.jp/keizai3/2008/1014seisakukadai01-0.pdf> (only in Japanese))

From the first stage of the developing economies, investment treaty is heavy rather than competition policy, but after that, competition policy is much heavier than investment treaty. I would like to introduce a research output that is palm oil in Malaysia. The palm oil industry is Malaysia's one of the most competitive industry in the world. Since 1970, the industry has maintained world leadership in the global production and export share for about 40 years. And still maintains the second largest share in the world after Indonesia. Palm oil and its related industries account for about 7% of the total export value of Malaysia and about 8% even at gross national income contributing greatly to the Malaysian economy.

([https://ir.ide.go.jp/?action=repository\\_action\\_common\\_download&item\\_id=40450&item\\_no=1&attribute\\_id=22&file\\_no=1](https://ir.ide.go.jp/?action=repository_action_common_download&item_id=40450&item_no=1&attribute_id=22&file_no=1) (only in Japanese))

The industry started from the state of exporting purified palm crude in the early stage. But Malaysian government's trade policy and international policy of foreign capital were successful. Diversified related industries from the position of raw material supplier succeeded in high added value. It can be recognized as one of the successful example of catch-up industrialization in the sense that it effectively utilize natural conditions suitable for palm oil production effectively introduced foreign iconology and capital and succeeded in industrial development. And the Malaysian successful policy includes infrastructure investment, human resource development and breed improvement. They have the competitiveness that is not derived slowly on the advantage of the initial elementary conditions. The high profit margin of palm oil related industries inspired the entrepreneurial spirit that occurs at the enthusiastic entry into the industrial refining business.

Sound competitive relationship was created among private enterprises creating a virtuous circle that increased the productive of the Malaysian palm oil industry. The palm oil industry in Malaysia exemplifies the importance of elaborated investment policy and also particularized competition policy to maintain and promote healthy competitive environment that's one of the example.

Only there is a competition law is enough. The example of Chinese anti-monopoly law should be focused. Some people, foreign firms and foreign associations criticize the Chinese anti-monopoly law enforcement. For example, European Chamber of Commerce 2014, foreign companies are being disproportionately targeted. The United States-China Business Council, the perception that foreign companies are being disproportionately targeted, it is also fueled by China's domestic media reporting which has break up foreign related investigations versus domestic companies. But, China's anti-monopoly law enforcement, only the some huge cases are announced by National Development and Reform Commission (NDRC) and it is very specialized case, the percentage of the foreign valuated funds of, in NDRC statistics 99%. So, Chinese official say they are not. Everyone is equal before the law, Li Pumin, the Secretary

General of the NDRC which is the most powerful of the three agencies involved in enhancing anti-trust laws in China declared.

If there was anti-monopoly cooperation agreement, the authority of other jurisdictions would express their intention to provide information each other in the individual cases that the authority investigates in accordance with the laws and regulations of their respective economies and subject to their respective reasonably available resources. If firms in the jurisdiction are involved in a case investigated by the other authority, the authority conducting the investigation may notify the other authority of the case to the extent compatible with the laws and regulations.

These are only obligations to make an effort, but the rules are for restraining for the perceptions from the outside. The authority of the other jurisdiction would support the enforcement authority. And I would like to share the other case study regarding the recent the United States' Supreme Court decision. A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government's submission. But the court is not bound to accord conclusive effect to the foreign government's statements.

The Second Circuit expressed the concern about reciprocity, but the United States has not historically argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit's rigid rule. This is Supreme Court's decision on 14 June 2018.

The courts are not required to defer to a foreign government's interpretation of its own law. The implication of this decision is that transparency must be required of foreign legal systems and their enforcement in such matters. The competition chapters of FTAs/ETAs are potentially conducive to creating transparent law enforcement and communication between authorities.

I would like to sum up my presentation. The competition policy, primarily through the enforcement of the anti-monopoly law, promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition, thereby ensuring economic vitality and consumer benefit. There seems to be little relation between competition agreement and FDI; however, the role of competition policy has increased in the NGeTIs, specifically in how competition policy affects investment activities.

For the enhancement of investment in developed economies, the ratio of experts and managers in business as well as cost reduction are especially important, therefore the competition policy is needed in NGeTIs. In China's case study, the rules are for restraining the perceptions from outside and the authority of other jurisdiction would be able to support the enforcement authority. In the recent the United States' Supreme Court case, the competition chapters in FTAs/EPAs are potentially conducive to creating transparent law enforcement and communication between authorities.

**ii) Subsequently, Mr Grigory Karakov, Deputy-head of the department, department for control over Foreign Investments, Federal Anti-monopoly Service of Russia made a presentation as follows;**

I want to tell you the experience of Russian Federal Anti-monopoly Service (FSA) and its activity and its correlation between competition policy and foreign investment. FSA is a kind of mega regulator which manages the classical anti-monopoly regulation which includes economic concentration, anti-trust, reviewing government acts that restrict competition, review natural monopolies activity etc.

The next aspect of our activity is control over foreign investment. We have ministry of economic development that attracts foreign investment but we will control this process. Also we control over state tendering, over state defense order and tariff regulation. All of these activities lead to pro-competitive nature of regulation and help optimizing expenditures in regulating sectors. We have unity of approaches in different sectors which are under our regulation and ensuring the availability of infrastructure on a non-discriminatory basis.

Regarding the development of our competition policy, we have some new trends. Firstly, our aim is to reduce administrative burden on business. The number of pre-merger notifications is declining from about 6,000 in 2008 to 1,000 in 2017. And the number of post-merger notifications is also declining from 44,000 to just 100 in last ten years. This statistic shows our objective, the liberalization of anti-monopoly regulation and increase of enforcement efficiency on the basis of the best world practices.

FAS have also used advocacy of competition and foreign investment having a concept of an Open Authority, it means that all of our decisions and procedures are transparent, and you can see them on our website. We establish interaction with business and scientific unions to hear the ideas on the business and statistics and make our decisions more adequate. We also have international cooperation with anti-monopolies authorities of different economies to promote competition and consumer welfare, exchange the information, to establish technical cooperation. We have memorandum of competition with several economies.

The other our new trend is anti-monopoly and investment compliance. First of all we want to establish the preventive mechanisms in anti-monopoly control. We try to have more warnings for those who disobey the law than penalties. We had more than 5,000 administrative cases in 2003 and in 2017 we have just more than 1,000 administrative cases. As the number of warnings is increasing, it is very effective approach, because a lot of business persons do not want to disobey the law, and they just change their practices to the appropriate one after receiving our warning.

The next step is implementation of compliance as a mitigating factor for businesses. A lot of companies, international companies as well establish now, compliance practices in their activity. And if they disobey the law, we can mitigate for them based on the fact. Moreover, according to Russian President Act, we have the obligation for regional governmental bodies to implement anti-monopoly compliance in their activity, because regional governmental body have a lot of disobeying, more than 20, more than 98% of warnings by the governmental body are made on the regional level that's why we want to improve this situation by implementing anti-monopoly compliance. And next year we would like to adopt a law on anti-monopoly compliance which is already in our parliament.

Regarding foreign investment control, we have several laws on it, it is very complex. One is the federal law on foreign investment and the foreign, and the other one is the

federal law on procedure for foreign investments in companies of strategic significance for Russian National Defense and State Security, and there are more than 20 sectoral legislative and regulatory act that is supervising the procedure for foreign investment in different sectors of our economy.

Federal law in foreign investments established the legal treatment of the activities of foreign investors shall not be less profitable than the legal treatment granted to Russian investment. That is very important issue and on the other hand a foreign investment shall observe the anti-monopoly legislation on Russian federation and avoid unfair competition for restrictive business practices. Therefore, that is why cost for foreign investor and for internal local investors are the same. And it is non-discriminatory regime for foreign investments.

Federal law was established in mechanism of control foreign investment in strategic companies has just some restrictive exemptions for foreign investors to establish control over strategic companies. For example, when they acquire the property which costs 25 and more percent of strategic companies' book value.

Also this federal law affects the listing of strategic activities which are related to really strategic and really important issues for our security such as medicine and nuclear power etc. Then procedure is established, and consequences and sanctions for non-compliance with legal requirements are imposed.

FAS it's like just a half, which connects the applicant, the foreign investor and the government commission on foreign investment. We get the application and give the final decision. And our authority we also send request to federal executive bodies and Ministry of Defense and Federal Security Service for us to understand whether there is a threat to national security or whether there is a threat to economies' defense.

During the last 10 years, FAS has received just slightly more than 500 requests, 200 were returned to the applicants because they did not require the preliminary consideration, 47 were withdrawn by applicants and on the 200, 37 of were considered by the Government Commission. And 221 were preliminary approved. And only 16 were declined, so it's a good statistic about 6 or 7% of request for decline. Our commission is rather friendly and it doesn't make any additional burdens for business.

The investment was increased from 6 billion dollar in 2015 after the starting of sanction to 25 billion dollar in 2017. The interest of foreign investments are to the Russian economy are still active. And still our strategic commission practically 43% of our investment in – of the years came from our commission. We have no discriminatory regime for foreign investors and competition policy and foreign investment control of federal anti-monopoly service. It is not a burden for a business because first of all the procedure is transferred and the procedure is fixed. We have no pitfall for foreign investors, moreover we have good international consulting companies who are dealing with our laws, any international companies can connect them.

Our purpose is to continue the synergy of our competence, anti-monopoly competence and foreign investment control competence because the development of competition leads to a better investment climate which in turn encourages foreign direct investments. We will focus transparency in law, procedural fairness, procedural openness, development for future or further development of advocacy. We have

already published all of our laws, guidelines, procedurals and our final decisions. In future, we need to be more internationalized and publish all this stuff in English and different languages for foreign investors to be more convenient to comply with this.

The next main step is to promote cooperation, cooperation in enforcement activities coordination of enforcement activity. We should precede consultation, regular meetings with other anti-monopoly authorities. And to conclude this all of this should be made on the innovation basis. For example, within in digital work now we can use such as big data to establish the right way of communications.

## **Q&A**

**Mr Chen Kening, Deputy Director, Anti-monopoly Bureau of State Administration for Market Regulation, China:** I just want to respond a few words to Mr Arai. Actually we had meetings with the foreign companies and also chambers from EU and the United States. The purpose of this kind of meetings is to hear or listen to the complaints and also advises from foreign companies to improve our work. Actually these kinds of methods are very effective, the time of the case review has already been shortened year by year, for example, compared with the year 2017, in 2018 the time have been reduced by about 30%.

Secondly, regarding the equality of foreign companies and local companies, actually all companies are equal in China. As to the chambers you have mentioned I have to say that about 90% of the companies fined according to competition laws are local companies, not foreign companies. Companies such as the Qualcomm and the Tetra Pak are worried. The penalties are great because their turnover in China are very large.

Everyone knows that the Qualcomm's turnover in China is very big. We decide the penalty according to its turnover of last year. If we take Qualcomm and the Tetra Pak case out of the penalties you will find the truth. Most of the penalties are from local companies not from foreign companies. The foreign companies paid more attention to this, is only because that it is widely reported. But when we make decisions to fine our local companies it is rarely noticed by foreign medias.

Since the enforcement of Chinese anti-monopoly law, the foreign investment in China has increased dramatically. So in this way I really think it is not a very proper or explanatory evidence for the relationship between competition law and investment.

**Mr Arai:** I have already mentioned the 90% of the violation is the China companies and the competition chapter will be able to make support the Competition Authority in China. Therefore, I would like to mention the competition chapter is effective in the cooperation between the competition authorities.

## **IV. Conclusions**

Moderator, **Mr Hiroshi Kudo, Negotiator for Economic Partnership Agreements, Ministry of Foreign Affairs of Japan** wrapped up the discussions of the day based

the presentations by speakers as follows;

Firstly, the current situation surrounding competition chapter in FTAs/EPAs is updated and we shared the view that international cooperation and harmonization in the field of competition law is crucial.

I think each speaker presented its status and development of a competition chapter in each FTAs/EPAs. Mr Allen the chair of the CTI asked us that the international competition on competition policy is important for creating the type of predictable environment for business and consumers, and that can help boost the growth. Mr Willett from Australia concluded that why competition policy has traditionally had a domestic focus.

Each speaker presented its status and development of competition chapter in each FTAs/EPAs. Mr Allen, CTI Chair, stressed that international cooperation on competition policy is important for creating the type of predictable environment for business and consumers and that can help boost growth. Mr Willett concluded that while competition policy has traditionally had the domestic focus. Competition policy principles are entirely consistent and indeed complementary, to the interests of international economic participation. And it is time to consider the consideration of competition policy principles in international agreement in a comprehensive holistic manner. Mr Hayashi emphasized the importance of international cooperation and harmonization in the field of competition law through his experience on legal development support for competition law in Asia, differences between competition laws and social systems originate from Europe and America and those in Asia, that we must attach the importance to the values of Asia and Asian competitions laws and also he expressed the importance of the advocacy of the competition policy.

Secondly, the desirable and optional elements of a competition chapter, which may serve for the future FTAs/EPAs negotiations are explored. And we manage to share the views on these elements.

Mr Kening from China mentioned that the key elements of FTA competition chapters are 'Objectives', 'Definitions', 'Principles in Competition Law Enforcement', 'Transparency', 'Cooperation', 'Information Confidentiality', 'Consultation', 'Dispute Settlement', 'Independence of Competition Law Enforcement' and so on.

Mr Masuda from Japan concluded most of the FTAs/EPAs improve the following elements; Elements I is addressing 'Anti-competitive Activities', 'Non-discrimination', 'Transparency', 'Procedural Fairness', Elements II, 'Notification', 'Cooperation in Enforcement Activities', 'Coordination of the Enforcement Activities', Element III, 'Technical Cooperation', 'Consultation/Regular Meeting between Competition Authority' and considers that the necessary elements from Elements I to III should be included in the competition chapter, in accordance with the counter party's status.

This was also highlighted by Mr Teo from Singapore, that there exist diverse differences among partners. And no one-size fits all approach or text is important. Mr Masuda also highlighted that there are trends to stipulate 'Operationally Independent Competition Authority' or to specify basic principles in detail especially about 'Procedural Fairness' in the recent FTAs/EPAs.

Mr Kumaran from Malaysia presented some of the elements from CPTPP competition chapter as well as RCEP competition chapter, highlighting the 'Procedural Fairness', 'Private Rights of Action', 'Transparency', 'Consultation and Cooperation', 'Confidentiality' are important.

And Mr Kumaran also highlighted 'SOEs', as well as 'Consumer Protections' as emerging issues in FTAs/EPAs competition chapters. Mr Teo from Singapore highlighted also the 'Procedural Fairness', 'Transparency', 'Private Rights of Action' and 'Confidentiality of Information' as essential elements of competition chapters in FTAs/EPAs. He also referred to the 'Public Enterprises and State Monopolies', 'State Aids and Subsidies', 'Consumer Protection' and 'Review Mechanisms' of the optional elements of the competition chapters in FTAs/EPAs.

In the end we shared our views that 'Objectives', 'Basic principles' including 'Addressing Anti-competitive Activities', 'Non-discrimination', 'Transparency', 'Procedural Fairness', as well as 'Technical Cooperation' are the desirable elements of a competition chapter in FTAs/EPAs, whereas, 'Private Rights Actions', 'Notification', 'Cooperation in Enforcement Activities', 'Coordination of Enforcement Activities', 'Confidentiality of Information', 'Consultation/Regular Meeting between Competition Authority', 'Dispute Settlement', 'SOEs', 'State Aids and Subsidies', 'Consumer Protection' and 'Review Mechanisms' as the optional elements of the competition chapters in FTAs/EPAs, on the condition that, no 'one-size-fits-all' approach is important, and we apply those elements in accordance with the counterparty's status.

Thirdly, the relation between investment and competition policy was discussed, especially how competition policy affects investment activities. Mr Arai concluded that there seems to be little relation between competition agreement and FDI; however, the role of competition policy has increased in NGETIs, specifically in how competition policy affects investment activities.

Mr Karakov, from Russia explained the Synergies of FAS Russian Competence, competition policy and investment compliance in Russia and the mechanisms of control of foreign investment in strategic companies and foreign investment control procedure in Russia and highlighted that the synergy, transparency, cooperation and the innovation are the very important elements.

Finally, I would like to express my sincere gratitude to distinguished speakers, to all those who participated in this workshop and to those who contributed to organize this workshop.

#### **IV. Next Steps**

Japan will share the outcome of the workshop, inter alia, the desirable elements that were identified there, so that they can serve as references for APEC economies in negotiating future competition chapter in FTAs/EPAs, with the understanding that they may form a part of the eventual FTAAP. Japan intends to make further contributions in the area of competition policy and the competition chapter in FTAs/EPAs.



## Appendix 1 : Agenda

### FTAAP Capacity Building Workshop on Competition Chapter in FTAs/EPAs under the 3rd REI CBNI (CTI 03/2018T)

11<sup>th</sup> August 2018  
'A-216/217', International Convention Center  
Port Moresby, Papua New Guinea

#### Program

08:30-09:00	<b><i>Registration</i></b>
09:00-09:10	<b><i>Opening Remarks</i></b> <ul style="list-style-type: none"><li>- <b>Mr Justin Allen</b>, CTI Chair (Senior Policy Officer, Ministry of Foreign Affairs and Trade, New Zealand)</li></ul>
09:10-09:20	<b><i>Introduction</i></b> <ul style="list-style-type: none"><li>- <b>Mr Hiroshi Kudo</b>, Negotiator for Economic Partnership Agreements, Ministry of Foreign Affairs, Japan (Moderator)</li></ul>
09:20-10:30	<b><i>Session 1</i></b> <b><i>Update the Current Situation surrounding Competition Chapters in FTAs/EPAs</i></b> <i>This session presents the current situation surround competition chapters in FTAs/EPAs based on the empirical research to promote better understanding regarding the benefits of the establishment of the chapter on competition in FTAs/EPAs.</i> <ul style="list-style-type: none"><li>- <b>Mr Edward C Willett</b>, Associate Commissioner, Papua New Guinea Independent Consumer &amp; Competition Commission (Former Commissioner, Australian Competition and Consumer Commission)</li><li>- <b>Mr Shuya Hayashi</b>, Professor, Graduate School of Law, Nagoya University, Japan</li></ul> <p>(Open the floor for discussion and Q&amp;A for each session)</p>
10:30-12:30	<b><i>Session 2 - 1</i></b> <b><i>Exchange the Information of Essential Elements on Competition Chapter in FTAs/EPAs</i></b> <i>This session extracts essential elements of competition chapter FTAs/EPAs considered to be indispensable through exchanging the information and knowledge from the negotiators' experience.</i> <ul style="list-style-type: none"><li>- <b>Mr Chen Kening</b>, Deputy Director, Anti-monopoly Bureau of State Administration for Market Regulation, China</li><li>- <b>Mr Tatsuro Masuda</b>, Deputy Director, International Affairs Division, Fair Trade Commission, Japan</li><li>- <b>Mr Arunan Kumaran</b>, Senior Principal Assistant Director, Ministry of Domestic Trade, Cooperatives and Consumerism, Malaysia</li><li>- <b>Mr Wee Guan Teo</b>, Director, International &amp; Strategic Planning Division, Competition Commission, Singapore</li></ul> <p>(Open the floor for discussion and Q&amp;A for each session)</p>
12:30-14:00	<b><i>Lunch</i></b>

14:00-16:30	<p><b><u>Session 2 - 2</u></b>  <b><i>Explore Desirable Elements of a Competition Chapter in FTAs/EPAs</i></b>  <i>This session explores desirable elements of a competition chapter which could be accepted by many participants, which may serve as guidelines for future FTAs/EPAs negotiations.</i></p> <ul style="list-style-type: none"> <li>- <b>Mr Chen Kening</b>, Deputy Director, Anti-monopoly Bureau of State Administration for Market Regulation, China</li> <li>- <b>Mr Hideyuki Shimozu</b>, Senior Planning Officer, International Affairs Division, Fair Trade Commission, Japan</li> <li>- <b>Mr Arunan Kumaran</b>, Senior Principal Assistant Director, Ministry of Domestic Trade, Cooperatives and Consumerism, Malaysia</li> <li>- <b>Mr Wee Guan Teo</b>, Director, International &amp; Strategic Planning Division, Competition Commission, Singapore</li> </ul> <p>(Open the floor for discussion and Q&amp;A)</p>
16:30-18:00	<p><b><u>Session 3</u></b>  <b><i>Discuss the Relation between Investment and Competition Policy including Chapters on FTAs/EPAs</i></b>  <i>This session discusses relation investments and competition policy as one of the existing Next Generation Trade and Investment Issues (NGeTIs), specifically, how competition policy affects investment activities.</i></p> <ul style="list-style-type: none"> <li>- <b>Mr Koki Arai</b>, Professor, Faculty of Comprehensive Management, Shumei University, Japan</li> <li>- <b>Mr Grigory Karakov</b>, Deputy Head of the Department, Department for Control over Foreign Investments, Federal Anti-monopoly Service, Russia</li> </ul> <p>(Open the floor for discussion and Q&amp;A)</p>
18:00-18:15	<p><b><u>Wrap Up and Closing</u></b></p> <ul style="list-style-type: none"> <li>- <b>Mr Hiroshi Kudo</b>, Negotiator for Economic Partnership Agreements, Ministry of Foreign Affairs, Japan (Moderator)</li> </ul>

# Competition Policy and International Economic Co-operation

FTAAP Capacity Building Workshop Competition Chapter in FTAs/EPAs  
under the 3<sup>rd</sup> REI CBNI (CTI 03/2018T)

Port Moresby

Ed Willett

10 August 2018

# Competition Policy and FTAs/EPAs

- Traditional scope of trade liberalising agreements and competition policy are:
  - Entirely consistent with each other; and indeed
  - Strong complements to each other
- Both aim to maximise access to markets by all suppliers to promote competition in the interests of consumers
  - And thereby promoting lower costs, efficient resource allocation and innovation
- In the past, such international agreements have focused on international trade
  - While competition policy has focused on domestic competition
  - But distinction is breaking down
- Reducing barriers to international trade can be seen part of an economy's unilateral competition policy reform

# The Key Components of Competition Policy

- Competition Law
  - Antitrust
  - Consumer Protection
- Review and Reform of new and existing Legislation that Restricts Competition
- Structural Reform of Natural Monopolies
  - Especially public monopolies before privatisation
- Access Arrangements for Natural Monopolies
  - To promote competition in dependent contestable markets
- Reform of SOE Governance and Operations to be more Business-Like
- Competitive Neutrality
  - Especially where SOEs compete with private sector
- Institutional Arrangements

# Competition Law - Antitrust

- Promotes competition by regulating:
  - Mergers and acquisitions that substantially lessen competition
  - Anti-competitive use of market power
  - Anti-competitive agreements
  - Some anti-competitive practices
- Increasingly part of FTAs/EPAs, eg
  - Australia and Chile
  - Agreements by Japan as outlined last year by the Fair Trade Commission
    - Types 1, 2 & 3 economies
- More than 120 economies have adopted antitrust laws
- Should be applied uniformly to all market participants:
  - Individuals
  - Corporations and other business associations
  - SOEs
- Reflects growing international co-operation between regulators in antitrust law enforcement
  - Especially in regard to cartel conduct

# Competition Law - Consumer Protection

- Protects consumers by assisting them to deal in markets such as through:
  - Prohibitions on misleading consumers
  - Minimum product standards
  - Labelling standards
  - Origin of production requirements
- Some agreements include consumer protection provisions eg
  - Australia and Japan
  - Australia and Korea

# Review and Reform of Legislation Restricting Competition

- Principle that legislation (including subordinate legislation) should not restrict competition unless:
  - There is a clear net benefit to the community from the restriction; and
  - The net benefit can only be achieved by legislation restricting competition.
- Parallel process for proposed new legislation
- Net benefit assessment includes a competition test
- Restrictions on imported goods and services can be viewed as legislation restricting competition
  - Thus domestic competition policy may lead to unilateral free trade initiatives
  - Eg Australia reviewed its remaining import tariffs and other trade restrictions under its Competition Policy Reform Program



# Structural Reform of Natural Monopolies

- Considers the separation of natural monopoly business activities from business activities in dependent competitive (or potentially competitive) markets to reduce anti-competitive discrimination eg separating:
  - Electricity network businesses from electricity generation and retail operations
  - Gas transmission pipeline businesses from gas supply and marketing operations
  - Communications wire network businesses from core services and marketing
  - Rail network businesses from train and logistics operations
  - Water pipeline networks from water supply and treatment, waste water treatment and retailing
- Challenging to apply structural separation to established private businesses
  - But should be applied to SOEs, especially prior to privatisation

# Access Arrangements for Natural Monopolies

- Designed to promote competition in dependent markets by ensuring access to essential natural monopoly services
- Provides right of access on reasonable terms to monopoly services needed to compete in upstream or downstream markets
- Usually supported by some form of regulatory enforcement eg
  - Mandatory arbitration of access disputes
  - Legislated access undertakings
  - Regulator determinations
- Many international agreements have some market access obligations in utility services
  - Especially in telecommunications
    - A by-product of international agreements on communications standards?
  - Generally these obligations are not comprehensive eg
    - Australia and Chile

# Reform of SOE Governance and Operations

- Reform of SOE governance and operations to put the entity on a more commercial basis
  - designed to complement other SOE reforms such as competitive neutrality and structural reform to reduce market distortions and discrimination
    - through eg corporatisation under Corporations Law
- Especially important if the SOE is a monopoly.
- Such measures include consideration of:
  - the appropriate commercial objectives for the SOE
  - the most effective means of separating regulatory functions from commercial functions of the SOE
  - the merits of any community service obligations undertaken by the SOE and the best means of funding and delivering any mandated community service obligations
  - the price and service regulations to be applied to the industry
  - the appropriate financial relationships between the owner of the SOE and the SOE
    - including the rate of return targets, dividends and capital structure.
- This issue has been a focus, at least in part, of many negotiations
  - Important where the economies of parties differ in terms of the mix of public and private businesses

# Competitive Neutrality

- The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities:
  - Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.
  - These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities. (Council of Australian Governments, Competition Principles Agreement – 11 April 1995, Clause 3<sup>a</sup>).
- Some agreements include some competitive neutrality provisions eg
  - Australia and Japan
  - Australia and Korea
  - Australia and the US
- Equally important for international economic opportunities as for domestic competition

# Competitive Neutrality - a Broader View

- The application of competitive neutrality policy could be broadened to make it a more comprehensive and effective complement to:
  - legislation designed to promote competition, such as anti-trust and consumer protection laws; and
  - policies on the review of legislative restrictions on competition.
- The OECD has suggested that a such a broader definition could be:
  - Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages. (OECD, Competitive Neutrality, Maintaining a Level Playing Field Between Public and Private Business, Paris, 2012, p.17)
- Should this be the ultimate objective of free trade and economic participation?

# Competitive Neutrality - a Broader View 2

- A broader approach to competitive neutrality could mean that it would apply to all potentially discriminatory non-regulatory government measures:
  - supplying products directly – the traditional competitive neutrality issue;
  - buying products for their own use, through procurement processes and contracting out;
  - ensuring particular third party products are available to particular consumers, usually to promote social policy outcomes; and
  - seeking to influence how goods and/or services are traded without being directly involved in that trade, generally through subsidies, concessions or taxes to encourage consumption of some products or to deter others.
- Each of these measures is likely to impact on trade and economic participation opportunities
  - Some of these measures are already the focus of international agreements

# Institutional Arrangements

- International agreements can require domestic competition laws to be applied consistently in accordance with principles of transparency, timeliness, non-discrimination and procedural fairness
- Sound institutional arrangements are a key
- Competition regulators should be competent, independent, well resourced and accountable
- Same principles should apply to utility regulators
- Different economies have different approaches to constituting regulators
  - Separating or combining competition and consumer protection regulators
  - Separating or combining competition and utility regulators
  - Separating or combining utility regulators for different industries

# The Public Interest Test

- Governments will want to reserve the right to breach competition policy principles in special circumstances
- Competition policy principles should include a public interest exemption
  - This should be a broad economy-wide test rather than focusing on a particular industry or sector
- However, there should also be rules on how a public interest test is applied and satisfied
- The process should be objective, robust, transparent and thorough
- The regulation review test outlined provides a good example:
  - Any exemption from competition policy principles should be supported by a clear and established net benefit to the community; and
  - The exemption is the only way to achieve the net benefit



# Concluding Comments

- While competition policy has traditionally had a domestic focus
  - Increasingly international agreements are seeking to mesh these domestically focused policies with international engagement
- Competition policy principles are entirely consistent, and indeed complementary, to the interests of international economic participation
- Time to consider the consideration of competition policy principles in international agreements in a comprehensive holistic manner
- Competition policy can be divided into three broad categories:
  1. Competition laws designed to promote competition
  2. Review and reform of laws and regulations that restrict competition
  3. Government non-legislative measures that impact on competition

**International cooperation and harmonization  
in the field of competition law : Experience  
from legal development support for  
competition law in Asia**



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# 1. Introduction

# Introduction



The main purpose of this presentation is to

“ Address the topic regarding competition law development support within Asia region (including East Asia and South-East Asia).”

# Introduction



- ❧ In the last few years, I got the opportunity to visit Central Asia (Uzbekistan), East Asia (Mongolia, China), Southeast Asia (Viet Nam, Cambodia) frequently in relation to the project of support of law at the school of belonging.
- ❧ In these economies/countries the stage of economic development and the development of economic and social capital are also different from developed economies/countries. People's perceptions of market competition are more serious than those of developed economies, while the introduction stage and the degree of experience of competition law are also diverse.



# Introduction



- ❧ Market competition is a beneficial social mechanism in Asia's developing economies to achieve efficiency in resource allocation.
- ❧ However, in reality, there were many phases in which competition was restricted from the viewpoint of fairness of distribution at the public policy decision places.
- ❧ The economic system and policy management also cause new unfairness of adhesion structure between economic agents with the background of favoritism and cronyism. In Japan, there are problems of bid rigging and bid rigging in public procurements.
- ❧ This problem is however considered as corruption and is treated as a big social problem in the developed economies.

# Introduction



- ❧ Since the modernization of industries was achieved at a later stage by the “state”, resistance to government intervention was poor, and the exclusive and discretionary nature of administrative rights remained small especially in developing economies in Asia.
- ❧ In addition, social cushioning and control functions against consumer exploitative abuses by domestic enterprises are still weak. The jurisdiction that should be a citizen's rights defense is weak with corruption problem.

# Introduction



The social and political problems stated above are relevant with the Asian economic law development support, this report is thus based on the principle of local competition law in the Asian region.

I will thereby focus on discussion about the perspective of international cooperation in this presentation.





## **2. Current situation and need for support for competition law improvement in the Asian region**

## Current situation and need for support for competition law improvement in the Asian region



Japan has competition authorities with the world's most competitive law enforcement experience and is the largest technical support economy in East Asia.

“The problem is how to construct effectively and have effective technical support based on the needs of the recipient economy.”

## Current situation and need for support for competition law improvement in the Asian region



In the East Asian region, because the needs of support are diverse among economies and regions where the competition law is not well developed to economies and regions with abundant accumulation in execution experience, the stage of development is not uniform.

I will thus present separately “economy by economy”.

# Korea



- ❧ Republic of Korea (established the competition law in 1980 (so called fair trade law) and Chinese Taipei (enacted in 1992) have sufficient experiences in enforcing competition law, whilst Japan has diverse experiences in competition law enforcement and has become a provider of competition law maintenance support.
- ❧ It is necessary to cooperate among providing economies as well as between providing economies ("donor") and receiving economies ("recipients") so that they do not become "competition for legal development support" that impersonates each other's "national interests".

# Thailand and Indonesia



- ❧ Major operational details and guidelines have already been developed more than 15 years since the introduction of the competition law in Thailand (established in 1999) and Indonesia (established in 2000) , whilst the actual results of execution are mainly inequitable. There are few numbers - centered on regulated fields of trading methods.
- ❧ For these economies, we are closer to practical application, such as research on concrete case studies and advancement of examination methods to formulate execution results on areas other than unfair trade practices such as cartel and abusive acts of dominant position. All in all, technical cooperation is required.



# Viet Nam, Mongolia and Laos



- ✧ There is an immense development of major operational rules and guidelines in Viet Nam (enacted in 2005), Mongolia (enacted in 2005), and Laos (enacted in 2004) during 15 years since the first introduction and enforcement of the competition law. However, it is still insufficient, and the execution performance is still poor comparing to Japan.
- ✧ Technical cooperation aiming for full-fledged operation of competition law (such as supporting detailed formulation of administrative rules and guidelines, supporting examination methods for forming execution performance etc.) is necessary as a framework for enabling effective law enforcement.

# Philippines, Malaysia and Cambodia



In economies with inadequate competition laws such as the Philippines (comprehensive competition law is not established), Malaysia (established in 2010), Cambodia (comprehensive competition law is not developed), overall technical cooperation such as legal theory and execution system improvement is needed as a support for formulation of the draft legislation.

# Japan's Fair Trade Commission



- ✧ Japan's Fair Trade Commission (JFTC) undertakes technical cooperation with overseas competition authorities under the cooperation of Japan International Cooperation Agency (JICA) and others as well as aggressively promotes collective training of developing economies (e.g. economy-specific training etc.).
- ✧ For the planning of the plan, the person in charge of the JFTC (specifically, the International Division of Secretariat of the Secretariat of the General Affairs Bureau, International Division) has formulated and implemented the program "ad hoc" for each individual training project and is currently in the process.



## 2. Current situation and needs for support for competition law improvement in the Asian region



- ▶ However, ad hoc response has not been working very well for the effective implementation of technical cooperation.
- ▶ In other word, as the JFTC among medium to long term technical cooperation, it is time to build up "strategies" of legal assistance to determine the demand from recipients and the kind of vision that should be carried out.
- ▶ Based on the strategies, regarding the planning and designing of individual project, it is necessary to consider the best program designed in accordance with the needs of the assisted economies.
- ▶ In particular, some economies in East and Southeast Asia, such as China and Indonesia, have completed the first phase of introduction and development of competition law.
- ▶ The level of staffs at the competition authorities who participate in the training program offered by Japan is improving every year.
- ▶ As a result, the advancement of contents of technical cooperation programs itself is also essential.

## 2. Current situation and needs for support for competition law improvement in the Asian region



► In view of such awareness of issues, with regard to planning and designing of oversea technical cooperation in the future, it is necessary to cooperate with institute activities relating to this theme, and to comprehensively analyze:

- (1) the needs of assisted economies
  - (2) the types of technical cooperation of Japan
  - (3) the correlation of needs of the assisted economies, as well as
  - (4) the initiatives of the Legal Assistance of Europe and the United States and so on.
- Also, it is necessary to establish a system to make optimal program design aiming at the diversity of the technical cooperation menu to plan and design individual technical cooperation project .
- In addition, it can be said that designing the direction of medium-to long-term legal assistance of competition policy of Japan is being sought.



### 3. “Fairness” in Asian Competition Laws

### 3. “Fairness” in Asian Competition Laws



- ▶ At least in Asia, the competition law and policy of the United States’ type that only focus on free competition do not seem to be able to last long (based on my personal experiences).
- ▶ As Adam Smith ever said, efficiency could be achieved as if led by “an invisible hand of the god.” with individuals pursuing their own interest.
- ▶ However, Smith did not say that social justice could be attained through market.
- ▶ What he contended was merely that market competition contributed to the achievement of economic efficiency.
- ▶ When considering the future of competition law in Asia, it cannot be discussed outside the context of “the Fairness of competition.”
- ▶ After all, it took more than thirty years to have the Antimonopoly Act take its root in Japan.
- ▶ Transplanting the current legal system as it is from the developed economies does not have the support from the citizen.
- ▶ As a natural result, it is not able to take root in the society.

### 3. “Fairness” in Asian Competition Laws



- ▶ Traditional competition law and policy can solve problems in a very limited manner (personal opinion based on my experience).
- ▶ As a matter of fact, severe social problems are lying ahead, such as environmental pollution and labor exploitation etc.
- ▶ The current challenge is how to respond to corporate social responsibility and to establish connections with labor law in the context of the theory of economic law.



# 3. “Fairness” in Asian Competition Laws



- ▶ One of the features of competition law in Asia is the emphasis on the regulation on unfair trade practices.
- ▶ Likewise, regulation on the abuse of dominant position which focuses on exploitative abuses is another distinctive feature.
- ▶ In Asia, there is a general tendency that maintenance of fair trade (protection of competitors) is more understandable and preferable than maintenance of free competition (protection of competition).
- ▶ There should not be dichotomy between “nation” and “market”.
- ▶ As can be seen in the Asian Currency Crisis, there arises the question of whether market mechanism could protect Asian regional “community” from the uncontrollable rampant effects of global excess capital liquidity that occurs occasionally.
- ▶ In this regard, the thoughts in the East and Southeast Asia competition laws, which focus on the maintenance of fair trade together with free competition, have a strong point and therefore can be effectively utilized (but not a weakness that should be overcome).



# **4. Conclusion: Universalism and Particularism in Asian Competition Laws**

## 4. Conclusion: Universalism and Particularism in Asian Competition Laws



- ▶ Basically, the competition law and other social systems in Japan originate from Europe and the United States.
- ▶ Competition law system should not be comprehended simply from the outside; however, it should be necessarily partly assimilated.
- ▶ Although Asian legal systems are mostly inherited from western laws, much of our so-called the “living law” has its origins from (the traditional culture of) the pre-modern time.
- ▶ After all, there are deviations between Asian economies and Europe and the United States.
- ▶ With that being said, how should we weave this deviation into the theory of competition law?



## 4. Conclusion: Universalism and Particularism in Asian Competition Laws



- ▶ A compromise could be used to comprehend this matter.
- ▶ The difference of trade practice in each economy does exist when applying the policy.
- ▶ So, we must attach importance to the values of Asian competition laws, which emphasize the maintenance of fair trade, to wisely achieve the objective of that policy, with a more effective construction and application of the legal system.
- ▶ Meanwhile, regarding the overall framework of the competition law, in Europe or the United States, it is important to focus on how the legal principle of competition law has been developed and how the practice of the competition law has progressed.
- ✂ European competition law adopted the United States' style and has been developed independently – the European and the United States' competition laws cannot be simply put together as they have developed diversely.
- ▶ This is also related to the argument of what kind of assessment should be made towards the globalization of the competition law.

## 4. Conclusion: Universalism and Particularism in Asian Competition Laws



- ▶ With regard to the cross-border competition law cases, a conflict is likely to occur when one side of the competition authority adopts the universalism point of view and the other side adopts the particularism point of view.
- ▶ Then global harmonization might be essential to the outline of the legal system of where the two views are integrated.
- ▶ However, is the global harmonization alone really enough? (my personal concern )
- ▶ After all, in the United States, the current anti-trust thought which neglects fair trade is something inherent in the economy today and we cannot say it is universal.
- ▶ In the history, there were times when the survival of rigid peasants and medium or small sized producers was considered important (i.e. the atomistic market structure was considered important) to protect social health (Jeffersonian democracy) even in the United States.
- ▶ From a historical point of view, we can never say that the standpoint of fair trade was something particular in the United States.

## 4. Conclusion: Universalism and Particularism in Asian Competition Laws



- ▶ In conclusion, the following three aspects are essential to the fixation of competition culture in Asia. (personal opinion)
- (1) The efficiency supremacism (public welfare) in competition law is being relativized from the area studies of the competition law.
- (2) Emphasis on fair competition and fair trade should be given positive evaluation, instead of being removed as something indicating the backwardness of Asian competition laws.
- (3) Japan's past experience of regulating "unfair trade practice" is essential to the social fixation of the competition law in Japan, and it should be passed on as required in the competition law legal assistance in Asia.



Thank you for your  
attention

# COMPETITION CHAPTERS IN FTAS/EPAS

Kening CHEN

11th August, 2018



# CONTENT

- + 1.The development of FTA Competition Chapters in China.
- + 2.The role of FTA Competition Chapters.
- + 3.The key elements of FTA Competition Chapters.
- + 4.The trends of FTA Competition Chapters.

# **+ 1.The development of FTA Competition Chapters in China.**

## **+ (1)Scattered in other chapters.**

**+ FTAs with New Zealand, Peru, Singapore**

## **+ (2)Competition article.**

**+ FTA with Costa Rica**

## **+ (3)Competition Chapter.**

**+ FTAs with Iceland, Switzerland**

- + **2.The role of FTA Competition Chapters.**
- + (1) Competition advocacy.
- + (2) Ensure the effective enforcement of FTAs.
- + (3) Boost competition cooperation.



### **3.The key elements of FTA Competition Chapters.**

Objectives, Definitions, Principles in Competition Law Enforcement, Transparency, Cooperation, Information Confidentiality, Consultation, Dispute Settlement, Independence of Competition Law Enforcement and so on.

# (1)Objectives

## Ensure Trade Liberalization.

Preventing the benefits of trade liberalization from being undermined. (China-Korea)

Prevent and proscribe anticompetitive practices that affect trade and investment between the Parties. (China-Eurasian Economic Union)

## Promote Economic Development.

Promoting economic efficiency, proper functioning of markets and sustainable economic development of the Parties. (China-Eurasian Economic Union)

Promoting economic efficiency. (China-Korea)

## Promote Consumers Welfare.

Promoting consumer welfare. (China-Korea)

## + (2)Definitions

- + Including competition law, competition authority, anti-competitive practice, undertaking and so on.



- + (3) Principles in Competition Law Enforcement.
- + Non-discriminatory, Procedure Justice, Transparency
- + 1. Each Party shall be consistent with the principles of transparency, non-discrimination, and procedural fairness in the competition law enforcement.
- + 2. Each Party shall treat persons who are not persons of the Party no less favorably than persons of the Party in like circumstances in the competition law enforcement.
- + 3. Each Party shall ensure that:
  - + (a) a person subject to an investigation to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present opinion or evidence in its defense in the investigation process.
  - + (b) persons subject to the imposition of a sanction or remedy for violation of its competition laws should be given the opportunity to seek review of the sanction or remedy through administrative reconsideration and/or administrative lawsuit in accordance with each Party's laws. (China - Korea)

## + (4)Transparency.

### + Legislation Transparency.

- + Disclose all the competition laws and regulations, including procedural rules.

### + Law Enforcement Transparency.

- + All final decisions finding violations of its competition laws and regulations are in writing, containing relevant findings of fact and legal basis on which the decisions are based. And shall be made public.

## + (5) Cooperation.

### + Cooperation in Law Enforcement.

- + Cooperate through notification, consultation, exchange of information.

### + Technical Cooperation.

- + Technical cooperation activities including training programs, workshops and research collaborations and other activities for the purpose of enhancing each Party' s capacity on competition policy and competition law enforcement.



- + **(6)Information Confidentiality.**
- + Not necessary but sometimes appears.
- + Each Party shall maintain the confidentiality of any information provided as confidential by the competition authority of the other Party and shall not disclose such information to any entity that is not authorized by the Party providing information.

## + (7) Consultation.

### + Reasons for the consultation:

- + Usually specific matters that arise under this Competition Chapter;

### + The procedure of the consultation:

- + A request for consultations shall be submitted to the other Party' s contact.

### + The responsibilities of the parties:

- + The requested party shall accord full and sympathetic consideration to the concerns raised by the other Party.



## + (8)Dispute Settlement.

- + Usually there will be no separate Dispute Settlement mechanism for competition chapter. This article' s main purpose is to make it clear that any matters arising under competition chapter shall not recourse to Dispute Settlement Mechanism of the FTA.

## **+ (9)Independence of Competition Law Enforcement.**

- + Competition Chapter should not intervene with the independence of each Party in enforcing its respective competition laws and regulations.**

- + **4.The trends of FTA Competition Chapters.**
- + (1)The content of FTA Competition Chapters is getting richer.
- + (2)The manoeuvrability of FTA Competition Chapters will be further enhanced.
- + (3)The role of FTA Competition Chapters is increasingly more and more important.

# Thanks!

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Appendix 5 : Presentation Document (Mr Masuda)

# Essential Elements on Competition Chapter in FTAs/EPAs (from JFTC's experience)



FTAAP Capacity Building Workshop on Competition Chapter in FTAs/EPAs  
11th August 2018, Port Moresby, Papua New Guinea

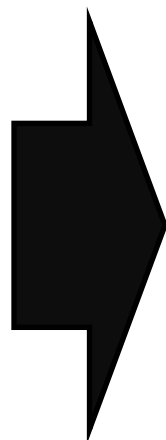
Tatsuro MASUDA  
Japan Fair Trade Commission



## The Signing of the Agreement between the EU and Japan for an Economic Partnership on July 17, 2018

### <CHAPTER11 COMPETITION POLICY>

Element
Principles
Anticompetitive practices
Legislative and regulatory framework
Operational independence
Non-discrimination
Procedural fairness
Transparency
Enforcement cooperation
Dispute settlement



**Promotion of  
fair and free  
competition in  
their trade and  
investment  
relations**

# Table of Contents

1. Necessity for International Cooperation Frameworks on Competition
2. Overview of Japan's International Cooperation Frameworks
3. Elements in FTAs/EPAs's Competition Chapter
4. Trend of Elements in FTAs/EPAs's Competition Chapter
5. Conclusion

# 1. Necessity for International Cooperation Frameworks on Competition



# Globalization of economic activities

- Globalization of supply chains
- Increase of international mergers



- ◆ Necessity to make efforts to achieve **global convergence of competition policies**
- ◆ Necessity to promote **cooperation among/between foreign authorities in enforcing competition law**



**Necessity for International Cooperation  
Frameworks on Competition**

## 2. Overview of Japan's International Cooperation Frameworks

I

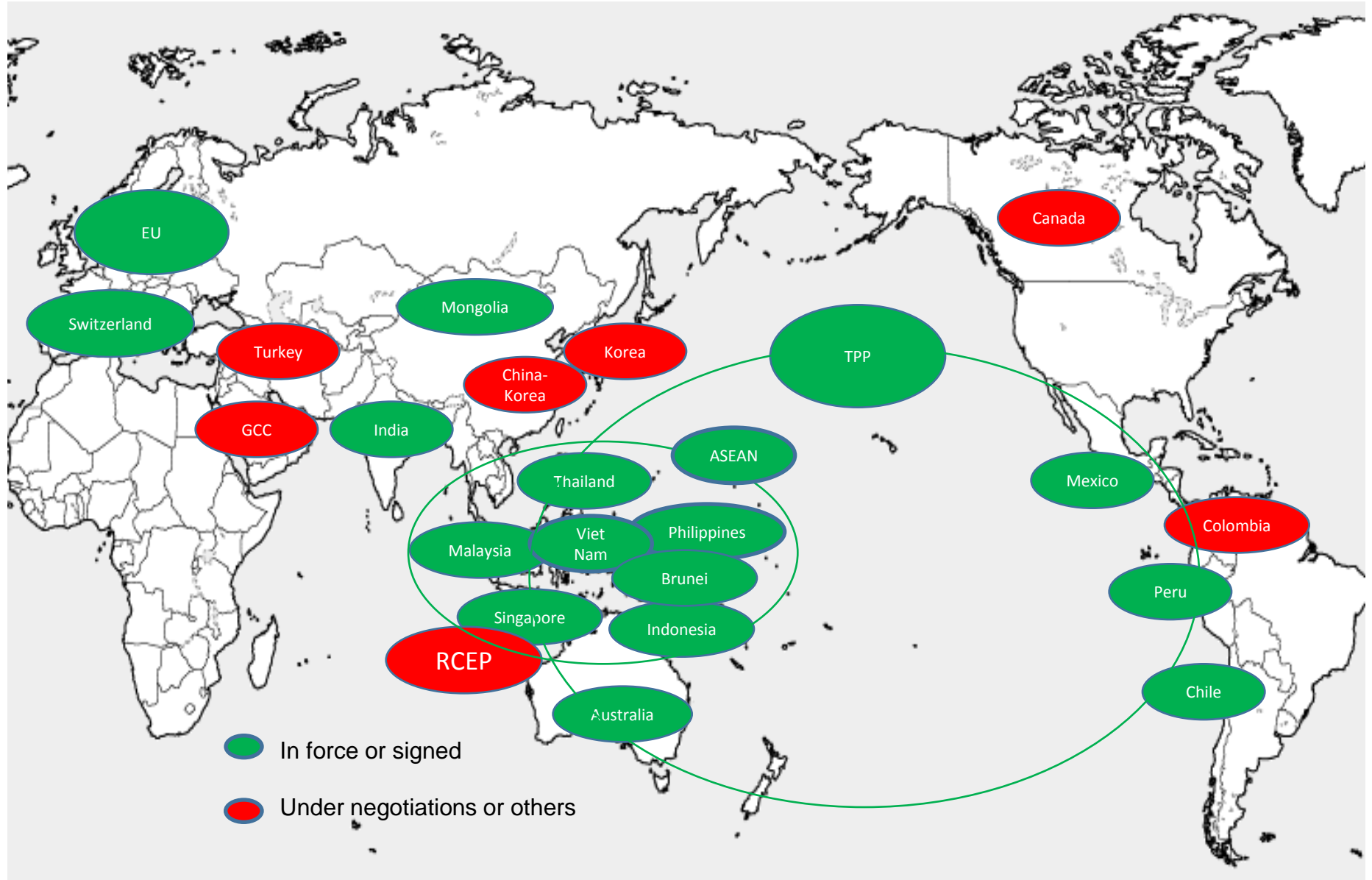
FTA/EPA (competition chapter)

II

Anti-monopoly Cooperation Agreement

III

MOU (Memorandum of Understanding)



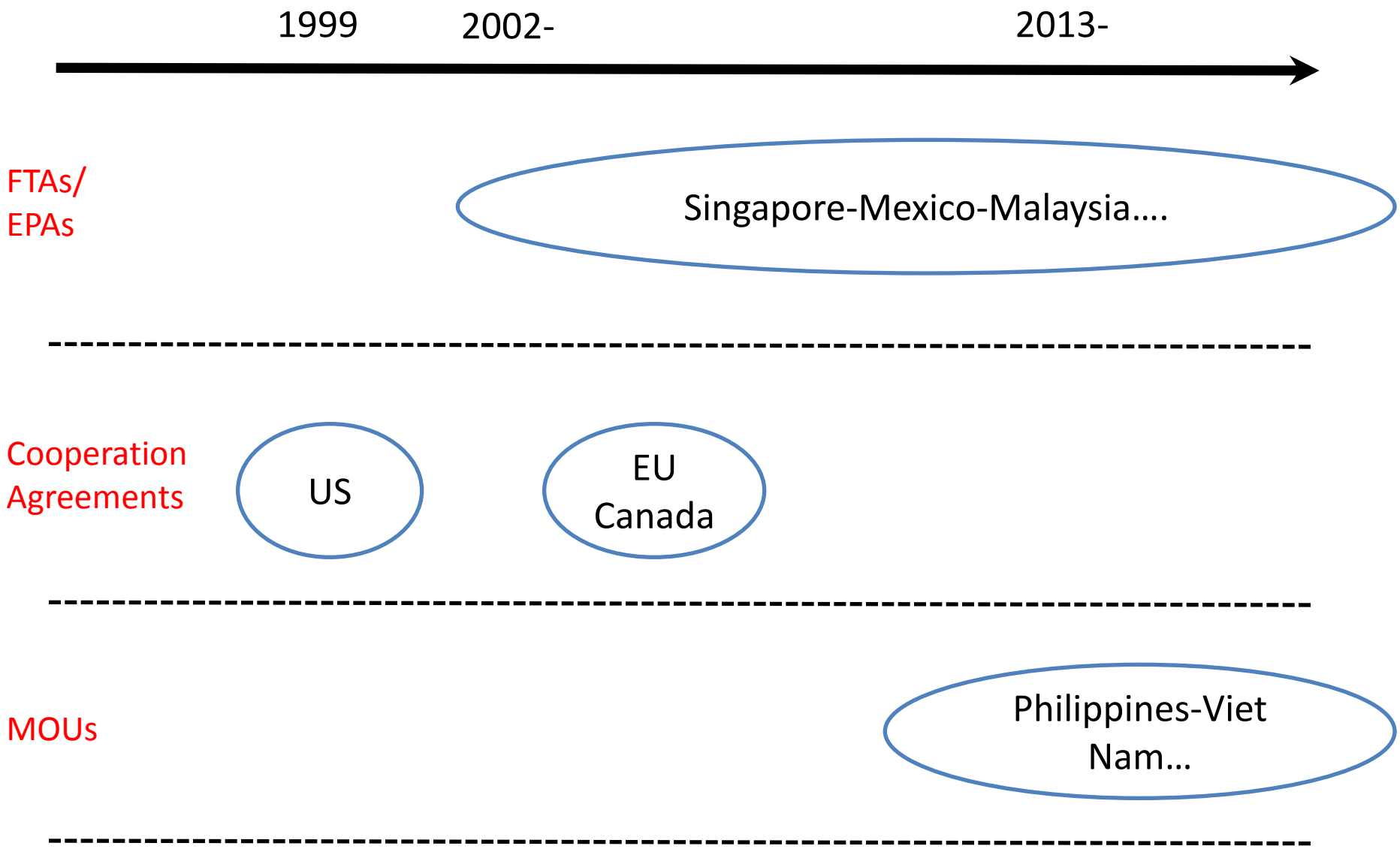
(as of July 2018)

	Economy / Region	Signature Date	Effective Date
1	Singapore	2002.1	2002.11
2	Mexico	2004.9	2005.4
3	Malaysia	2005.12	2006.7
4	Philippines	2006.9	2008.12
5	Chile	2007.3	2007.9
6	Thailand	2007.4	2007.11
7	Indonesia	2007.8	2008.7
8	ASEAN	2008.4	Sequentially effective
9	Viet Nam	2008.12	2009.10
10	Switzerland	2009.2	2009.9
11	India	2011.2	2011.8
12	Peru	2011.5	2012.3
13	Australia	2014.7	2015.1
14	Mongolia	2015.2	2016.6
15	TPP	2016.2 2018.3	Not yet effective
16	EU	2018.7	Not yet effective

Type	Economy / Region	Signature Date
Cooperation Agreement	United States	1999.10
	European Community	2003.7
	Canada	2005.9
MOU	Philippines	2013.8
	Viet Nam	2013.8
	Brazil	2014.4
	Korea	2014.7
	Australia	2015.4
	China: NDRC	2015.10
	China: MOFCOM	2016.4
	Kenya	2016.6
	Mongolia	2017.3
	Canada	2017.5
	Singapore	2017.6

FTA/EPA	<i>Economy to Economy *</i> <i>Government to Government</i>	legally binding
Cooperation Agreement	<i>Government to Government</i>	legally binding
MOU	<i>Agency to Agency</i>	legally non-binding

\* 'Economy' means 'Economy / Region'





### 3. Elements in FTAs/EPAs's Competition Chapter

I

Articles for **basic principles** in enforcing competition law

II

Articles for **cooperation between competition authorities** in enforcing competition law

III

Others

## ● Examples of basic Principles in Enforcing Competition

### Law

- Addressing anti-competitive activities
- Adopting or maintaining competition law
- Establishing or maintaining competition authority
- Ensuring independence of competition authority
- Principles of non-discrimination
- Principles of transparency
- Principles of procedural fairness



	SINGAPORE	MEXICO	MALAYSIA	PHILIPPINES	CHILE	THAILAND	INDONESIA	ASEAN	VIETNAM	SWITZERLAND	INDIA	PERU	AUSTRALIA	MONGOLIA	TTP	EU
Addressing anti-competitive activities	●	●	●	◎	●	●	●		●	●	●	●	●	●	●	●
Adopting or maintaining competition law	●		●	●											●	●
Establishing or maintaining competition authority															●	
Ensuring independence of competition authority																●
non-discrimination		●		◎	●	●	●		●	●	●	●	●	●	●	●
transparency	●	●	●	◎	●	●	●		●	●	●	●	●	●	●	●
procedural fairness		●		◎	●	●	●		●	●	●	●	●	●	●	●

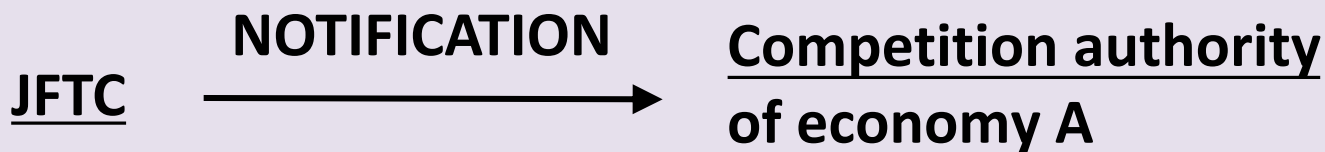
● : FTA /EPA    ◎ : FTA/EPA and MOU

- Examples of cooperation between competition authority in enforcing competition law
  - Notification
  - Cooperation in enforcement activities (providing information)
  - Coordination of enforcement activities
  - Negative comity
  - Positive comity



	S I N G A P O R E	M E X I C O	M A L A Y S I A	P H I L I P P I N E S	C H I L E	T H A I L A N D	I N D O N E S I A	A S E A N	V I E T N A M	S W I T Z E R L A N D	I N D I A	P E R U	A U S T R A L I A	M O N G O L I A	T P P	E U
Notification	⊙	●		○		●	●		⊙	●		●	⊙	●	●	△
Cooperation in enforcement activities	⊙	●		○		●	●		⊙	●		●	⊙	⊙	●	△
Coordination of enforcement activities	○	●				●	●		⊙	●		●	⊙	●	●	△
Negative comity		●								●		●	○	●		△
Positive comity	○	●								●		●	○	●		△

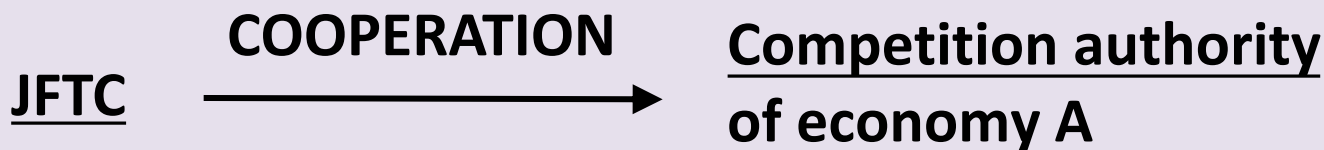
⊙ : FTA/EPA and MOU   ● : FTA/EPA   ○ : MOU   △ : Anti-monopoly Cooperation Agreement



## Examples

JFTC notifies the competition authority of economy A,

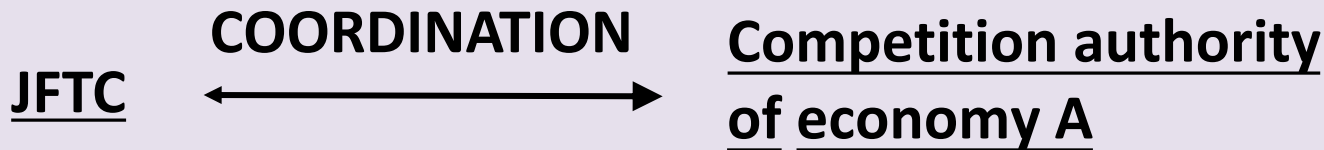
- ◆ in a case which JFTC has launched an investigation against branch office in Japan of a company of economy A.
- ◆ In a case which merger review including a company of economy A goes to the second stage.



## Examples

- ◆ JFTC provides information with respect to anti-competitive activities which may be relevant to the enforcement activities of the competition authority of economy A.
- ◆ JFTC provides information it possesses upon the request of the competition authority of economy A.





## Examples

- ◆ JFTC and the competition authority of economy A coordinate the timing of dawn raid in international cartel case.
- ◆ JFTC and the competition authority of economy A coordinate remedies in international merger case.

- Examples of possible enforcement cooperation

## Pre-investigation stage

- Coordination of
  - timing of dawn raid
  - target products
  - target companies

## Investigation stage

- Exchange of progress of investigation

## Decision making stage

- Provide information on legal measures

- Examples of international cartel case

Marine hose  
(Feb. 2008)

Air freight  
forwarder  
(Mar. 2009)

Auto parts  
(2012-2013)

International  
ocean shipping  
(Mar. 2014)

Capacitor  
(Mar. 2016)

## Comity

### Negative (traditional) comity

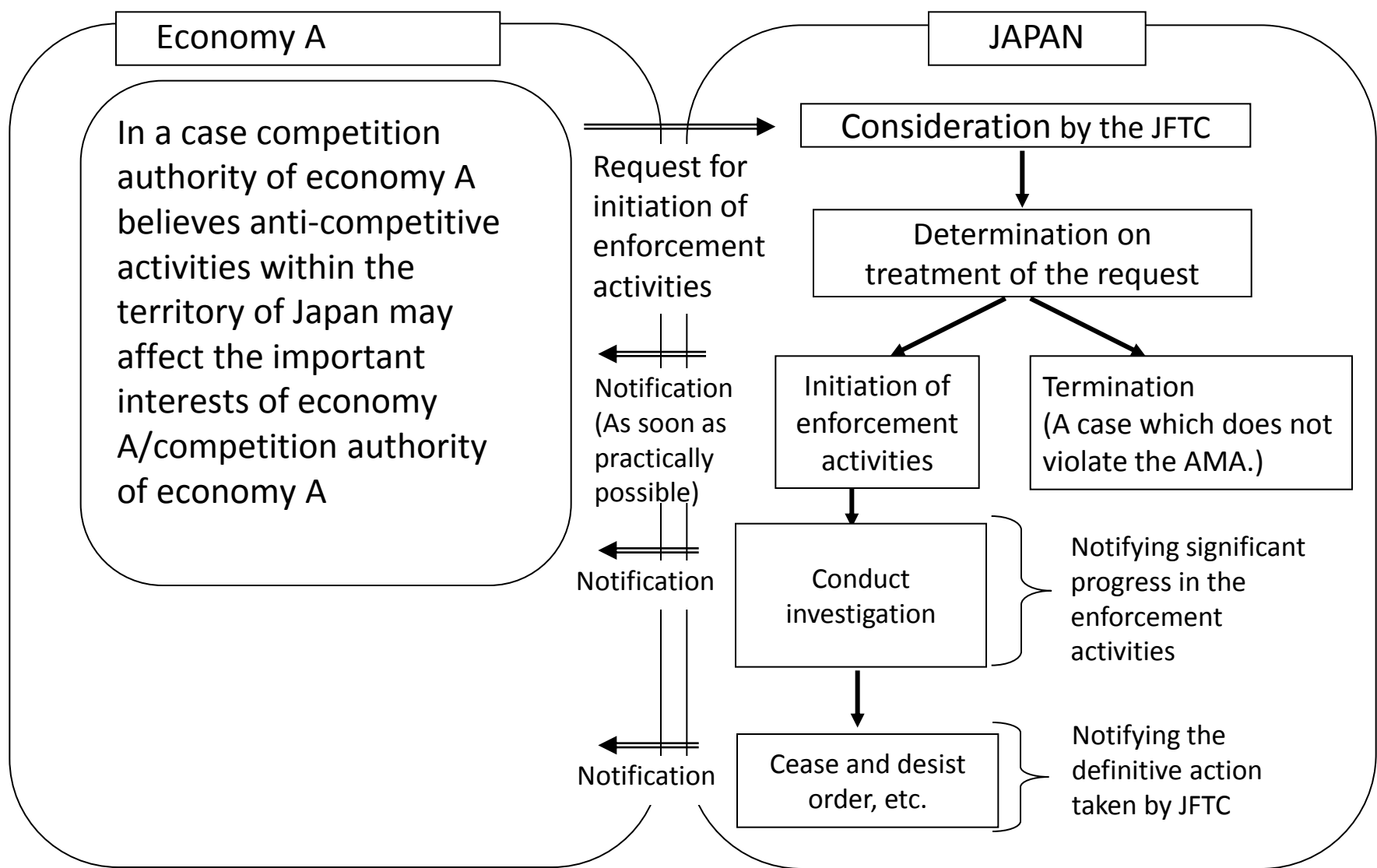
*- Consideration of how to prevent its law enforcement actions from harming important interest of another economy*

### Positive comity

*- Request by one economy that another economy undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interest of the referring economy*



Examples



## ● Examples of other articles

- Technical cooperation
- Consultation/regular meeting between competition authority
- Confidentiality of information
- Review of articles



	S I N G A P O R E	M E X I C O	M A L A Y S I A	P H I L I P P I N E S	C H I L E	T H A I L A N D	I N D O N E S I A	A S E A N	V I E T N A M	S W I T Z E R L A N D	I N D I A	P E R U	A U S T R A L I A	M O N G O L I A	T P P	E U
Technical cooperation	◎	●	●	◎		●	●		◎			●		◎	●	
Consultation/regular meeting between competition authority	○	●	●	◎		●	●		◎	●		●	◎	◎	●	△
Confidentiality of information	◎	●				●	●		○	●		●	◎	●		△
Review of articles	●		●	●		●	●	●					◎	○		■

◎ : FTA/EPA and MOU   ● : FTA/EPA   ○ : MOU   △ : Anti-monopoly Cooperation Agreement  
■ : FTA/EPA and Anti-monopoly Cooperation Agreement

## 4. Trend of Elements in FTAs/EPAs's Competition

### Chapter



	Elements I	Elements II	Elements III
FTAs/EPAs	✓	✓	✓
Cooperation Agreements		✓	✓
MOUs		✓	✓

- FTAs/EPAs : agreements on economic field overall
  - stipulate widely
- Cooperation Agreements : agreements of cooperation on enforcement of competition law
  - stipulate mainly enforcement cooperation
- MOUs : Understanding of cooperation (not limited enforcement cooperation) between competition authorities
  - stipulate cooperation overall

## ● In terms of contents of enforcement cooperation

economy	Notification	Cooperation in enforcement activities	Coordination of enforcement activities	Positive Comity	Negative Comity	Technical Cooperation
Cooperation Agreements	✓	✓	✓	✓	✓	
<u>Economy</u> <u>_____</u> <u>Type1</u>	✓	✓	✓	✓	✓	
<u>Economy</u> <u>_____</u> <u>Type2</u>	✓ *	✓ *	✓ *			✓
<u>Economy</u> <u>_____</u> <u>Type3</u>						✓

\* general and brief prescription

Economy Type 1	has comprehensive competition law and enough experience of competition policy	<ul style="list-style-type: none"> <li>Full-fledged elements of cooperation (as in cooperation agreements) are contained.</li> </ul>
Economy Type 2	has comprehensive competition law but less experience of competition policy	<ul style="list-style-type: none"> <li>Notification, cooperation and coordination are contained in general and brief description.</li> <li>Positive/negative comity are not contained.</li> <li>Cooperation will be reviewed and enhanced as appropriate.</li> </ul>
Economy Type 3	doesn't have comprehensive competition law	<ul style="list-style-type: none"> <li>No detailed cooperation is contained.</li> <li>Cooperation will be reviewed and enhanced when comprehensive competition law is enacted.</li> </ul>

## Trend to stipulate “Operationally Independent competition authority”

	Contents of related provision
Japan-EU EPA	Each Party shall maintain an operationally independent authority which is responsible and competent for the effective enforcement of its competition law.

## Trend to specify basic principles in detail

(Especially about Procedural Fairness)

	Contents of related provision
General provisions so far (Before TPP)	Each Party shall implement administrative and judicial procedures in a fair manner to control anticompetitive activities, pursuant to its relevant laws and regulations.
TPP	Each Party shall ensure that before it imposes a sanction or remedy against a person for violating its national competition laws, it affords that person: a reasonable opportunity to be heard and present evidence in its defence, except that a Party may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy.

	Contents of related provision
TPP	Each Party shall provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that Party's laws.
	Each Party shall authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action.

## 5. Conclusion

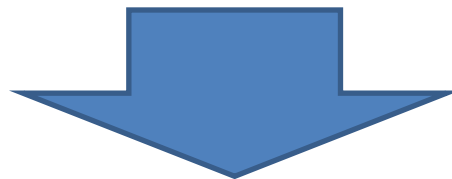
## What are the Essential Elements in FTAs/EPAs's Competition Chapter ?

◆ Most of the FTAs/EPAs include the following elements.

Elements I	<ul style="list-style-type: none"><li>▪ Addressing anti-competitive activities</li><li>▪ non-discrimination</li><li>▪ transparency</li><li>▪ procedural fairness</li></ul>
Elements II	<ul style="list-style-type: none"><li>▪ Notification</li><li>▪ Cooperation in enforcement activities</li><li>▪ Coordination of enforcement activities</li></ul>
Elements III	<ul style="list-style-type: none"><li>▪ Technical cooperation</li><li>▪ Consultation/regular meeting between competition authority</li></ul>



How does JFTC consider the elements ?



JFTC considers the necessary elements from  
**Elements I ~ III** in accordance with the  
**counterparty's status** (existence of comprehensive competition  
law, level of competition policy, enforcement of the competition law, other  
domestic law etc.).

Thank you for your kind attention !!



Japan Fair Trade Commission  
(<https://www.jftc.go.jp/en/index.html>)



Appendix 6 : Presentation Document (Mr Kumaran)

# **COMPETITION CHAPTERS IN FTAs: THE MALAYSIAN EXPERIENCE**

**FTAAP Capacity Building Workshop on  
Competition Chapter in FTAs/EPAs**

**Third APEC Senior Official's Meeting  
Port Moresby, Papua New Guinea  
11<sup>th</sup> August 2018**

**ARUNAN KUMARAN**  
***Lead Negotiator for Malaysia***  
***Competition Policy and State Owned Enterprises Chapters***  
***Free Trade Agreements***

# MALAYSIA AND FTAs



## Concluded and implemented

7 bilateral FTAs : **Japan, Pakistan, New Zealand, India, Australia, Chile and Turkey.**

6 regional FTAs : **China, Korea, Japan, Australia, New Zealand and India.**



## Signed but yet to implement

Comprehensive Partnership Agreement for Trans-Pacific Partnership (**CPTPP**)



## Under negotiations

Malaysia- EU FTA (**MEUFTA**)

Malaysia-EFTA Economic Partnership Agreement (**MEEPA**) – **Iceland, Liechtenstein, Norway and Switzerland**

Regional Comprehensive Economic Partnership Agreement (**RCEP**)

# ***WHAT WILL WE COVER?***

- Malaysia Japan Economic Partnership Agreement
- Malaysia New Zealand Free Trade Agreement
- ASEAN-Australia New Zealand Free Trade Agreement
- Malaysia Australia Free Trade Agreement
- Comprehensive and Progressive Agreement for Trans Pacific Partnership
- Regional Comprehensive Economic Partnership Agreement



# ***Pre Competition Act***

**Malaysia entered into many FTAs but.....**

- **Avoid Competition Policy Chapter**
- **Cautious Approach**
- **Minimal Commitments**
- **Focus on Technical Cooperation**





# JAPAN MALAYSIA ECONOMIC PARTNERSHIP AGREEMENT

## Chapter 10 – Controlling Anti Competitive Activities



- Measures Against ACP
- Review/Improve/Adopt Law or Measures to Control ACP
- Cooperate in Controlling ACP
- No Dispute Settlement Provisions

---

The first time where Malaysia agreed to have a Competition Chapter in a FTA

**Cooperation**

**Technical  
Cooperation**

# MALAYSIA – AUSTRALIA FREE TRADE AGREEMENT

## Chapter 14 – Competition Policy



- **Adopt/Maintain/Enforce Measures on ACP**
- **Commercial Activities to be Subjected to the Measures**
- **Exemptions to be Transparent/Public Policy/Public Interest**
- **Cooperation and Technical Cooperation**
- **Consultation**
- **No Dispute Settlement Provisions**

---

**More substantive obligations on implementation of Competition Law**

**Timeliness**

**Procedural  
Fairness**



## Chapter 12 – Competition



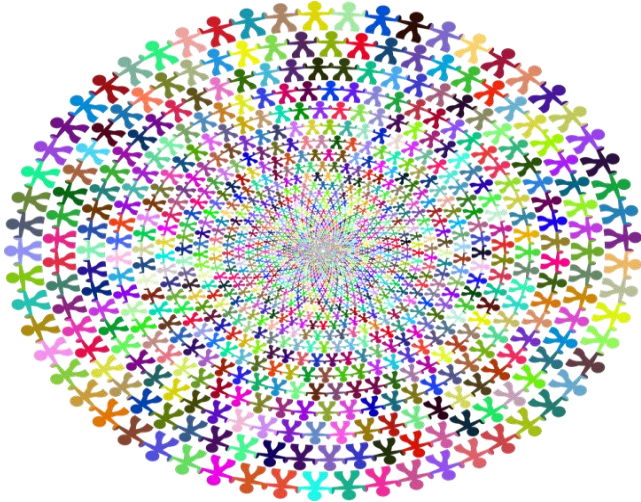
- Measures/Laws to be Consistent with Competition Principles
- Cooperation and Technical Cooperation
- Commercial Activities to be Subjected to the Law
- Discussion on developing measures to address ACP
- Exemptions to be Transparent/Public Policy/Public Interest
- Non Application of Dispute Settlement

**Began to Focus on substantive obligations such as ACP and Exemptions**

**Measures/Law**

**Exemptions**

## Chapter 14 – Competition



- Cooperation in promotion of competition, enhance efficiency, consumer welfare and curtailment of ACP
- Exchange of Information/experience
- Technical Cooperation
- No Dispute Settlement Provisions

---

**Focus on Cooperation/Technical Cooperation and Information Exchange**

**Cooperation**

**Information  
Exchange**

# ***Post Competition Act 2010***

- **Broad Approach**
- **Consider Commitments**
- **Cooperation on Enforcement**
- **Technical Cooperation**



# ***TPPA AND CPTPP***

- **21<sup>st</sup> Century Agreement**
- **A Step Further**
- **Strong Commitments**
- **Prescriptive**
- **Onerous**



# ***CPTPP COMPETITION CHAPTER***



# ***CPTPP Competition Chapter***

---

## ***Scope***

- **Applies to all commercial activities in Malaysia regardless of ownership**

# ***CPTPP Competition Chapter***

## ***Competition Law and Authorities***

- **Adopt or Maintain Law**
- **Exemption – Transparent, Public Policy and Public Interest**
- **Authorities to Enforce Law**
- **Non Discrimination of Enforcement Policies**

# ***CPTPP Competition Chapter***

## ***Procedural Fairness***

- **Reasonable Opportunity to be Represented by Counsel**
- **Opportunity to be Heard and Present Evidence**
- **To Allow Analysis of Qualified Expert**
- **Cross Examine Witnesses; Rebut Evidence**
- **Written Investigation Procedures**
- **Review Sanction or Remedy in Courts and Tribunals**
- **Settlement Mechanisms**



# ***CPTPP Competition Chapter***

## ***Procedural Fairness***

- **Reasonable Opportunity to be Represented by Counsel**
- **Opportunity to be Heard and Present Evidence**
- **Written Investigation Procedures**
- **Review Sanction or Remedy in Courts and Tribunals**
- **Settlement Mechanisms**

# ***CPTPP Competition Chapter***

## ***Private Rights Of Action***

- **To provide for Private Rights of Action**
- **Available to all affected Parties**

# ***CPTPP Competition Chapter***

## ***Transparency***

- **Enforcement Policies to be Transparent**
- **Maintain Central Electronic Database**
- **Competition Law Enforcement Activities**
- **Exemptions and Immunities**
- **Decisions – Written and Published**
- **Reasoning – Legal and Economic Analysis**

# ***CPTPP Competition Chapter***

## ***Consultation & Cooperation***

- **Consultation Between Parties on Matters That Affects Trade and Investment**
- **Cooperation and Coordination**
  - Notification
  - Consultation
  - Exchange of Information
  - Cooperation Agreement between Competition Authorities
- **Technical Cooperation**
  - Training
  - Advice
  - Exchange of Officials
  - Promote Competition Culture

# ***RCEP Competition Chapter***

## ***Some of the Elements***

- **Measures on ACP**
- **Procedural Fairness**
- **Cooperation**
- **Confidentiality**
- **Cooperation**
- **Technical Assistance and Capacity Building**
- **Consumer Protection**

# Emerging Issues in FTA Competition Chapters

**State Owned Enterprises**

**Consumer Protection**

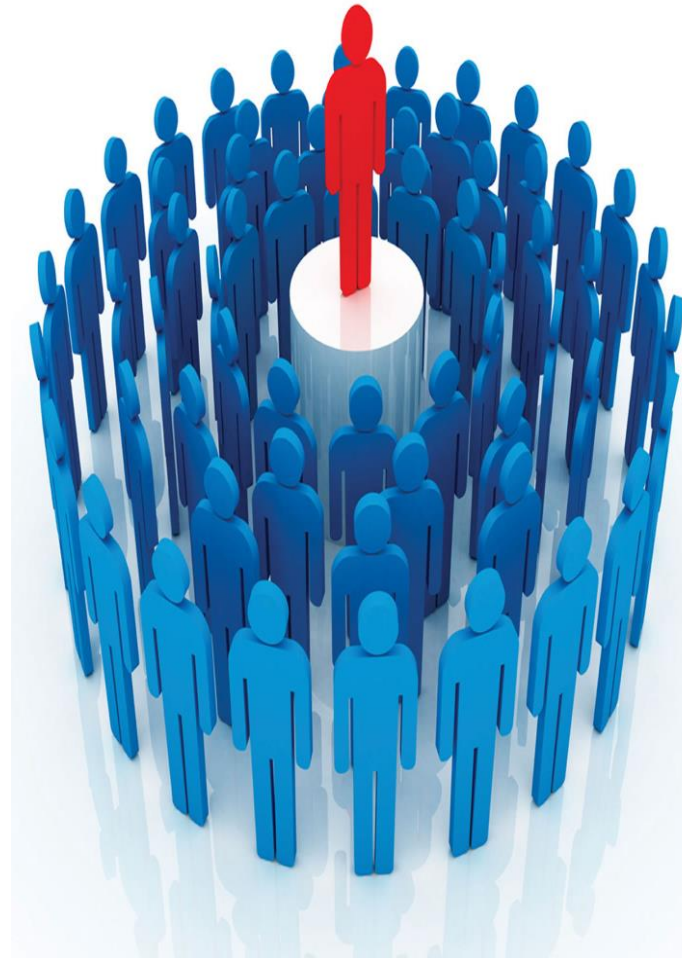


**CONSUMER  
PROTECTION**

# Disciplines on State Owned Enterprises - Is it New?

## GATT Article 17 (1) – State Trading Enterprises

- (a) A State Trading Enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment.
- (b) Such enterprise shall make any such purchases and sales solely in accordance with commercial considerations, including, price, quality, availability, marketability, transportation and other conditions for purchase or sale.



# Disciplines on State Owned Enterprises - Is it New?

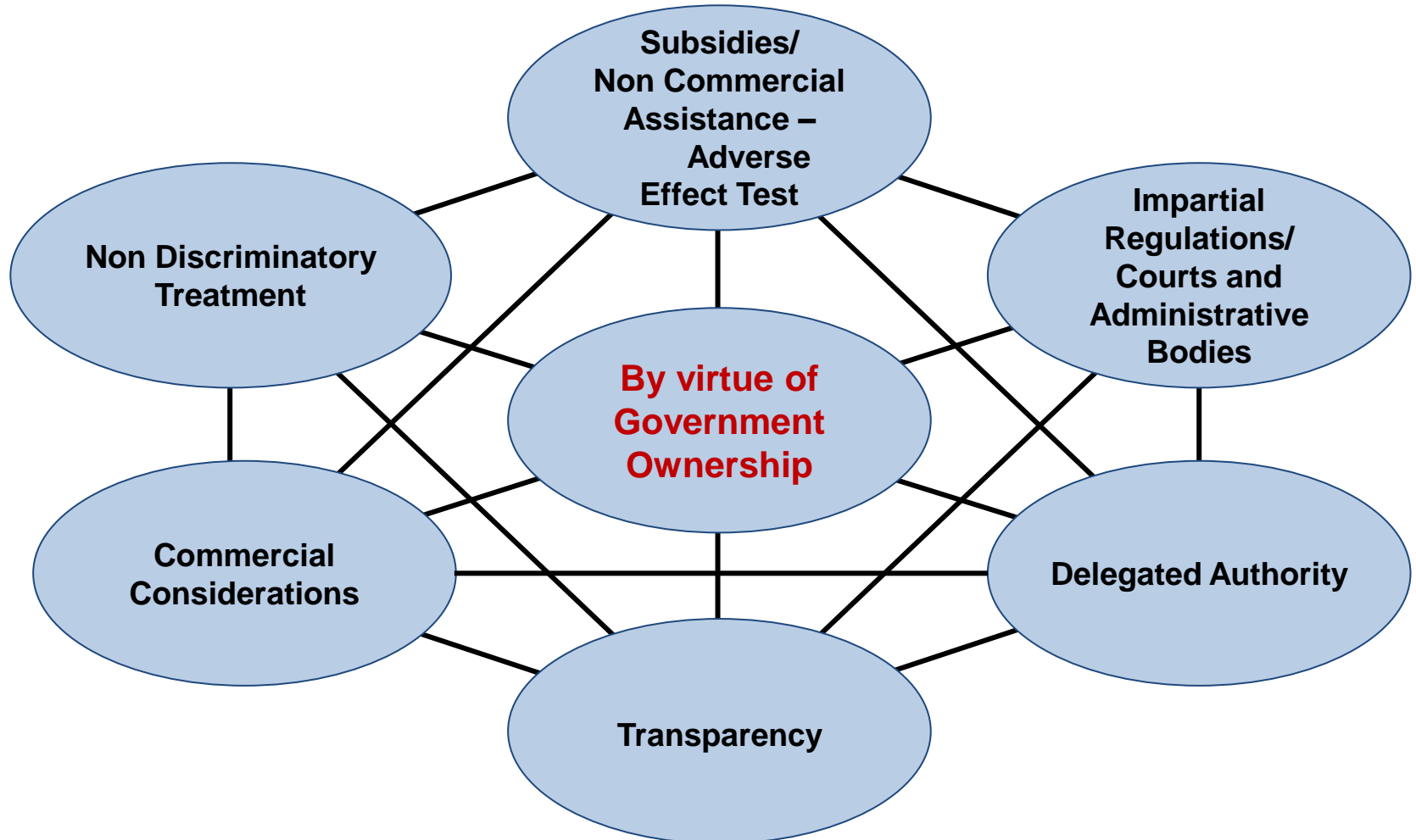
**WTO Agreement on Subsidies and Countervailing Measures**

- i. Definition of Subsidies**
- ii. Adverse Effects**
- iii. Serious Prejudice**
- iv. Transparency**





# Disciplines on State Owned Enterprises – Possible Elements



# **Disciplines on State Owned Enterprises**

## **– *Is It Needed?***

### **Factors to be Considered**

- 1. Efficiency**
- 2. Better Governance**
- 3. Accountability**
- 4. Government Policies**
- 5. Socio Economic Development**
- 6. Role of SOEs in Nation Building**
- 7. Economy Specific Flexibilities**



# ***CONSUMER PROTECTION***

- **To maintain Consumer Protection Laws to Address Fraudulent and Deceptive Commercial Practices**
- **Cooperation and Coordination on Enforcement**



# Concluding Remarks

Malaysia's Approach

**YES**

- Progressive Step for Malaysia
- Cautious/Case by Case
- More FTAs Soon
- Efficient and Competitive Market

Assess Needs of Stakeholders

**YES**

- Extensive Consultation
- Gauge Readiness to Accept Commitments

Assess Approach to FTAs

**YES**

- Competition Chapter – Permanent Feature in FTA
- Open to Consider New Issues – Identify Positive Issues

Way Forward

**YES**

- To Depart from Defensive Mode
- Best Interest of the Nation

A nighttime photograph of the Kuala Lumpur skyline. The Petronas Twin Towers are prominent on the right, illuminated with white lights. To the left, the Kuala Lumpur Tower is visible, also lit up. The city is filled with various other skyscrapers and buildings, their lights reflecting in the dark sky. The foreground shows some greenery and lower-level buildings.

# **THANK YOU**

**[arunan@kpdnkk.gov.my](mailto:arunan@kpdnkk.gov.my)**



## Appendix 7 : Presentation Document (Mr Teo)



# Essential Elements of Competition Chapter in FTAs

# Benefits of Competition Chapter in FTAs

- Address 'beyond- the-border'/'Non-Tariff' barriers
  - » Facilitate trade and investment flows
  - » Promote economic integration
  - » Make regional markets more competitive vis-à-vis others
- Ensure consistent application of competition law
  - » Provide greater certainty
  - » Reduce regulatory burden/transaction costs
  - » Reduce 'regulatory arbitrage'
  - » Promote effective enforcement of cross-border cases
  - » Strengthen competition cooperation



# Singapore FTAs

An extensive network of over 22 implemented agreements



## Bilaterals

*(Signed between SG and a single trading partner)*

- CSFTA
- India-Singapore CECA
- JSEPA
- KFTA
- ANZSCEP
- PSFTA
- PeSFTA
- SAFTA
- SCRFTA
- SJFTA
- SLSFTA
- TRSFTA
- USSFTA

## Regional FTAs

*(Signed between Singapore and a group of trading partner)*

- ASEAN-China FTA
- ASEAN-India FTA
- ASEAN-Japan CEP
- ASEAN-Korea AKFTA
- ASEAN FTA
- EFTA-Singapore FTA
- GCC-Singapore FTA
- Trans-Pacific SEP





# Singapore FTAs

An extensive network of over 22 implemented agreements

## ← CONCLUDED/SIGNED, BUT NOT READY FOR USE →

### Regional FTAs

*(Signed between Singapore and a group of trading partner)*

- EUSFTA
- CPTPP

## ← UNDER NEGOTIATION →

### Regional FTAs

*(Signed between Singapore and a group of trading partner)*

- ASEAN-India (Services & Investment)
- ASEAN-Japan (Services & Investment)
- EAEU-Singapore FTA
- PA-Singapore FTA
- RCEP

# Typical Structure of Competition Chapter in FTAs

## Essential

- » Objectives
- » Basic Principles
- » Measures to proscribe anti-competitive conduct
- » Procedural Fairness
- » Transparency
- » Private Rights of Action
- » Confidentiality of Information
- » Enforcement Cooperation
- » Technical Assistance/Capacity Building
- » Consultations
- » Dispute Settlement

# Typical Structure of Competition Chapter in FTAs

## Optional

- » Public Enterprises & State Monopolies (e.g. EUSFTA, USSFTA)
- » State Aids & Subsidies (e.g. EUSFTA)
- » Consumer Protection (e.g. CPTPP, RCEP)
- » Review Mechanism





# Procedural Fairness

Before a sanction or remedy is imposed, the entity concerned is given the **necessary information/grounds for the alleged violation and a reasonable opportunity to be heard and present evidence**

- » Authority shall establish the legal and factual basis, including economic reasoning where applicable, for the alleged violation
- » Allow entity under investigation timely access to information necessary to prepare an adequate defense against the allegation
- » Reasonable opportunity to present evidence or testimony, including call of qualified experts to offer analysis, cross-examine testifying witness or review or rebut evidence introduced
- » Reasonable opportunity to consult with the relevant authority with respect to significant legal, substantive or procedural issues that arise during the investigation
- » Opportunity for the entity to be represented by a qualified counsel and offer necessary protection of privileged communication



# Procedural Fairness

- Affords the entity that is subject to the imposition of a sanction or remedy with the **opportunity to seek independent review of the decision**, including review of the sanction or remedy, as well as any substantive or procedural matters
  - » Final decision or order made is in writing, setting out the grounds of decision including the findings of fact, legal grounds, and economic findings/assessment where applicable
  - » Review by an independent, impartial adjudicative body (e.g. court, tribunal or appellate body)



# Procedural Fairness

- Adopt or maintain **written procedural rules that apply to investigations and enforcement proceedings**
- **Inform entity concerned about an investigation**, including the legal basis for investigation and the conduct/action involved under investigation
- Observe **timeliness of investigations** and enforcement procedures
- **Conflict of interest** (must not have material personal or financial conflicts of interest in the investigation or enforcement proceedings)
- **Allow for voluntary resolutions** (commitments/settlement), can be subject public consultation and/or approval by judicial or independent tribunal



# Transparency

Promotes consistency/predictability in application of competition law and compliance with the law

- Publish or make available the following:
  - » **competition law and regulations**, including any exclusions or exemptions to its law
  - » **guidelines** on how the law will be applied and enforced
  - » **procedural rules** applicable to investigations and enforcement proceedings
  - » **final decision of a violation**, including findings of fact, legal and if applicable, economic analysis, on which the decision is based



# Private Rights of Action

Supplements public enforcement and makes it easier for affected victims to seek redress and recover losses, thereby promoting a robust and effective competition regime

- Provide for the rights of an entity who suffers a loss or damage caused by a violation of competition law **to seek redress, including injunction, monetary or other relief, from a court or other independent tribunal, either independently or following a finding of violation by the authority**
- Provide for **Class or Group Action**: two or more injured parties to bring a joint action for damage before the appropriate judicial authority





# Confidentiality of Information

- Requesting party should notify providing party **the purpose and intended use of information received** and **any domestic laws or regulations** of the requesting that may impact the use of information received
- Requesting party shall **safeguard confidentiality of information received, use it only for the purpose it has disclosed, and not used it as evidence in criminal proceedings unless the information is obtained through diplomatic channel or other channels established under the laws of both parties**
- Party shall not be required to give information to the other Party if it is prohibited by the laws or regulations of the providing party or if the providing party considers it to be incompatible with its important interests

# Challenges

- **Diverse differences among partners**

- No 'one-size-fits-all' approach or text

- » Differences in competitive law regimes, including the substantive and procedural frameworks
    - » At economy-level, each differ in terms of socio-economic developments, political and governance systems, legal and economic frameworks and institutions, as well as exposure to and reliance on international trade and investments
    - » Different or even conflicting domestic / national objectives and interests



# Challenges

- **Striking the right balance ambition and commitments**

- » Commitment level (e.g. may, shall, shall on best endeavour basis)
- » Ambition level – determines the scope, what and how much to include
- » Prescriptive level – the amount of details; need to consider flexibility, certainty and costs

- **Lack of trust and understanding**

- **Dealing with ‘beggar-thy-neighbour’ mentality**

- » Pushing for offensives while refusing to trade defensives



# Key takeaways...



- **Negotiation is both** a science and art
  - » Be well-prepared; Requires good understanding of the various competition regimes; know parties' offensives and defenses well
  - » A good negotiator should have a high emotional intelligence and cultural intelligence (aim to connect with negotiating partners cognitively, emotionally and culturally)
  - » Mutual respect and trust is important (treat all negotiating partners as equals)
  - » Think 'win-win'
  - » Build shared understanding/find common denominator/Go for 'low-hanging fruits' first



# Thank You

# Discuss the Relation between Investment and Competition Policy Including Chapters on FTAs•EPAs



Koki Arai

Professor, Faculty of Comprehensive  
Management, Shumei University, Japan

# Today's outline



- ❧ Competition policy essentials
- ❧ Japan's experience
- ❧ Relation between investment and competition policy
- ❧ International case study
- ❧ Takeaways



- ❧ Dr. Koki Arai is Professor of Economics at Shumei University, Japan
- ❧ Before working in his current position, he was Strategist for Economics, General Affairs Division, Economic Affairs Bureau, Japan Fair Trade Commission (JFTC), Japan; and Deputy Director-General, Competition Policy Research Center
- ❧ He was also in charge of Economic Research Office as a director, for merger and acquisition (M&A) issues in the M&A division of JFTC as the senior examiner, and in the International Affairs Office for the International Competition Network issues as senior policy planner
- ❧ Prior to joining JFTC, he was an associate professor of economics at the Institute of Social and Economic Research of Osaka University
- ❧ He received his Ph D from Osaka University, and his BA from Waseda University



# Competition Policy Essentials



- ❧ Competition between firms is usually the most effective way of allocating economic resources and achieving consumer and producer welfare
- ❧ At the same time, there is a balance to be struck; firms must not be over-regulated, but neither must they be completely free to create a monopoly or oligopoly giving them super-competitive profits or a quiet life
- ❧ Therefore, the role of competition policy is to maintain a balance by using the collaborative economics of industrial organization

# Competition Policy Essentials



- ❧ This presentation analyzes relation investment and competition policy based on the knowledge and experience of Japanese and international antimonopoly law and enforcement in cases such as cartel cases, private monopolization cases, and merger cases
- ❧ The JFTC implements a competition policy, primarily through the enforcement of the antimonopoly law, which promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition, thereby ensuring economic vitality and consumer benefit
- ❧ It is important to understand the competition policy from the point of view of Asia Pacific businesses

# Competition Policy Essentials



## ❧ Regulation of the Antimonopoly Act

### ❧ Prohibition of Private Monopolization

- ❧ If any entrepreneurs exclude or control competitors from the market by means of unjust low-price sales, discriminatory prices, etc. or monopolize the market by obstructing business activities of new-comers to the market, such acts are prohibited as “private monopolization”

### ❧ Prohibition of Cartels

- ❧ If any entrepreneurs consult with each other to jointly determine product prices, sales and production volumes, etc. and restrain competition as the result, such acts are prohibited as “unreasonable restraint of trade”

### ❧ Prohibition of Unfair Trade Practices

### ❧ Merger Control

# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Private Monopolization

- Where the music copyright management service provider currently operating in the market, in the course of granting blanket authorization to exploit musical works under its management in broadcasting, concludes a license agreement with almost all broadcasting organizations wherein fees are to be collected by a method on the basis of the amount calculated by multiplying the income from broadcasting business in each fiscal year by a predetermined rate or on the basis of a predetermined amount, and collects fees under such agreement, given the factual circumstances indicated in the judgment, including (1) through (3) below, such practice of the current music copyright management service provider has the effect of making it extremely difficult for other service providers to enter the market for licensing the use of musical works in broadcasting, which constitutes the element of "excluding business activities of other enterprises" referred to in Article 2, paragraph (5) of the Antimonopoly Act:



# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Private Monopolization

- ❧ (1) it should have been difficult in said market for broadcasting organizations to think of not concluding a license agreement based on blanket authorization with the current service provider who has been entrusted with the management of the majority of music copyrights even after the change from the permission system to the registration system for said management service;
- ❧ (2) since the current service provider adopts the abovementioned collection method wherein the ratio of use in broadcasting of the musical works under the current service provider's management is not reflected in the amount of fees, if broadcasting organizations pay broadcasting fees to other management service providers, the total amount of broadcasting fees payable thereby would increase; and
- ❧ (3) the current service provider's practice as described above continued for more than seven years

❧ Date of the judgment (decision): 2015.04.28, Supreme Court of Japan

# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Cartels

- In the case where a cartel conducted by business operators engaged in the manufacturing and selling of cathode-ray tubes for televisions (CRT) in relation to the sales prices of CRT for subsidiary companies, etc. of business operators engaged in the manufacturing and selling of televisions in Japan that were located outside of Japan was agreed upon outside of Japan, under the circumstances held in the judgment, such as the following (1) to (3), such cartel infringed on the order of the free-competition economy in Japan, and therefore a provision related to a surcharge payment order of the Antimonopoly Act of Japan applies to a business operator who conducted such cartel

# Competition Policy Essentials

## Recent Development of the Antimonopoly Act

### Prohibition of Cartels



- ❧ (1) The business operators engaged in the manufacturing and selling of televisions in Japan controlled the business of the manufacturing and selling of cathode-ray tube televisions conducted by them and their subsidiary companies, etc., and instructed subsidiary companies, etc. that were located outside of Japan and that were manufacturing cathode-ray tube televisions to conduct manufacture, etc., and all or most of cathode-ray tube televisions manufactured by such subsidiary companies, etc. in accordance with the said instruction were purchased and sold by such business operators or their subsidiary companies, etc.
- ❧ (2) As part of conducting the business of manufacturing and selling cathode-ray tube televisions as mentioned in (1), the business operators engaged in the manufacturing and selling of televisions in Japan determined important trade terms and conditions, such as suppliers, purchase prices, and purchase volumes, for cathode-ray tubes, which are key parts of the televisions; instructed subsidiary companies, etc. that were located outside of Japan and that were manufacturing cathode-ray tube televisions to purchase such cathode-ray tubes; and had such subsidiary companies, etc. purchase cathode-ray tubes from business operators who conducted such cartel.
- ❧ (3) While the business operators engaged in the manufacturing and selling of televisions in Japan conducted negotiations directly by themselves pertaining to trade terms and conditions for cathode-ray tubes for televisions with business operators who conducted such cartel, sales prices presented in the negotiations by business operators who conducted such cartel were bound by such cartel.

❧ Date of the judgment (decision): 2017.12.12, Supreme Court of Japan

# Japan's experience

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## Economic Partnership Agreements

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Mongol	Agreement between Japan and Mongolia for an Economic Partnership	7-Jun-16
Australia	Agreement between Japan and Australia for an Economic Partnership	15-Jan-15
Peru	Agreement between Japan and The Republic of Peru for an Economic Partnership	1-Mar-12
India	Comprehensive Economic Partnership Agreement between Japan and the Republic of India	1-Aug-11
Switzerland	Agreement on Free Trade and Economic Partnership Between Japan and The Swiss Confederation	1-Sep-09
Viet Nam	Agreement between Japan and The Socialist Republic of Viet Nam for an Economic Partnership	1-Oct-09
ASEAN	Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations	
Indonesia	Agreement Between Japan and The Republic of Indonesia for an Economic Partnership	1-Jul-08
Thailand	Agreement Between Japan and The Kingdom of Thailand for an Economic Partnership	1-Nov-07
Chile	Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership	3-Sep-07
Philippines	Agreement Between Japan and the Republic of the Philippines for an Economic Partnership	11-Dec-08
Malaysia	Agreement between Government of Japan and the Government of Malaysia for an Economic Partnership	13-Jul-06
Mexico	Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership	1-Apr-05
Singapore	Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership	30-Nov-02

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# Japan's experience

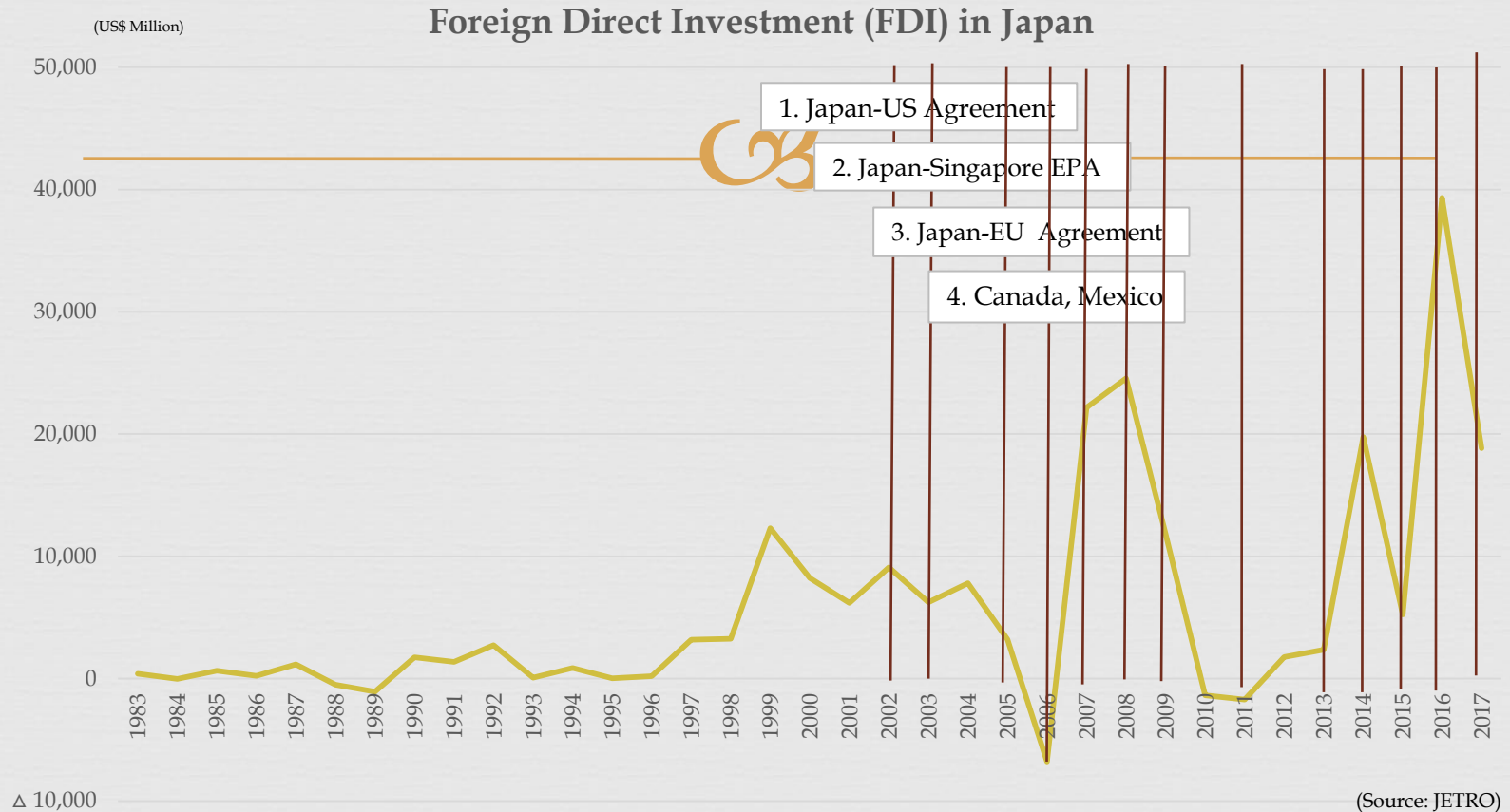
## Anti-monopoly Cooperation Agreements

Canada	Agreement Between The Government Of Japan And The Government Of Canada Concerning Cooperation On Anticompetitive Activities(PDF : 24KB)	6-Oct-05
European Communities	Agreement Between The Government of Japan and The European Community Concerning Cooperation on Anticompetitive Activities(PDF : 37KB)	9-Aug-03
United States	Agreement Between The Government of Japan and The Government of The United States of America Concerning Cooperation on Anticompetitive Activities	8-Oct-99

## Inter-agency Cooperation Memorandums/Arrangements/

Singapore	Memorandum Of cooperation Between The Fair Trade Commission Of Japan And The Competition Commission Of Singapore	22-Jun-17
Canada	Cooperation Arrangement Between The Fair Trade Commission Of Japan And The Commissioner Of Competition, Competition Bureau Of The Government Of Canada In Relation To The Communication Of Information In Enforcement Activities	11-May-17
Mongolia	Cooperation Arrangement Between The Fair Trade Commission Of Japan And The Authority For Fair Competition And Consumer Protection Of Mongolia	15-Mar-17
Kenya	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Competition Authority of Kenya	9-Jun-16
China	Memorandum on Antimonopoly Cooperation between the Fair Trade Commission of Japan and the Ministry of Commerce of the People's Republic of China	11-Apr-16
	Memorandum on Antimonopoly Cooperation between the Fair Trade Commission of Japan and the National Development and Reform Commission of the People's Republic of China	13-Oct-15
Australia	Cooperation Arrangement between the Fair Trade Commission of Japan and the Australian Competition and Consumer Commission	29-Apr-15
Philippines	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Department of Justice of the Republic of the Philippines	28-Aug-13
Viet Nam	Cooperation Arrangement between the Fair Trade Commission of Japan and the Competition Authority of the Socialist Republic of Viet Nam	28-Aug-13
Brazil	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Administrative Council for Economic Defense of the Federative Republic of Brazil	24-Apr-14
Korea	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Fair Trade Commission of the Republic of Korea	25-Jul-14

# Japan's experience



These seems to be little relation between competition agreement and FDI

# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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- ❧ However, the role of competition policy has increased in the *Next Generation Trade and Investment Issues (NGeTIs)*, specifically in how competition policy affects investment activities
- ❧ Whether it is enough to have an investment treaty
- ❧ Whether it is enough to have a competition law

# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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## ❧ Investment Treaty and Competition Policy

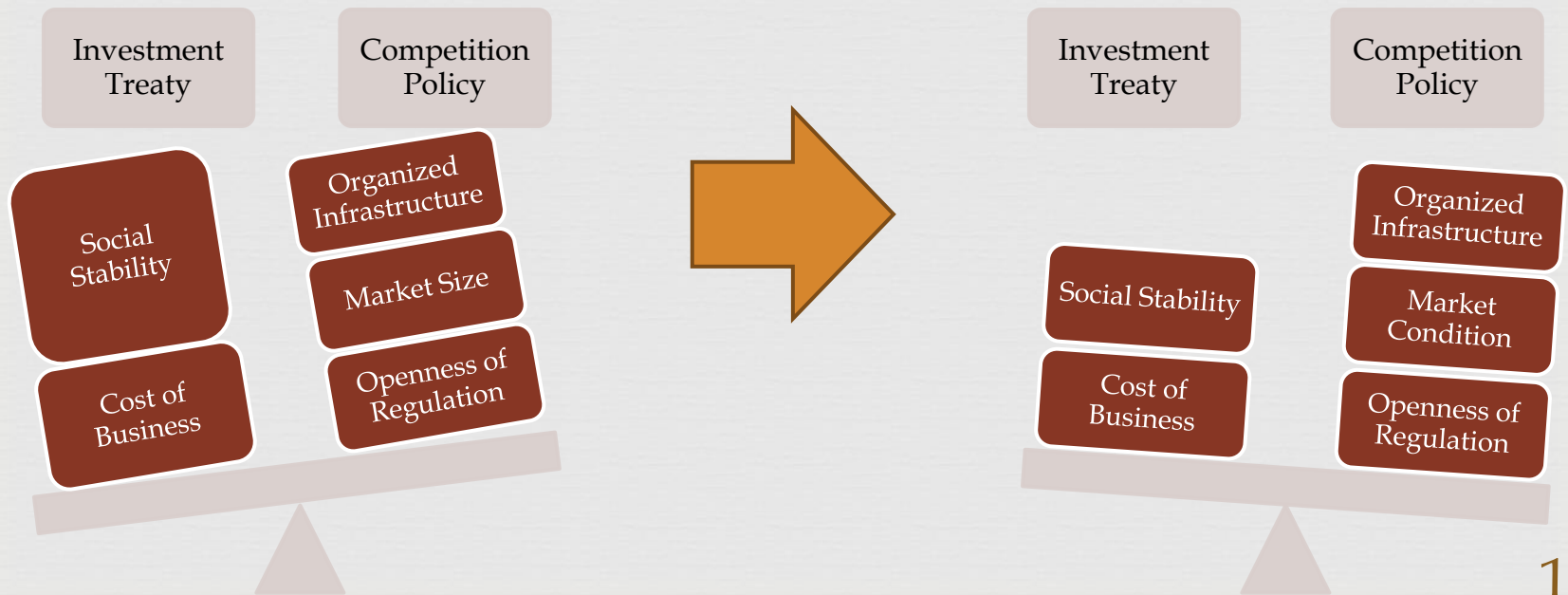
- ❧ The factors of foreign direct investment are explained by the ratio of experts and managers in the business through the Knowledge-Capital model analysis, and the economy that has a large percent of internal direct investment has higher costs for investment than other economies
- ❧ For the enhancement of investment in developed economies, the ratio of experts and managers in the business as well as cost reduction are especially important

“Analysis of Factors of Internal and External Investment,” Cabinet Office, Japan, 2008

# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

## ✧ Investment Treaty and Competition Policy





# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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- ❧ Whether it is enough to have a competition law
- ❧ Some criticized China's antimonopoly law enforcement
  - ❧ “Foreign companies are being disproportionately targeted”  
(European Chamber of Commerce, 2014),  
(The US-China Business Council, 2014)

# International Case Study

## ❧ China's antimonopoly law enforcement

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❧ “They are not, say Chinese officials, ‘Everyone is equal before the law,’ declared Li Pumin, the secretary-general of the NDRC, the most powerful of three agencies involved in enforcing antitrust laws in China” (The Economist, Aug 23<sup>rd</sup> 2014)

# International Case Study

❧ If there were an antimonopoly cooperation agreement:



- ❧ The authority of other jurisdictions would express their intention to provide information to each other on individual cases that the authority investigates in accordance with the laws and regulations of their respective economies and subject to their respective reasonably available resources
- ❧ If firms in the jurisdiction are involved in a case investigated by the other authority, the authority conducting the investigation may notify the other authority of the case to the extent compatible with the laws and regulations
- ❧ These are only obligations to make an effort, but the rules are for restraining for the perceptions from the outside
- ❧ The authority of other jurisdiction would support the enforcement authority



# International Case Study

## Recent US Supreme Court decision



- “ A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government’s submission, but the court is not bound to accord conclusive effect to the foreign government’s statements.”
- “The Second Circuit expressed concern about reciprocity, but the United States has not historically argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit’s rigid rule. ”
- Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.
- No. 16-1220. Argued April 24, 2018--Decided June 14, 2018

# International case study

## Recent US Supreme Court decision



- ✧ The courts are not required to defer to a foreign government's interpretation of its own law
- ✧ The implication of this decision is that transparency must be required of foreign legal systems and their enforcement in such matters
- ✧ The competition chapters on FTAs•EPAs are potentially conducive to creating transparent law enforcement and communication between authorities

# Takeaways



- ❧ The competition policy, primarily through the enforcement of the antimonopoly law, promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition, thereby ensuring economic vitality and consumer benefit
- ❧ There seems to be little relation between competition agreement and FDI; however, the role of competition policy has increased in the NGeTIs, specifically in how competition policy affects investment activities

# Takeaways



- ❧ For the enhancement of investment in developed economies, the ratio of experts and managers in business as well as cost reduction are especially important; therefore the competition policy is needed in NGeTIs
- ❧ In China's case study, the rules are for restraining the perceptions from outside, and the authority of other jurisdiction would be able to support the enforcement authority

# Takeaways



- ✧ In the recent US Supreme Court case, the competition chapters on FTAs•EPAs are potentially conducive to creating transparent law enforcement and communication between authorities

# Thank you for your attention



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# **Correlation between Competition Policy and Investments based on FAS Russia experience**

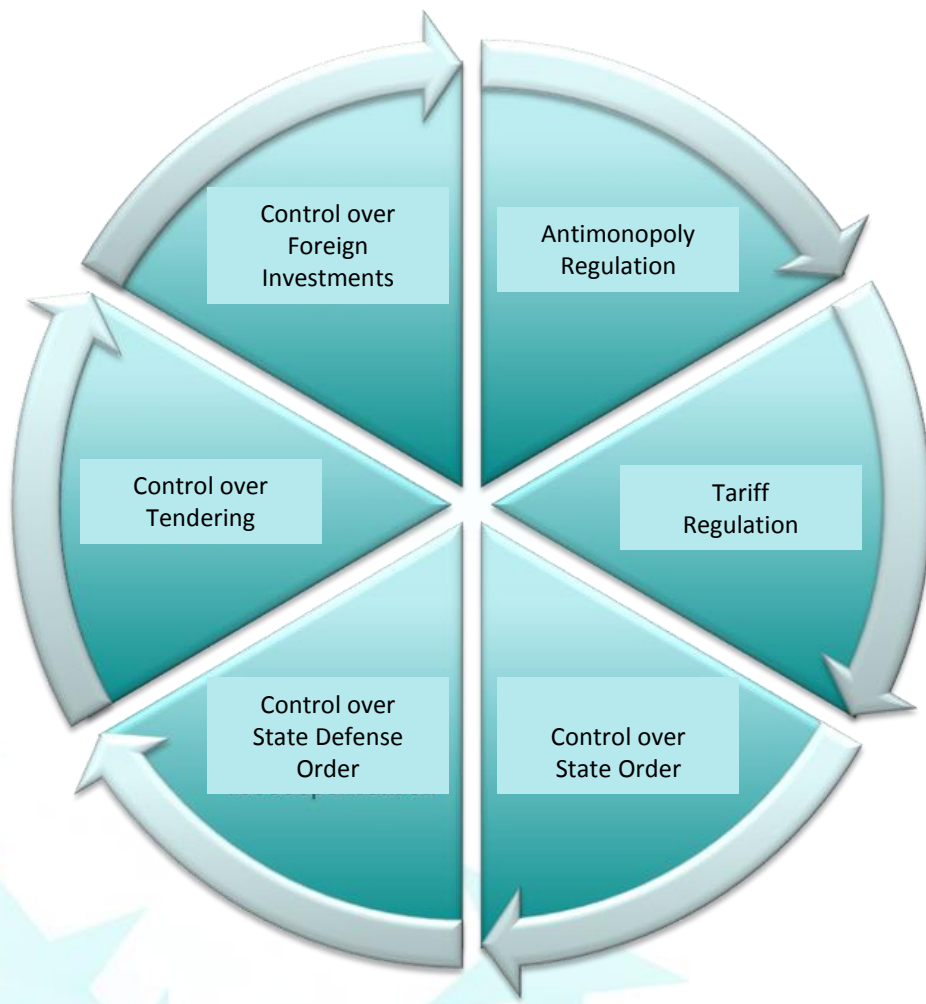
**Grigory Karakov**

**Deputy-head of  
Foreign Investment Control Department  
FAS Russia**

# Development of Competition Policy. Synergy of FAS Russia Competence



Федеральная  
Антимонопольная  
Служба



- **Pro-competitive nature of regulation**
- **Optimizing expenditures in regulated sectors**
- **Customer orientation**
- **Unity of approaches to regulation**
- **Ensuring the availability of infrastructure on a non-discriminatory basis**



# Development of Competition Policy. New trends.



Федеральная  
Антимонопольная  
Служба

- Reducing administrative burden on business;
- Decrease in the number of pre-merger notifications (2008 – 5821, 2015 – 1793, 2017 - 1001);
- Decrease in the number of post-merger notifications (2008 – 44088, 2015 – 165, 2017 - 109);
- FAS Russia objective – liberalization of antimonopoly regulation and increase of enforcement efficiency on the basis of the best world practices.

# Competition Policy. Advocation.



Федеральная  
Антимонопольная  
Служба

## ➤ Advocation of competition and foreign investment:

- ✓ Conception of an “Open Authority”;
- ✓ Interaction with business and scientific unions;
- ✓ Establishment of FAS Russia Expert Councils;
- ✓ International cooperation;
- ✓ Social and network activity.

# Competition Policy. Future steps.



Федеральная  
Антимонопольная  
Служба

## ➤ Antimonopoly and Investment Compliance:

- ✓ Preventive mechanisms in antimonopoly control;
- ✓ Warnings instead of penalties (5 200 administrative cases in 2013, 1 200 – in 2017);
- ✓ Implementation of compliance as a mitigating factor for businesses;
- ✓ Obligation of regional governmental bodies to implement antimonopoly compliance in their activity;
- ✓ Adoption of a law on antimonopoly compliance.

# Foreign Investment Control. Legal Bases.



Федеральная  
Антимонопольная  
Служба

- **Federal Law № 160-FZ** “On Foreign Investments in the Russian Federation”, dated July 9, 1999;
- **Federal Law № 57-FZ** “On Procedure for Foreign Investments in Companies of Strategic Significance for Russian National Defense and State Security”, dated April 29, 2008;
- **Code of Administrative Offences Of the Russian Federation** № 195-FZ dated December 30, 2001;
- **More than 20 sectoral legislative and regulatory acts** supervising the procedure for foreign investments in the Russian Federation.

# Federal Law On Foreign Investments in the Russian Federation



Федеральная  
Антимонопольная  
Служба

## Article 4

The **legal treatment** of the activities of foreign investors and the use of profit received from investments **shall not be less favorable** than the legal treatment granted to Russian investors

## Article 18

A **foreign investor shall observe the anti-monopoly legislation** of the Russian Federation and avoid unfair competition and restrictive business practices



# Mechanism of Control of Foreign Investment in Strategic Companies

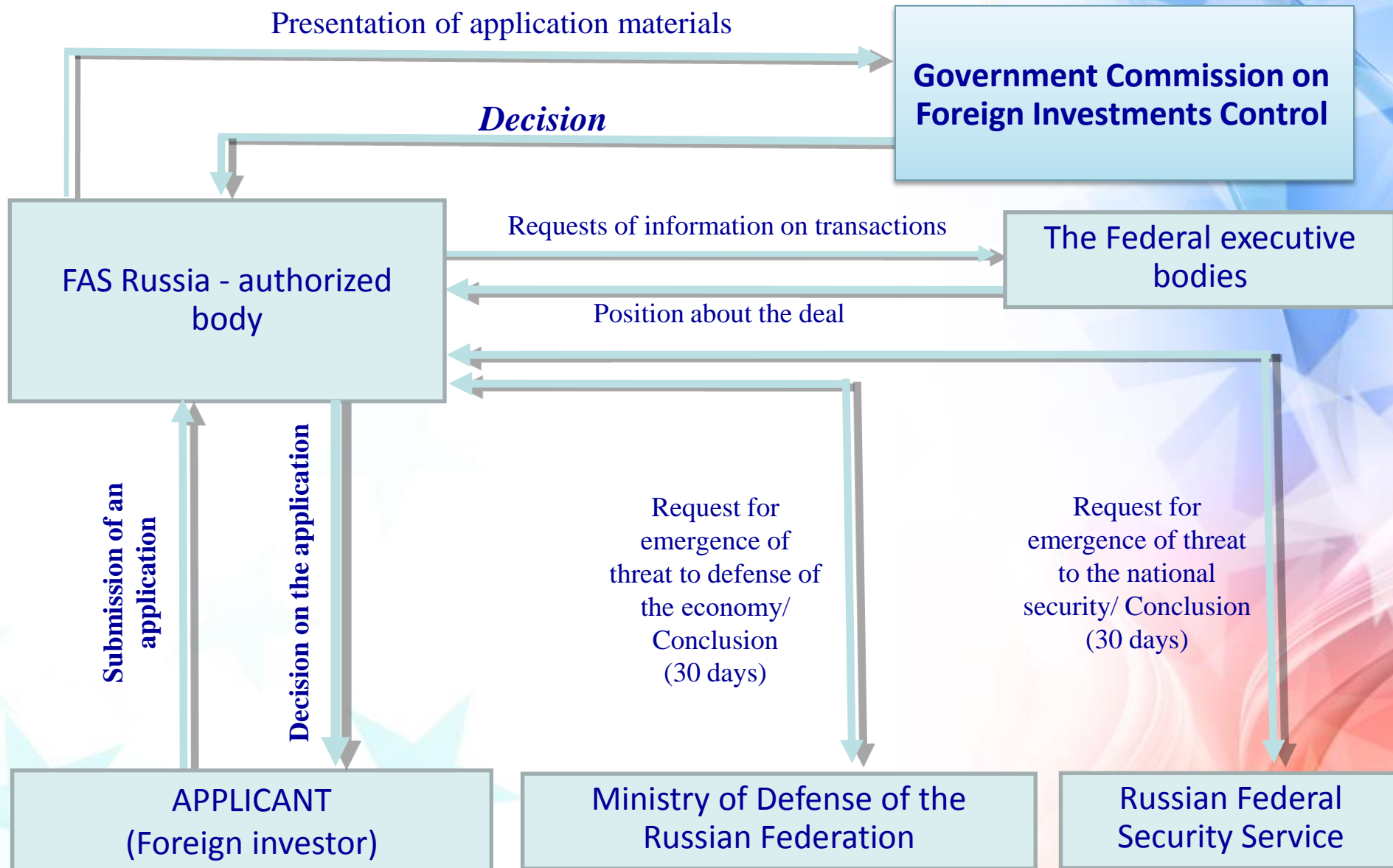


Федеральная  
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Служба

**Federal Law № 57-FZ establishes:**

- **Restrictive exemptions for foreign investors:**
  - on transactions or other actions resulted in establishing control over strategic companies;
  - on acquisition of property which costs 25 and more percent of strategic companies' book value.
- **Listing of the strategic activities;**
- **Procedure for considering applications of foreign investors on preliminary approval of transactions;**
- **Consequences and sanctions for non-compliance with legal requirements.**

# Foreign Investment Control Procedure.



# Statistic of considering applications of foreign investors.

During 10 years of the application of the Law № 57-FZ the FAS Russia has received **534 requests**, including:



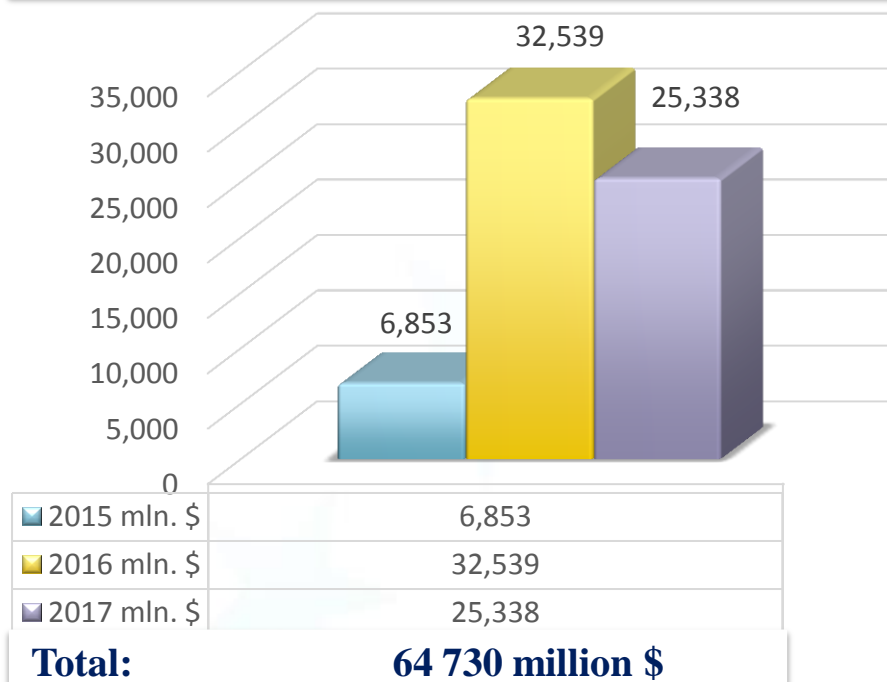
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Антимонопольная  
Служба

- ✓ **237 were considered by Government Commission:**
  - **221** were preliminary approved,
  - **16** were declined because of the treatments to the national security or defense;
- ✓ **214 were returned to applicants** as they did not require preliminary consideration;
- ✓ **47 were withdrawn by applicants** as the latter refused to carry out a transaction;
- ✓ **36 are under consideration.**

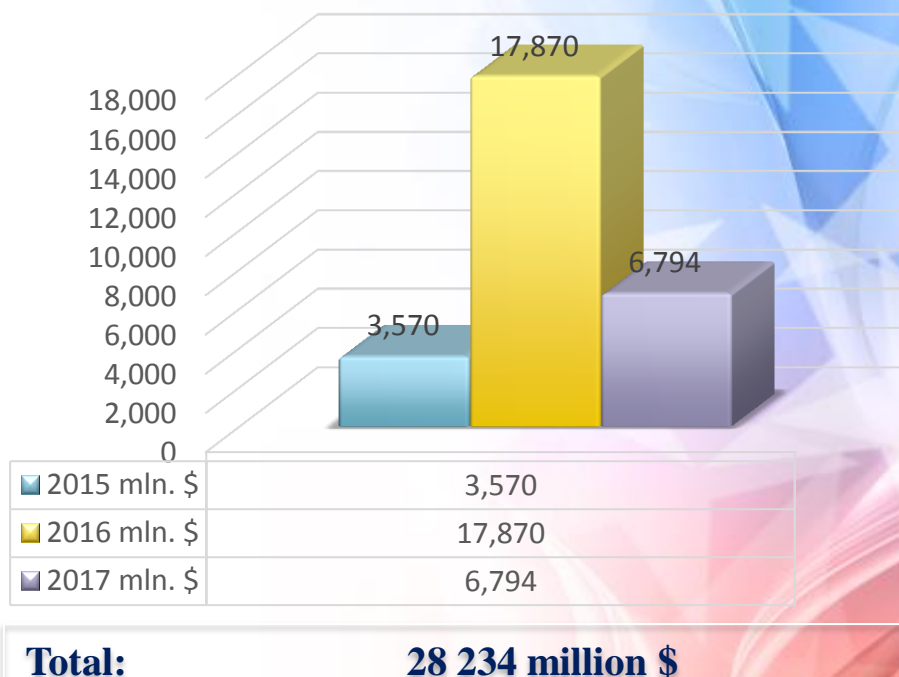


# Volume of the Foreign Investments to the Russian Federation

**Total value of direct foreign investments into economy of the Russian Federation during 2015-2017**



**Value of foreign investments into strategic companies during 2015-2017**

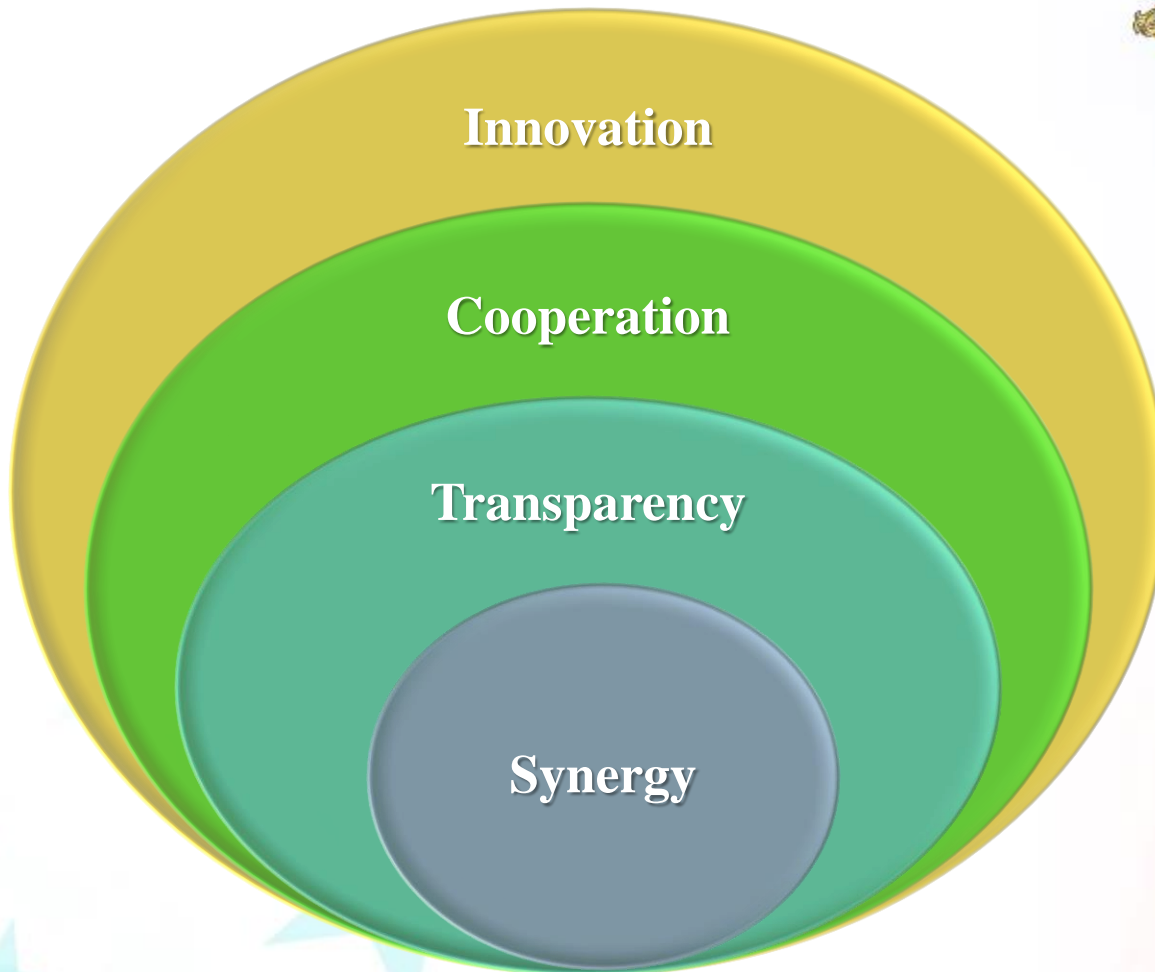


**43,6 per cent from the total value of foreign investments to the Russian Federation**

# The Image of the FAS Russia Future



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# Thank you for your attention!



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