



**Asia-Pacific
Economic Cooperation**

FTTAP Capacity Building Workshop on FTA Negotiation Skills on Competition under the 2nd REI CBNI

**19 August 2017
Ho Chi Minh City, Viet Nam**

Committee on Trade and Investment

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CONTENTS

	Page
I Overview	3
II Background	4
III Discussion	5
1. Opening Remarks	5
2. Introduction	7
3. Workshop's Sessions	8
1) Session 1	8
2) Session 2	9
3) Session 3	10
IV Summary and Conclusions	13
1. Summary	13
2. Conclusion	15
V Next Steps	16
Appendix 1 : Agenda	17
Appendix 2 : Presentation Document 1	18
Appendix 3 : Presentation Document 2	52
Appendix 4 : Presentation Document 3	90
Appendix 5 : Presentation Document 4	109
Appendix 6 : Presentation Document 5	129

FTAAP Capacity Building Workshop on FTA Negotiation Skills on Competition under the 2nd REI CBNI

**19 August 2017, Saigon Prince Hotel
Ho Chi Minh City, Viet Nam**

Summary Report

I Overview

On 19 August 2017, the **FTAAP Capacity Building Workshop on FTA Negotiation Skills on Competition under the 2nd REI CBNI (CTI 02/2017T)**, initiated by Japan and co-sponsored by Korea; Peru; Chinese Taipei and Viet Nam was held in Ho Chi Minh City, Viet Nam.

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; discussion at the international organizations; historical developments of the texts in competition chapter under Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs); overview of textual proposals of general principles, non-discrimination, procedural fairness, cooperation and transparency; and sharing best practices and experiences in preparing for negotiations.

This workshop was participated by more than 50 attendees from 16 member economies including seven speakers, from Japan, The Philippines, Thailand, OECD and academia (Kobe University, Japan). The details of speakers are as follows;

- **Ms Marie Sherylyn D Aquia**, CTI Chair (Supervising Trade-Industry Development Specialist, Bureau of International Trade Relations, Department of Trade and Industry, The Philippines) (Opening Remarks)
- **Mr Hiroshi Kudo**, Senior Deputy Director for FTA/EPA Negotiations, Ministry of Foreign Affairs, Japan (Moderator)
- **Mr Satoshi Ogawa**, Competition Lawyer, Competition Division, Directorate for Financial and Enterprise Affairs, OECD
- **Mr Fujio Kawashima**, Professor, Graduate School of Law, Kobe University, Japan
- **Ms Parima Damrithamanij**, Senior Trade Officer, Office of Trade Competition Commission, Department of Internal Trade, Ministry of Commerce, Thailand
- **Mr Toru Ishiguro**, Assistant Director, International Affairs Division, Fair Trade Commission, Japan

- **Ms Isabela Rosario G. Villamil**, Policy Research Officer, Competition Commission, The Philippines

This workshop comprised of three sessions ‘Significance of Competition Policy and the Meaning of the Establishment of the Chapter on Competition in FTAs/EPAs’, ‘Overview of the Chapter on Competition in the Existing FTAs/EPAs’, and ‘Challenges and Opportunities in Relation to Acceptance of the Chapter on Competition in FTAs/EPAs’.

Through this workshop, the following 3 points, 1) Growing significance of competition policy and the meaning of establishing competition chapters in FTAs/EPAs, 2) Concerns of discriminatory application of competitive law, jurisdiction over subsidies, and 3) the significance of ‘exchange of information’ were highlighted.

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 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 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 1st 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, such as 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), 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 Regional Economic Integration 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 2nd 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.”

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 CBNI and endorsed the Action Plan Framework of the 2nd CBNI. They instructed Senior Officials to take steps to ensure the effective implementation of the 2nd CBNI.

Since the initiation of 2nd CBNI in 2015 until June 2017, totally 9 workshops have been conducted including this workshop, such as 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).

III Discussion

1. Opening Remarks

In her Opening Remarks, **Ms Marie Sherylyn D Aquia, CTI Chair (Supervising Trade-Industry Development Specialist, Bureau of International Trade Relations, Department of Trade and Industry, the Philippines)** mentioned as follows.

Ms Aquia discussed that in APEC, the 1995 Osaka Action Agenda included the area of competition as one of the policy discussions that economies have to undertake actions in, particularly on the development of national competition policies in all economies and cooperation among all members. Likewise, in 1999, APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform with the premise that “open and competitive markets are the key drivers of economic efficiency and consumer welfare” alongside the principles of non-discrimination, comprehensiveness, transparency, and accountability.

Ms Aquia stated that there is a strong and complementary relationship between trade and competition policies. This is due in fact to their similarity in objectives. Both trade and competition policy seek to enhance welfare by providing for more efficient allocation of resources, whether it be in lowering trade barriers or through promoting competition.

New, comprehensive economic or trade agreements now feature specific provisions or entire chapters to competition-related matters.

It is a vast improvement and marked contrast to the failed attempts in the past to incorporate competition policy in international rule-making. Ms Aquia mentioned the 1948 Havana Charter, which provided for the establishment of the International Trade Organization and set out basic rules for international trade, international cooperation and rules against anti-competitive business practices.

Although it was signed by 56 economies, the Havana Charter failed to be ratified by United States Congress, thus eventually abandoned. The elements of the Charter would later become part of the General Agreement on Tariffs and Trade (GATT).

Ms Aquia highlighted the 1996 Singapore World Trade Organization (WTO) Ministerial Conference which also attempted to revive discussions for a multilateral competition framework. However, in 2004 the WTO General Council decided to exclude the interaction between trade and competition policy from the Doha Work Program.

Currently, work to negotiate competition policy happens more at regional and bilateral settings.

Ms Aquia also highlighted a think-piece by the International Centre for Trade and Sustainable Development and the World Economic Forum which reported that 88 percent of FTAs in force in 2015 devote specific provisions or entire chapters to competition-related matters.

Ms Aquia noted that these FTAs include a wide array of horizontal or sectorial provisions, covering market access, non-discrimination or import/export restrictions, all directly or indirectly impacting on competition policy.

There is a growing recognition that provisions on competition in trade agreements and more generally, better competition policy, foster and improve the efficiency of competition in markets including benefiting consumers and businesses.

Businesses today are increasingly engaged in conducting their activities across borders. Trade barriers are falling between economies. Yet, anti-competitive practices of businesses across borders and unnecessary regulatory barriers are also surging. Ms Aquia acknowledged that better information sharing is needed between competition authorities and experts in APEC economies to curb such conduct. By itself, trade policy is not sufficient to deal with the tension that results from the differences in systems and practices.

Ms Aquia also explained that provisions on competition in FTAs ensure that a more secure business environment is created. Through such provisions, the benefits of free trade are not undermined by behind-the-border public or private sector actions.

Ms Aquia shared that it would be crucial therefore to devise ways to increase the benefits of including competition-related provisions in FTAs. She also raised that competition principles that seek to encourage flexibilities and mutually supportive reform measures are of equal importance.

Especially among economies that have less experience in enforcing competition law/policies, the approach is rarely 'one-size-fits-all' and should be complemented by market-oriented reforms appropriate for each economy. As such, FTAs can also play a role in promoting structural reform and improving competitiveness, especially among less advanced economies.

Ms Aquia emphasized that notwithstanding the overall importance of competition policy as a tool of economic development and its relationship with trade liberalization, FTA chapters on competition policy are also a vital mechanism to ensure that mutual beneficial cooperation is promoted between competition agencies. She also offered the view that bilateral and regional arrangements can also facilitate in creating more institutional capacity and competition advocacy.

2. Introduction

Following Ms Aquia's Opening Remarks, as the Moderator of the workshop, **Mr Hiroshi Kudo, Senior Deputy Director for FTA/EPA Negotiations, Ministry of Foreign Affairs of Japan** welcomed attending guests and speakers by introducing 2 main issues that the workshop addressed. One is "Significance of Competition Policy and the Meaning of the Establishment of the Chapter on Competition in FTAs/EPAs", and the other is "Challenges and Opportunities in Relation to Acceptance of the Chapter on Competition in FTAs/EPAs".

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).

Mr Kudo mentioned an introduction to the today's discussion as follows.

Looking back the history of discussions on trade and competition policy, at the WTO Ministerial Meeting in Cancun in 2003, consensus was not reached among members to address the issue of trade and competition as agenda of the Doha Round due to the fact that at that time, there were only around 55 economies which adopted competition law. From that time on, globalization and the increasing interdependence of economies have led each economies' development on competition laws and authorities.

Nowadays, more than 120 economies adopted competition law. Within International Competition Network (ICN), more than 130 competition authorities participate, communicating best practices to relatively newly born competition authorities and promoting discussions on how to formulate proposals for procedural and substantive convergence of each economy's competition laws and regulations.

Also, many FTAs/EPAs include competition provisions. Japan included competition-related provisions in EPAs with Singapore, Mexico, Malaysia, The Philippines, Chile, Thailand, Indonesia, ASEAN, Viet Nam, Switzerland, India, Peru, Australia and Mongolia. Economic benefits of introducing competition laws etc. will be presented by Mr Ogawa from OECD later.

On the other hand, competition chapter is facing also challenges and opportunities. One of the emerging issues is introducing SOEs' disciplines in FTAs/EPAs. We will have a chance to discuss those issues with Mr Kawashima as well as with other economies' negotiators for competition chapter later.

APEC is playing an important role in advocacy, capacity building and cooperation in the competition field. APEC adopted "APEC Principles to Enhance Competition and Regulatory Reform, 1999", which endorse non-discrimination as well as transparency which are considered as "core principles" for competition chapter in WTO Ministerial Declaration in Doha. Also, APEC set up "APEC Competition Policy and Law Database" which provides information on each economy's competition laws and policies. Both principles and database are referred to in the competition chapter of TPP. So it is

appropriate and useful to have this kind of competition related workshop in the framework of APEC.

This workshop is expected contribute to further advocate the importance of competition chapter as well as to discuss challenges and opportunities in the competition field.

3. Workshop's Sessions

Experts provided presentations using the attached documents on the following topics:

1) Session 1

In Session 1 about "Significance of Competition Policy and the Meaning of the Establishment of the Chapter on Competition in FTAs/EPAs", **Mr Satoshi Ogawa, Competition Lawyer, Competition Division, Directorate for Financial and Enterprise Affairs, OECD** divided his speech into 2 parts: 1) Significance of competition policy and 2) the meaning of establishing competition chapter in FTAs/EPAs.

For the first part, he discussed the benefits brought along by competition policies in three respects 1) aggregate economic benefits, 2) distributional benefits and 3) social benefits, and pointed out as follows.

- Competitive practices help to save overcharges induced by cartels.
- The overcharges saved range from basic commodities bought by consumers to public procurement.
- Competitive markets gave momentum to innovation and productivity enhancement leading to great economic growth.
- Regulatory barriers are proven to hold back growth in both developed and developing economies.
- Socially, competitive markets alleviate inequality in wealth share and create more jobs, thus reducing poverty, inequality and unemployment.
- Competition also contributes to make politics less corruptive.

For the second part, competition chapters, when established in FTAs/EPAs, can preserve benefits of trade agreements, demonstrate transparency in law enforcement, display strong commitment for foreign investors and business community, promote common understanding and mutual trust between signatories of FTAs/EPAs and establish formal framework for international cooperation and coordination on competition law enforcement.

Q&A

Mr Kudo: I understand that OECD tried to draw a model agreement in the competition field in the past. But since there were only around 55 economies at the time when OECD tried to draw a model agreement in the competition field, it didn't work well. Now that there are around 120 economies which adopted competition law, which was also described by Mr Ogawa's presentation, do you think it is a right time to reconsider to draw a new multilateral framework in the competition field?

Mr Ogawa: In the union, competition is very much high but at the rest of the world competition is not what we expected but thoroughly I think the negotiations for competition is proceeding and as I said OECD has reviewed cooperation agreements and they are very practical. I'd say half of the competition agreements are not so detailed, just describe that they understand the importance of competition. In term of more stern cooperation and in order to establish more formal cooperation, the competition chapters are necessary.

2) Session 2

In Session 2 about "Overview of the Chapter on Competition in the Existing FTAs/EPAs", **Mr Fujio Kawashima, Professor, Graduate School of Law, Kobe University, Japan** started his session by citing reasons for the introduction of competition chapters to 1) combat private barriers replacing public barriers and 2) strategic use of competition law as a substitute for trade restrictions, 3) uphold cooperation in integrated markets, 4) presumably employed by competition authorities themselves (esp. Young enforcing agencies in developing economies) to elevate their mission to "an international commitment" or to promote domestic reforms.

Provisions in competition chapters incorporated 1) obligation to adopt competition law; 2) cooperation, notification and exchange of information, negative and positive comity; 3) enforcement principles of transparency, non-discrimination, procedural fairness and rights of defense; 4) scope of application endeavoring to include all businesses; 5) non-application of dispute settlement; 6) designated monopoly and SOEs; 7) subsidies.

The speech also touched upon trends and challenges facing competition chapters including the concern of discriminatory application of competitive law and the concerns of SOEs

Q&A

Mr Kudo: What will be the ideal or effective SOEs' disciplines to be introduced in FTAs/EPAs?

Mr Kawashima: As TPP suggested economies are very conscious about the importance of public mandate or public functions of SOEs. They try to exempt SOEs from SOE disciplines even if you introduce very stringent rules on SOEs. On the other hand, they try to remove many SOEs from disciplines. So, one of the ideas to strike a balance is defining the scope of the public mandate exemption. Based on the definition of public mandate or public policy mandate, they may help to reduce the scope of exemption of SOEs. Of course, it is a difficult task to define the scope of public mandate. But I think the core issue exists there.

Mr Nicholas Klissas, Senior APEC Coordinator, United States Agency for International Development (USAID): Some time ago, at the economic committee, we had a workshop with OECD on OECD's competition assessment tool and it is noticed in Mr Ogawa's presentation. We looked particularly at regulations or laws that were passed by economies themselves that will hamper or cause restrictions. So it's not competition policy issues about cartels or companies that we are looking at. So Mr

Ogawa did cover competition assessment in his slides about the enormous impact changes in regulation would make. But will competition assessment tool someday appear in FTAs or do you see that they are basically implicitly embodied provision of FTAs?

Mr Kawashima: As far as I examined 80 FTAs with competition chapters, I didn't find any FTAs with specific regulations about competitive assessment recommended by OECD. But there's general obligation to promote competition; maybe this general regulation covers introduction of competition toolkit recommended by OECD. I found one example of European Union-Viet Nam FTA (EVFTA) which incorporated not explicitly OECD but recognized the importance of SOE's governance principles, maybe recommended by OECD.

Ms Cristina Bas, Advisor, Ministry of Foreign Affairs of Chile: As you may know that SOE chapters are subject to discipline governments. I'm very interested in the session you spoke that competition policy chapter is not subject to discipline governments. What are your views regarding why it is possible that SOE chapter is subject to discipline government and competition policy is not? How could that be agreed in TPP?

Mr Kawashima: Already in original North American Free Trade Agreement (NAFTA), provisions for SOEs are subject to disciplines maybe because it also covers anti circumvention provisions targeting the price. They may have authority just like the government and if they're not part of the government, these companies should comply with FTA obligations just like Article XVII of GATT. United States' main objective in the TPP is making SOEs' subject to very effective disciplines. United States made a hard effort to persuade many other economies. I don't know the inside story but I can imagine, without effective disciplines over SOEs, they never agreed upon TPP.

3) Session 3

Session 3 shows challenges facing each economy in negotiating the chapter on competition and effects are expected by the acceptance of the chapter on competition. During Session 3, there are three speakers to talk about 'Challenges and Opportunities in Relation to Acceptance of the Chapter on Competition in FTAs/EPAs' from Thailand, Japan and the Philippines

(1) Ms Parima Damrithamanij, Senior Trade Officer, Office of Trade Competition Commission, Department of Internal Trade, Ministry of Commerce, Thailand presented about challenges and opportunities in relation to acceptance of the chapter on competition in FTAs/EPAs base on the Thailand authority's experience since her working research with laws and policy since 1999.

On development of FTAs/EPAs negotiation, after noting some typical issues of market access and issues from smaller tariff to non-tariff measures, Ms Damrithamanij also pointed that there were new issues relating to international trade including intellectual property, competitions policy and law, environment, labor, government procurement to improve the international standards.

Ms Damrithamanij mentioned that the law should be on market views when talking about competition policy and laws.

Furthermore, Ms Damrithamanij mentioned on the Thailand side, negotiations were influenced by a lot of interests from economy to economies, areas to economies.

Ms Damrithamanij showed the interesting fact for developing economies that some laws from the past could not be applied, while some laws need to be amended or reformed. For her, she realized the level of the language using from the law and policy becoming more concrete with more details, not too broad and general like the legal system in the past.

Ms Damrithamanij said Thailand had been in the process of reforming its competition law and policy to be more up to date.

To summarize, Ms Damrithamanij emphasized there were two important parts: positions and interests; when negotiating, the economy had to take care of the interests of both sides which developed from time to time and special position of their government's policy to be put into the past and presents as well as facts and process.

(2) Mr Toru Ishiguro, Assistant Director, International Affairs Division, Fair Trade Commission, Japan started off the benefits and issues of the competition chapter of EPA from the experience of Japan.

Mr Ishiguro divided his speech into three parts: 1) overview of Japan's EPAs, 2) benefits of the competition chapter and 3) issues on the competition chapter.

Mr Ishiguro stated that there are basic elements of EPA that the competition chapter follows, referring to “the appropriate measures against anticompetitive practices” and “cooperation on issues relating to competition law enforcement” as the central elements.

Mr Ishiguro also listed out the benefits of the competition chapter: 1) Contribution to the enforcement cooperation between competition agencies, 2) Building mutual understanding of enforcement activities and 3) Improvement of the predictability for foreign enterprises. Beside the benefits, Mr Ishiguro mentioned that the first issue on his presentation could be raised: the matrix of the contents of cooperation that are contained in the competition chapters of EPA.

Mr Ishiguro remarked three economy types with different competition laws and experiences of policy. In his presentation, economy type 1 had comprehensive competition law and enough experience of competition policy, while type 2 had comprehensive competition law but less experience of competition policy and the cooperation with this economy may be reviewed and enhanced in the future. Then Type 3 had no comprehensive competition law currently so the cooperation should be approached as tailor-made for counterparties.

The second issue to be concerned about was exchanging information processes in appropriate cases. Mr Ishiguro described the article 43-2 of Japanese Anti-Monopoly Act (AMA) which works as a legal gateway for the exchange of information.

Lastly, Mr Ishiguro then covered Japan's experience about TPP and national law amendment.

There were relevant law amendments regarding this multilateral EPA which puts high emphasis on the procedural fairness of competition law enforcement, and the commitment procedure is going to be implemented in Japanese AMA when TPP is put into force.

(3) Ms Isabela Rosario G. Villamil, Policy Research Officers, Competition Commission, the Philippines introduced the opportunities and challenges in the acceptance of a chapter on competition in FTAs from the Philippines.

Ms Villamil presented about four free trade agreements of the Philippines, opportunities from a chapter on competition and the challenges in the acceptance. The most remarked part from disciplines on SOEs.

Ms Villamil shared cases of the FTAs of the Philippines and FTAs with competition provisions, she mentioned benefits of incorporating competition provisions such as reinforcing internal reform and advocacy that could be practiced in reality and in the future.

Ms Villamil also pointed out that the transparency should be solved and pushed. She especially emphasized concerns related to SOEs designated as receiving privileged treatment from competition authority's policy, which should be applied in a competitive neutrality framework.

In Ms Villamil's opinion, challenge from differences in competition laws and policies, in different in capacity and level of development between economies could influence for APEC community in enforcement, conceptual and political negotiations.

Q&A

(Mr Kudo to Ms Damrithamanij)

Mr Kudo: In the process of reforming its competition law and policy, especially SOEs will be subject to the competition law except for conducts undertaken for the purposes of national securities, public policy or public interest, with these amendments, will your economy's position towards including SOE's disciplines to competition chapter of FTAs/EPAs change?

Ms Damrithamanij: FTAs negotiation, the agreement from more than one economy and under that the governments will come together to negotiate and to design which topics to have, which economy to come to participate. My answer is that I could not state, in particular, in changing positions of my economy policy or laws in the future. But, we now approach new laws and implement the currently laws. Negotiating FTAs/EPAs, currently, it will need the direction from government in the check in, in term of implementation the laws. I cannot answer exactly which specific topics will be raised in the competition laws. But, of course I think we are more ready to develop and to combine more the pictures of obligations and provisions.

(Mr Kudo to Mr Ishiguro)

Mr Kudo: About the issue of “Procedural fairness in competition law enforcement”, what is the significance of having this article in the competition chapter of FTAs/EPAs?

Mr Ishiguro: The fair procedures realize benefits for enterprise’s business by improving the predictability as I have explained in the presentation, while they might possibly involve some domestic measures on competition policy just like Japan has been implementing commitment procedure as a result of signing TPP.

(Mr Kudo to Ms Villamil)

Mr Kudo: You clarified the benefits and challenges of the inclusion of competition related provisions in FTA, convergence/divergence in competition policy and law. You although made a thorough analysis on SOEs, including importance of SOEs, concerns related to SOEs, addressing concerns through competition policy and law, benefits and challenges to address the SOEs issues in FTA and in competition chapter. You also emphasized that an FTA can discipline policies that give SOEs an unfair advantage over private firms. You also referred to challenges, such as enforcement/institutional challenges, conceptual/substantive challenges, political/practical challenges. You said that it might be better to have SOEs chapter separately rather than to have SOEs provisions in competition chapter. Is that your position?

Ms Villamil: I think to be much more contribution to chapter about SOE would spend as much time in specific SOEs or entire in the chapter. So I think to frame on the provisions also take as much time as so. And you know it could be effect on the government authority, example the Philippines and they need to able to speak more and you know. So I think there should be here to be on the chapter of SOE in the competition provisions.

(Attendee to Ms Villamil)

Mr Nicholas Klissas, Senior APEC Coordinator, USAID: You said that it might be better to have SOEs chapter separately rather than to have SOEs provisions in competition chapter. Is that your position?

Ms Villamil: Yes, it should be in chapter as a complement of the competition chapter. Chapter of competition could cover it, deepen but need more time to investigate, maybe to commit more disciplines to SOEs

IV. Summary and Conclusions

1. Summary

Moderator, **Mr Hiroshi Kudo, Senior Deputy Director for FTA/EPA Negotiations, Ministry of Foreign Affairs of Japan** made a brief with the presentations and sharing from speakers.

1) Growing significance of competition policy and the meaning of establishing Competition chapter in FTAs/EPAs are emphasized.

Mr Ogawa summarized significance of competition policy as aggregate economic benefits such as short term consumer benefits and long term innovation and growth, distributional benefits such as addressing inequality, poverty reduction and employment, social benefits such as fighting corruption.

Mr Ogawa also emphasized that the meaning of establishing competition chapter in FTAs/EPAs is to show strong commitment to fair competition, effective and transparent enforcement of competition laws and market economy, therefore now as never before, it is important to include competition provisions in FTAs/EPAs.

Ms Villamil also emphasized that a chapter on competition is now recognized as an important element to ensure that the potential benefits of an FTA can be fully realized. She also emphasized challenges such as differences in competition laws and policies and differences in capacity and level of development in the area of competition policy and law.

Ms Damrithamanij emphasized that from the start, competition policy has domestic nature in itself, but with “market” has expanded beyond borders, international business operations/foreign business people’s conducts can affect domestic business environment.

Mr Ishiguro mentioned the benefits of competition chapter, e.g., cooperation articles in EPA make enforcement cooperation between competition authorities easier, or through the dialogue in the negotiation for the competition chapter, each agency builds mutual understanding and trust, which leads to a shared awareness of sound enforcement activities.

2) Concerns of discriminatory application of competitive law, jurisdiction over subsidies are shared

Mr Kawashima gave reasons for the introduction of competition chapters and introduced Provisions included in competition chapters incorporated. He touched upon trends and challenges facing competition chapters, including the concerns of discriminatory application of competitive law and the and SOEs as the challenges and opportunities in relation to acceptance of competition chapter in FTAs/EPAs

Ms Damrithamanij explained that Thailand has been in the process of reforming its competition law and policy and one of the amendments to the Trade Competition Act P.E. 2542 (1999) is that under the new law, SOEs will be subject to the law except for conducts undertaken for the purposes of national securities, public policy or public interest. She also explained that the efficiency and effectiveness as well as independence of Thailand’s competition authority are pursued through this reform.

Ms Villamil made a thorough analysis on challenges and opportunities in relation to acceptance of the competition chapter in FTAs/EPAs, including convergence or divergence in competition policy and law, confidentiality and jurisdiction over subsidies and SOEs etc.

3) “Exchange of Information” is highlighted

That is emphasized by Mr Ishiguro which is a key activity on cooperation between agencies as one of the challenges on the competition chapter.

Ms Villamil also mentioned the significance of “Exchange of Information” in her presentation.

2. Conclusions

Before concluding, **Mr Kudo** emphasized the following 4 points from today’s discussions.

1) All shared the view that the importance of Competition chapter in FTAs/EPAs is growing

As Mr Kawashima presented, around 88% of the FTAs/EPAs currently in force devote specific provisions or even entire chapters to competitive related matters, compared to around 60% before 1990.

Furthermore, 71.4% FTA signed after 2000, have competition chapter. Also, Mr Ogawa emphasized that promoting competition leads to increasing economic benefits, productivity and growth etc. Furthermore, Mr Ogawa emphasized that one of the meaning of establishing competition chapter in FTAs/EPAs is to show strong commitment to fair competition, effective and transparent enforcement of Competition laws and market economy.

Ms Villamil also emphasized that a chapter on competition is now recognized as an important element to ensure that the potential benefits of an FTA can be fully realized.

Therefore, as Mr Ogawa concluded in his presentation now as never before, it is important to include competition provisions in FTAs/EPAs.

2) Challenges and opportunities in relation to acceptance of the chapter in competition in FTAs/EPAs are shared

Participants highlighted the recent trend and challenges of competition chapter, including the concerns of discriminatory application of competitive law and the concerns of SOEs, exchange of information and confidentiality, Thailand’s reforming process in competition law and policy, differences in capacity and level of development in the area of competition policy and law, institutional/substantive/practical challenges etc.

3) APEC is playing an important role in advocacy, capacity building and cooperation in the competition field continuously

Taking into consideration the process in a comprehensive and systematic manner towards the eventual realization of the FTAAP to which APEC is committed, it is worth discussing the future competition chapter as well as SOE chapter in the framework of APEC.

We also reaffirm our commitment that the FTAAP should be built upon ongoing regional undertakings, and through possible pathways including the TPP and RCEP.

4) The possibility of pursuing new multilateral framework in the competition field as a food for thought

Situation has been developing for competition related laws and regulations. It might be a right time to reconsider a new multilateral framework in the competition field.

The key elements which should be included in the possible future multilateral framework in the competition field might be transparency, non-discrimination and procedural fairness as included in Ministerial declaration of DOHA WTO Ministerial Conference 2001 as core principles.

IV. Next Steps

Mr Kudo hinted to continue dialogues on the matter related to competition policy, based on the results of this workshop including challenges and issues which were raised in this workshop. He suggested that Japan identify key areas in competition policy on which APEC will need to focus, in order to realize a potential FTAAP.

Japan intends to hold a workshop of the relevant theme next year again under 3rd CBNI, following the necessary procedures of APEC.

Appendix 1 : Agenda

FTAAP Capacity Building Workshop on FTA Negotiation Skills on Competition under the 2nd REI CBNI (CTI 02/2017T)

19th August 2017

'Grand Suite', Saigon Prince Hotel

Ho Chi Minh, Viet Nam

Program

08:30 - 09:00	Registration
09:00 - 09:10	Opening Remarks - Ms Marie Sherylyn D Aquia , CTI Chair (Supervising Trade-Industry Development Specialist, Bureau of International Trade Relations, Department of Trade and Industry, the Philippines)
09:10 - 09:20	Introduction - Mr Hiroshi Kudo , Senior Deputy Director for FTA/EPA Negotiations, Ministry of Foreign Affairs, Japan (Moderator)
09:20 - 10:40	Session 1 : Significance of Competition Policy and the Meaning of the Establishment of the Chapter on Competition in FTAs/EPAs <i>This session presents the significance of competition policy and its impact on a domestic economy based on an empirical research and shows the meaning and benefits of the establishment of the chapter on competition in FTAs/EPAs.</i> - Mr Satoshi Ogawa , Competition Lawyer, Competition Division, Directorate for Financial and Enterprise Affairs, OECD Session 2: Overview of the Chapter on Competition in the Existing FTAs/EPAs <i>This session overviews the chapter on competition in the existing FTAs/EPAs, and reviews the key elements, recent trend and tasks of them based on the empirical research.</i> - Mr Fujio Kawashima , Professor, Graduate School of Law, Kobe University, Japan (Open the floor for discussion and Q&A for each session)
10:40 - 10:55	Coffee Break
10:55 - 12:10	Session 3 : Challenges and Opportunities in Relation to Acceptance of the Chapter on Competition in FTAs/EPAs <i>This session shows challenges facing each economy in negotiating the chapter on competition and effects are expected by the acceptance of the chapter on competition.</i> - Ms Parima Damrithamanij , Senior Trade Officer, Office of Trade Competition Commission, Department of Internal Trade, Ministry of Commerce, Thailand - Mr Toru Ishiguro , Assistant Director, International Affairs Division, Fair Trade Commission, Japan - Ms Isabela Rosario G. Villamil , Policy Research Officer, Competition Commission, The Philippines (Open the floor for discussion and Q&A)
12:10 - 12:30	Wrap Up and Closing - Mr Hiroshi Kudo , Senior Deputy Director for FTA/EPA Negotiations, Ministry of Foreign Affairs, Japan (Moderator)



Significance of competition policy and the meaning of establishing competition chapter in FTAs/EPAs

Satoshi Ogawa
Competition Lawyer
OECD Competition Division

Ho Chi Minh, Vietnam - 19 August 2017

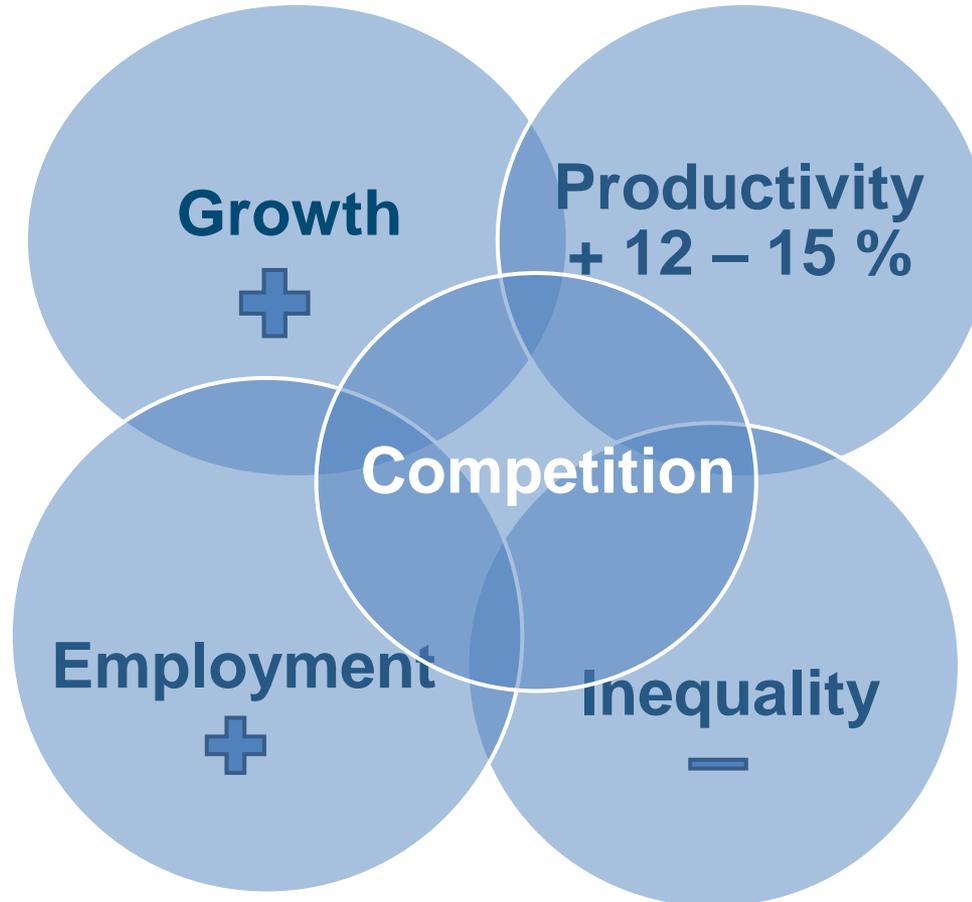


Table of Contents

1. Significance of competition policy
 - Aggregate economic benefits
 - Distributional effects
 - Social benefits
2. The meaning of establishing competition chapter in FTAs/EPAs
 - Rationales
 - Comparison with inter-agency co-operation agreements



Why We Care About Competition?



Source: OECD 2014



1. Significance of competition policy

- Aggregate economic benefits:
 - Short-term for consumers, and other buyers including public sector
 - Longer term: innovation and growth
- Distributional benefits
 - Inequality
 - Poverty reduction
 - Employment
- Social benefits
 - Fighting corruption



1. Significance of competition policy

- **Aggregate economic benefits:**
 - Short-term for consumers, and other buyers including public sector
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 - Fighting corruption



Consumer benefits

Harm from Cartels

- On average 1990 – 2013, **discovered** international cartels affected US\$750bn commerce per year, overcharge 40% (Connor, 2014)
- Just **one** international cartel on vitamins 1990-1999 resulted in overcharges of US\$2700m

Source: Estimates from Clarke and Evenett (2002)



Surveys of Cartel Overcharges

Reference	Number of Cartels	Mean Overcharge (percent)	Median Overcharge (percent)
Cohen and Scheffman (1989)	5-7	7.7-10.8	7.8-14.0
Werden (2003)	13	21	18
Posner (2001)	12	49	38
Levenstein and Suslow (2002)	22	43	44.5
Griffin (1989)	38	46	44
OECD (2003), excluding peaks	12	15.75	12.75
Weighted average	102-104	36.7	34.6



Consumer benefits

...from reduced regulatory barriers

Issue	Annual Benefit	Number of provisions affected	Value, €m
“Fresh” milk	€33m (consumer benefit/year)	2	33
Levy on flour	€8m-11m (value of levy/year)	1	8
Sunday trading	€2.5bn (annual expenditure), plus 30,000 new jobs	3	2 500
Sales and discounts	€740m (annual turnover)	9	740
Over the Counter pharmaceuticals	€102m (consumer benefit/year)	23	102
Marinas	€2.3m (annual turnover)	10	2
Cruise business	€65m (annual turnover)	4	65
Advertising	€1.8b (consumer benefit/year)	14	1 800
<i>Everything else</i>	???	263	???

OECD review of 4 sectors in Greece

Total: €5.2bn + ???



Significance of competition policy

- **Aggregate economic benefits:**
 - Short-term for consumers, and other buyers including public sector
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 - Employment
- **Social benefits**
 - Fighting corruption



Productivity and growth

Mechanisms





Productivity and growth

Economic studies: UK, South Africa

- “The most competitive firms experienced productivity growth rates 3.8 - 4.6 percentage points higher than the least competitive.”

Nickell, Quarterly Journal of Economics, 1996

- More competition could increase productivity growth in South Africa by 2 – 2.5 percentage points per year

Aghion, Review of Economics and Statistics, 2009

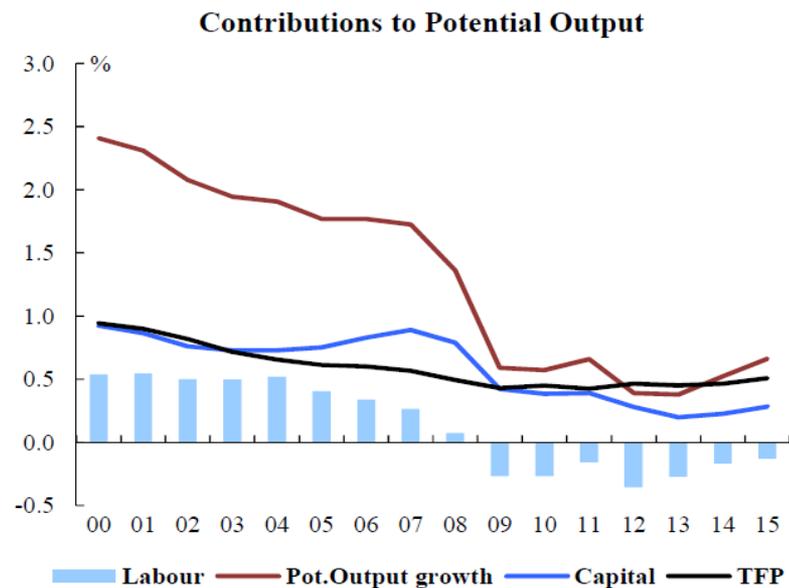
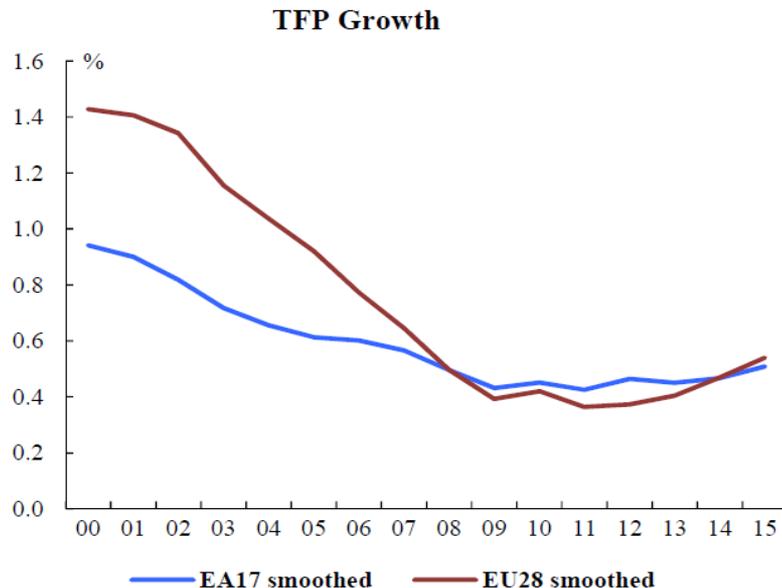


Productivity and growth

Economic studies: European Union

- “[E]ven a relatively small increase in the effectiveness of competition policy enforcement would give a significant boost to productivity...[O]ver the last decade TFP [total factor productivity] growth has had an impact on total GDP as important as increases in labour and capital, and it has become the most important factor during the last five years.”

European Commission (2017), Commission Staff Working Document; Impact Assessment (SWD (2017) 114 final)





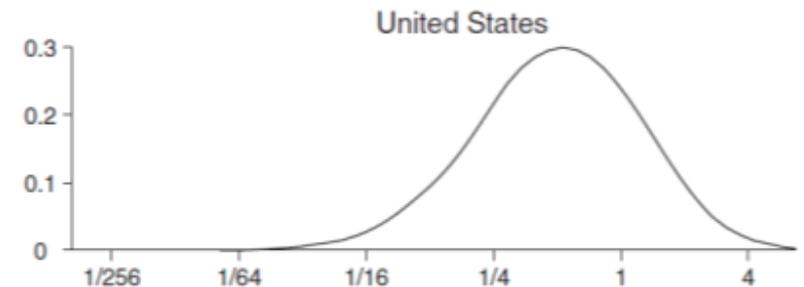
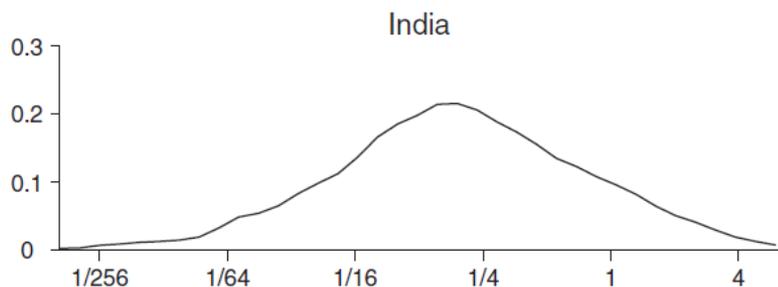
Productivity and growth

Economic studies: Asia

- **Japan:** Over a 50-year period, cartels almost never found in successful exporting industries, even though they were prevalent in the rest of the economy.

Porter, Takeuchi, and Sakakibara (2000)

- **India** can rapidly increase productivity by putting pressure on its long 'tail' of inefficient firms



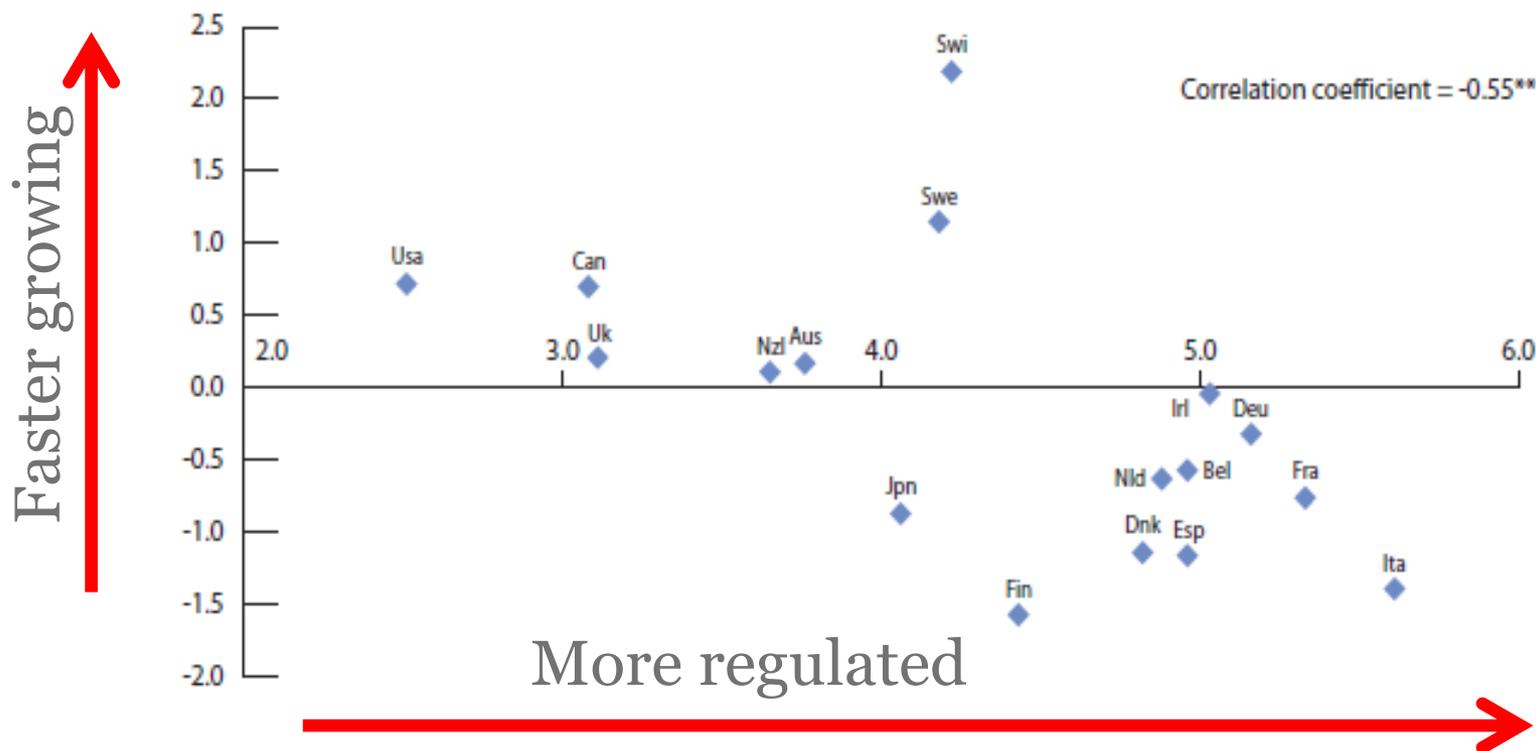
Source: Hsieh and Klenow (2009)



Productivity and growth

Regulatory barriers hold back growth

Increase in multi-factor productivity compared to regulatory stance



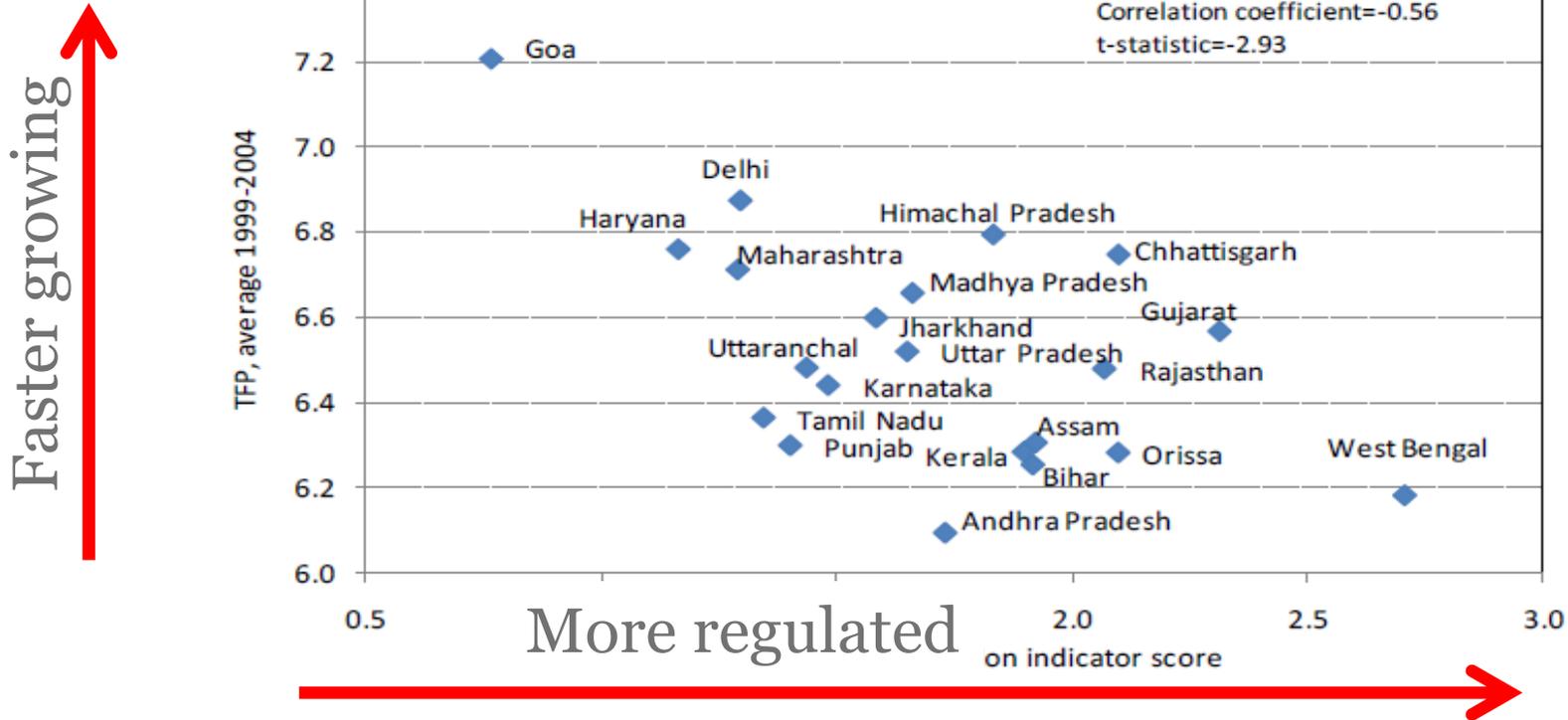
Source - Arnold, J., Nicoletti, G. and Scarpetta, S. (2011). "Does anti-competitive regulation matter for productivity? Evidence from European firms". IZA Discussion Paper No. 5511.



Productivity and growth

...in developing countries too

Increase in multi-factor productivity compared to regulatory stance



Source: OECD, using Indian National Accounts statistics



Significance of competition policy

- Aggregate economic benefits:
 - Short-term for consumers, and other buyers including public sector
 - Longer term: innovation and growth
- **Distributional benefits**
 - **Inequality**
 - **Poverty reduction**
 - **Employment**
- Social benefits
 - Fighting corruption

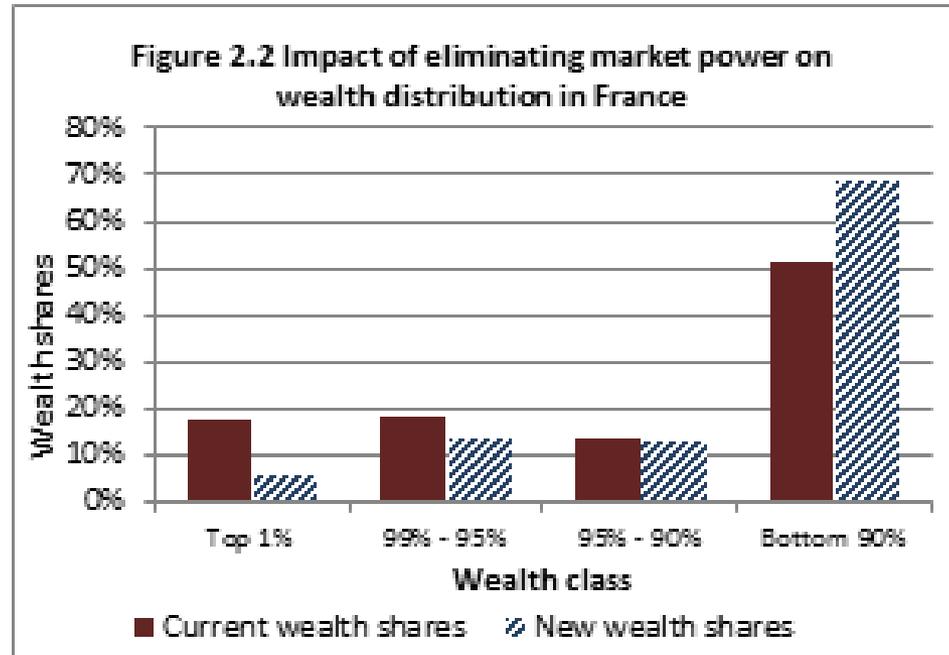


Distributional outcomes: inequality

Monopolies and cartels create inequality

- Monopolies and cartels:
 - Raise prices for everyone; and
 - Increase income for holders of financial wealth

OECD researchers are analysing data to quantify this effect





Distributional outcomes: inequality

Monopolies create inequality

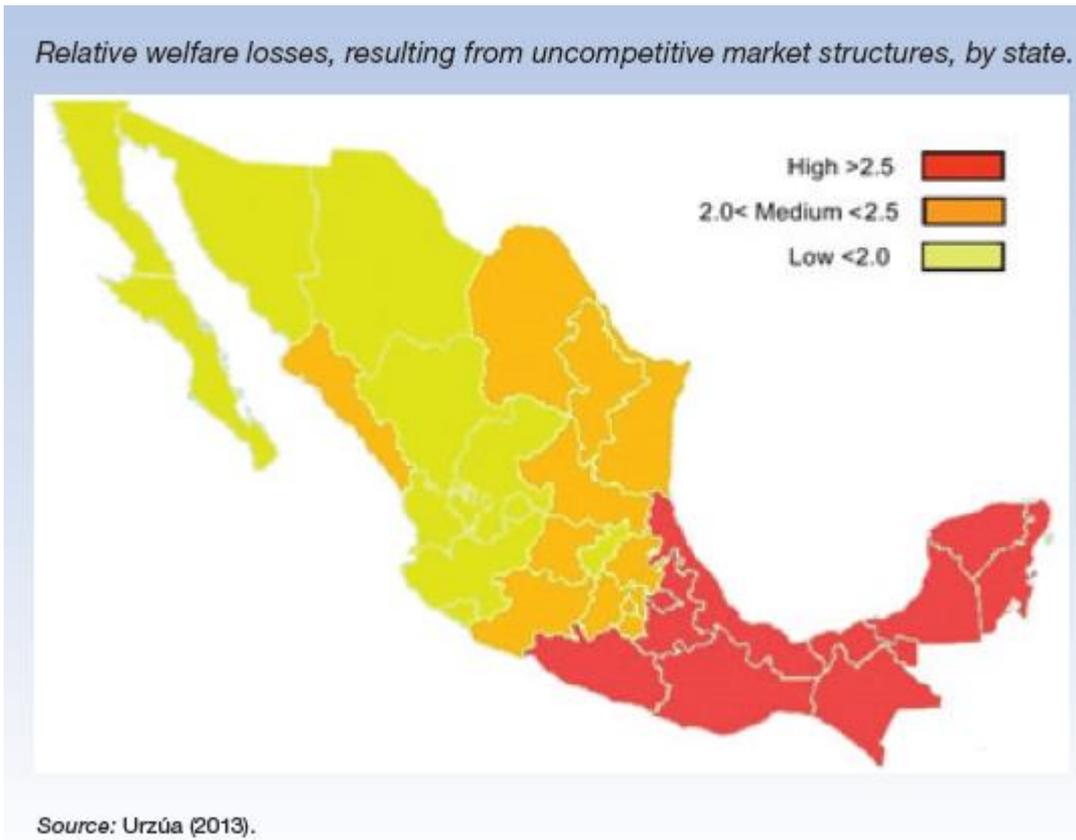
- Data from eight OECD jurisdictions (Canada, France, Germany, Korea, Japan, Spain, the UK and the US)
 - On average in the sample, market power *increases the wealth of the richest 10% by between 12% and 21%*, while it *reduces the income of the poorest 20% by between 14% and 19%*



Distributional outcomes: inequality

Monopolies create inequality

Example Mexico:



Impact of market power on household spending on staple products like tortillas, chicken and milk.
→ Harm caused by monopoly power is greatest among the poorest 10 % of households. In urban areas they suffer a welfare loss that is 20 % higher than for the wealthiest 10 %, even more pronounced in rural areas.

Source: OECD 2015a



Distributional outcomes: poverty reduction

The poor suffer most from price-fixing





Distributional outcomes: employment

Competitive markets create jobs

- Long term: more competitive economies are more dynamic, creating more jobs (OECD 2015b)
- Liberalisation can create jobs:
 - More competition from European Single Market reduces profits by 3%, reduce unemployment by 0.5%. *Griffith et al Economic Journal 2007:*
 - Regulatory restrictions reduced retail employment in France by 10% (*NBER Working Paper No. 8211*)
- There can also be short-term job losses as inefficient businesses close, but increased competition will lead to a steady growth of employment after two-three years (OECD 2015b)



Significance of competition policy

- Aggregate economic benefits:
 - Short-term for consumers, and other buyers including public sector
 - Longer term: innovation and growth
- Distributional benefits
 - Inequality
 - Poverty reduction
 - Employment
- **Social benefits**
 - **Fighting corruption**



...and it's not just economic outcomes

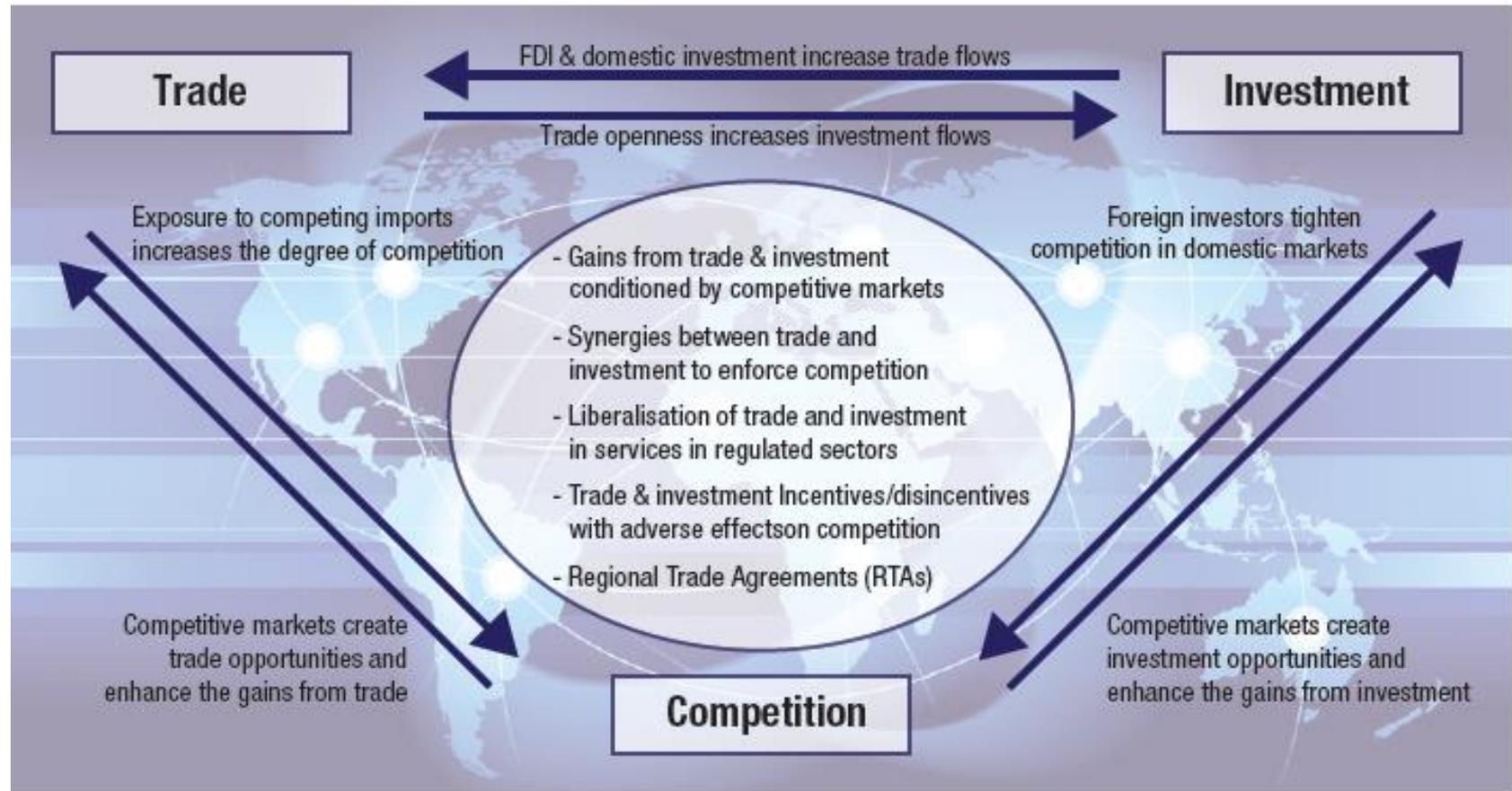
Monopolies corrupt the political process





Relationships between trade, investment and competition policies

The relationships between outward-oriented trade, investment and competition policies



Source: OECD 2007



The meaning of establishing competition chapter in FTAs/EPAs (i)

- Preserving benefits from FTAs/EPAs
 - Negative impacts of anticompetitive conduct on effective market economy and trade
- Competition policy as an important element in FTAs/EPAs:
 - Both underpin market economy and free trade
- Announcing adoption of fair market economy, effective competition policy and transparent competition law enforcement:
 - Demonstrating strong commitment for foreign investors and business community



The meaning of establishing competition chapter in FTAs/EPAs (ii)

- Promoting common understanding and mutual trust between signatories of FTAs/EPAs
 - Basis for effective international co-operation
- Establishing formal framework for international co-operation and co-ordination on competition law enforcement
 - Globalisation and increase of anticompetitive practices beyond national borders
- Convergence of competition laws
 - Leading to enhanced co-operation and allowing for global business with less costs



The international dimension of competition laws across the globe



Source: The George Washington University Competition Law Center
<http://www.gwclc.com/World-competition-database.html>

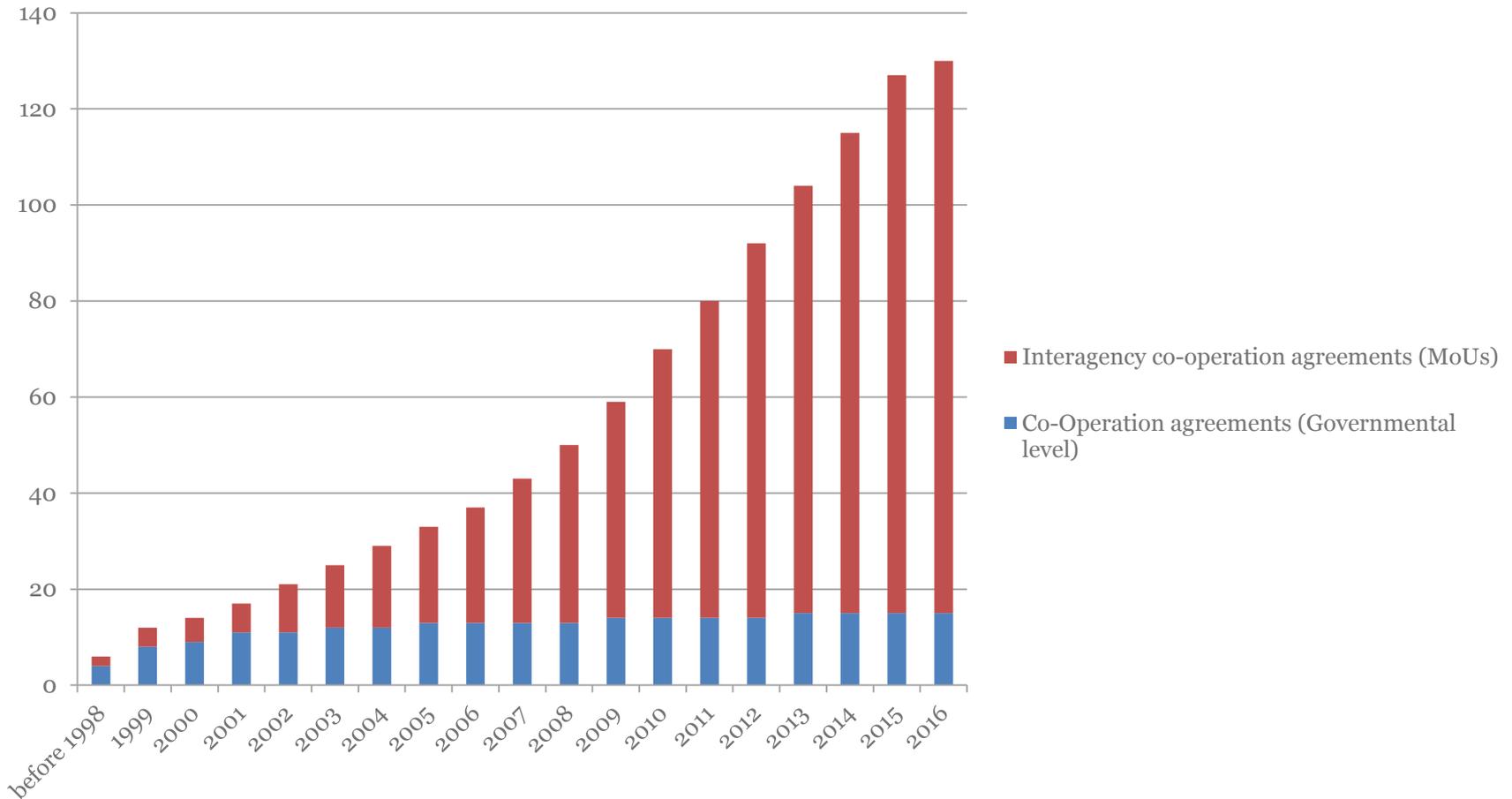


Development of co-operation agreements among competition authorities

- There are increasing number of co-operation agreements, arrangements or Memorandum of Understanding (MoUs) among competition authorities, not among governments:
 - More practical and detailed in terms of international co-operation
 - Easy to conclude and amend, based on developments and experience each other



Development of co-operation agreements among competition authorities



Source: OECD (2016)



The meaning of establishing competition chapter in FTAs/EPAs (iii)

- “Formal” framework for inter-agency co-operation MoUs
- Some provisions well-placed in FTAs/EPAs than inter-agency MoUs
 - E.g., State-owned enterprises, competition neutrality, subsidies
- Effect on enactment or amendment to domestic competition laws
 - Working as a momentum to amend competition law
 - E.g., introduction of commitment procedure because of the TPP
 - Resulting in more convergence
- Show strong commitment to fair competition, effective and transparent enforcement of competition laws and market economy



The meaning of establishing competition chapter in FTAs/EPAs - Conclusion

- Now as never before, it is important to include competition provisions in FTAs/EPAs:
 - In this globalised economy
 - Need for enhanced international co-operation to fight against anti-competitive conduct beyond national boarder
 - Convergence, which is beneficial for competition authorities and business community and investment



OECD materials:

- OECD (2017) INEQUALITY: A HIDDEN COST OF MARKET POWER;
[https://one.oecd.org/document/DAF/COMP\(2015\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)10/en/pdf)
- OECD (2016) INVENTORY OF PROVISIONS IN INTER-AGENCY CO-OPERATION AGREEMENTS (MoUs);
[https://one.oecd.org/document/DAF/COMP/WP3\(2016\)1/REV2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)1/REV2/en/pdf)
- OECD (2015a) Competition law and policy: Drivers of economic growth and development in: Coherence for Development, Issue 4, 2015; http://www.oecd.org/pcd/002014381_CfD_E-book_FINAL%20VERSION%20FOR%20WEB.pdf
- OECD (2015b) Does competition kill or create jobs?;
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2015\)9&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2015)9&docLanguage=En)
- OECD (2014) Competition and macroeconomic outcomes factsheet;
<http://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>
- OECD (2013), Competition and Poverty Reduction, OECD Policy Roundtables, OECD Global Forum on Competition, Paris; <http://www.oecd.org/daf/competition/competition-and-poverty-reduction.htm>
- OECD (2007), The interaction amongst trade, investment and competition policies, OECD Trade Policy Working Paper No. 60, OECD, Paris



Thank you for your attention!

FTAAP Capacity Building Workshop on
FTA Negotiation Skills on Competition
(19th Aug. 2017)

*Overview of Chapters on Competition in the Existing
FTAs/EPAs: Recent Trend and Challenges*

Fujio Kawashima

(Kobe University/Shanghai Jiao Tong University)

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1. Introduction

- (1) Proliferation of Regional Trade Agreements (RTAs) such as Free Trade Agreements (FTAs); or Economic Partnership Agreements (EPAs)
May be reaction to the deadlocked Doha round in the WTO
- (2) One of “the Singapore Issues,” Competition Policy not negotiated in the Doha Round for a decade (2004 Framework Agreement)
- (3) As shown below, about 70% of FTAs/EPAs signed after 2000 have chapters on competition policy (Competition Chapters), seemingly in order to fill such a gap in rule-making.
- (4) This presentation tries to answer:
 - How many FTAs have Competition Chapters?
 - Why do FTAs introduce Competition Chapters?
 - What components do Competition Chapters have?
 - What effects do they have?
 - What are the recent trend and challenges of Competition Chapters?

Table of Contents

1. Introduction
2. Competition Chapters in the existing FTAs/EPAs
3. Why Competition Chapters in FTAs/EPAs?
4. Typology of Provisions in Competition Chapters
5. Competition and Convergence between Models of Competition Chapters?
6. Recent Trend and Challenges

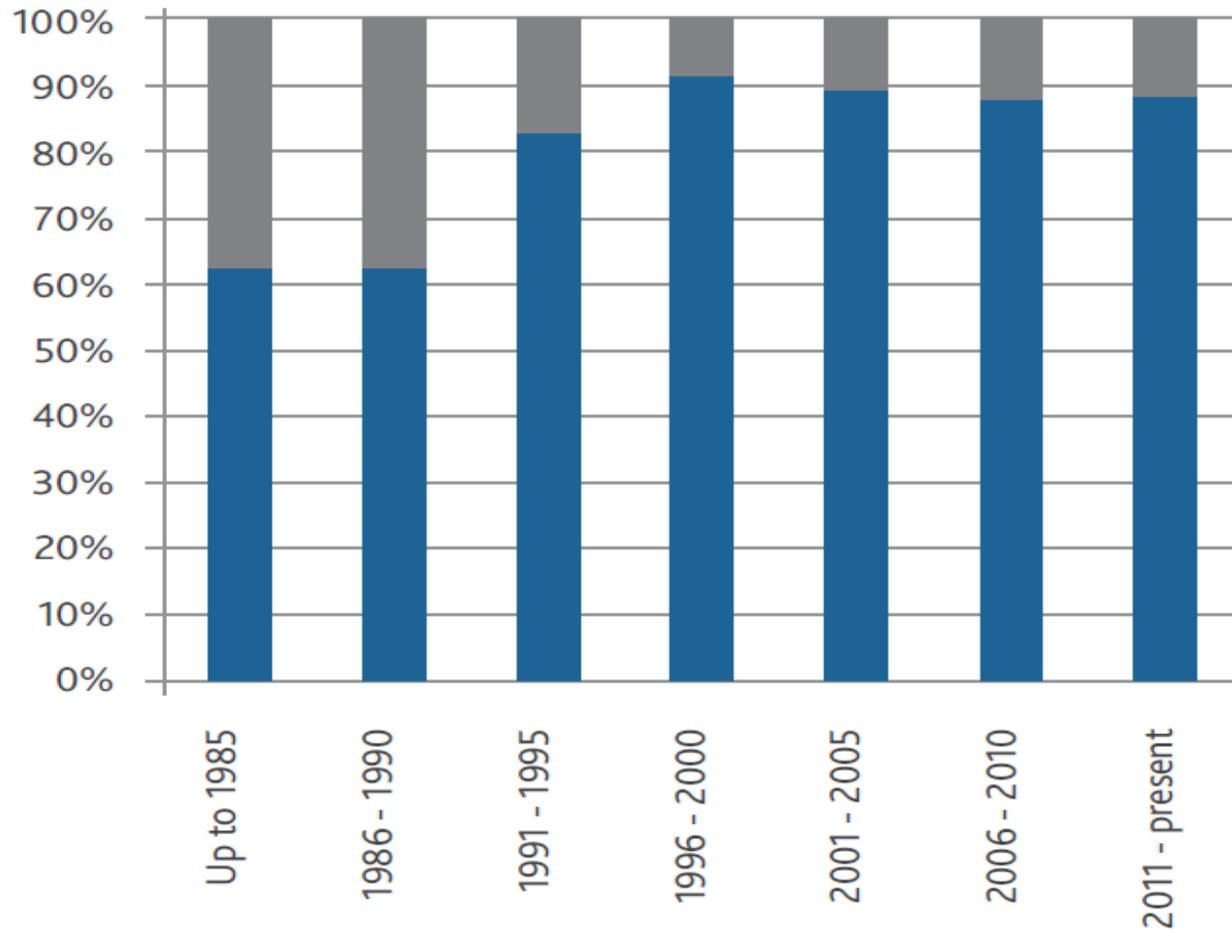
2. Competition Chapters in the existing FTAs/EPAs

(1) Many research found the proliferation of FTAs/EPAs with Competition Chapters and provisions

- Solano, O. and A. Sennekamp (2006), “[Competition Provisions in Regional Trade Agreements](#)”, OECD Trade Policy Papers, No. 31.
- Bourgeois, J et al.(2007), “[A Comparative Analysis of Selected Provisions in Free Trade Agreements](#)”, Commissioned by DG TRADE.
- Bradford, A. and T. Büthe (2015), “Competition Policy and Free Trade.” In Andreas Dür and Manfred Elsig, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements*, Cambridge University Press, Cambridge.
- Laprévôte, F. et al (2015), “[Competition Policy within the Context of Free Trade Agreements](#)”, E15 Expert Group on Competition Policy and the Trade System, Think Piece.

(2) According to Laprévôte et al. (2015), among 216 FTA samples, “an increasing number of FTAs—**88 percent of the agreements currently in force** (from 60 percent before 1990)—devote specific provisions or even entire chapters to competition related matters (Figure 1).”

Figure 1 Percentage of FTAs with Competition-specific Chapters/Provisions



Source: Lapr votte et al. (2015), p.2

2. Competition Chapters in the existing FTAs/EPAs

(3) Statistics of Competition Chapters only

Note: Lapr votte et al. (2015) counted FTAs/EPAs with Competition Chapters and **provisions as well**.

80 (71.4%) out of 112 FTAs signed after 2000, available at the following sites:

- [Australian Government FTA Portal](#)
- [China FTA Network](#)
- [FTAs/EPAs, MoFA, Japan](#)
- [JFTC Int'l Relations](#)
- [Korea Customs FTA Portal](#)
- [New Zealand Foreign Affairs and Trade](#)
- [SICE, Trade Agreements in force](#)
- [WTO Center, VCCI, Vietnam](#)

(Dataset NOT comprehensive, especially about EU/EFTA, Central Asia, Africa)

3. Why Competition Chapters in FTAs/EPAs?

Two main rationales for competition chapters in FTAs:

Trade policy and competition policy justifications

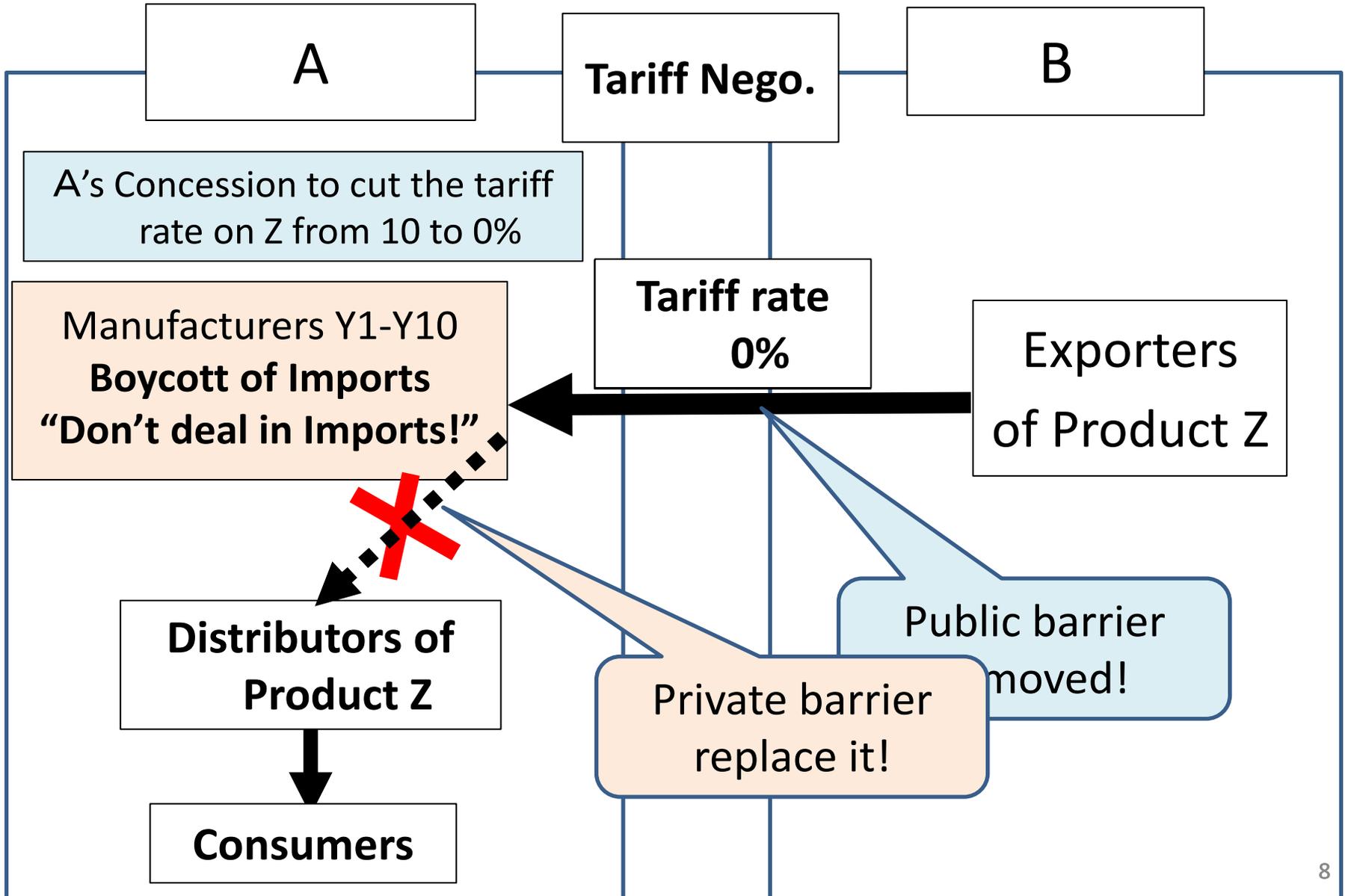
(1) Trade policy justifications No.1: Combatting Private Barriers replacing Public Barriers *E.g.*, EEC Treaty of Rome Arts.85/86(1957): Trade liberalization with competition law

China-Korea FTA Art. 14.1 (“Each Party understands that proscribing anti-competitive business practices of enterprises ... **contribute to preventing the benefits of trade liberalization from being undermined...**”)

Japan-Sw EPA Art.103 (“1. Recognising that **anticompetitive activities may nullify or impair the benefits of liberalisation** of trade and investment and impede the efficient functioning of its market, each Party shall take measures which it considers appropriate against anticompetitive activities, in accordance with its laws and regulations.”) See also Japan-Chile EPA Art.166

P4 Art.9.1.3 (“**avoid the benefits of this Agreement in terms of the liberalisation process in goods and services being diminished or cancelled out by anti-competitive business conduct.**”)

Figure 2 Private Barriers replacing Public Barriers



3. Why Competition Chapters in FTAs/EPAs?

(2) Trade policy justifications No.2:

Combatting Strategic Use of Competition Law

See also 6 (1)

Competition law itself may be used as another public barrier or “**a substitute for trade restrictions**” (Bradford and Büthe 2015: 260–62)?

Addressing such concerns by: for example, provisions of principles such as

“**transparency, non-discrimination and procedural fairness**” & **negative comity** ?

(*See Section 4 below*)

3. Why Competition Chapters in FTAs/EPAs?

(3) Competition Policy justification No.1: Cooperation in integrated markets

- **FTAs integrate markets.** Anticompetitive practices not only be found within a jurisdiction but also be organized as **international cartels and effects extend across the border.** Cf. One M&A may affect many economies.
- **Challenges: How to collect evidence scattered over the region to a lot of jurisdictions.** In order to address such int'l anticompetitive practices, competition authorities need to closely cooperate and coordinate.
- **Also applied to the case of *de facto* integrated markets even without FTAs.**

E.g., Japan-U.S. Agreement concerning Cooperation on Anticompetitive Activities (1999).

See also OECD, [International Enforcement Co-operation \(2013\)](#).

3. Why Competition Chapters in FTAs/EPAs?

(4) Competition Policy (Authority?) justification No.2

- Competition Authorities themselves may have wanted Competition Chapters in FTAs in order to **elevate their mission to “an international commitment.”**

E.g., Young enforcing agencies in developing economies

- Otherwise, they may have introduced specific provisions into Competition Chapters in order **to promote domestic reforms.**

E.g., Commitment Procedures obliged in TPP Art.16.2.5
JFTC wanted it in order to overcome domestic resistance? But precedent of KORUS Art.16.1.5

3. Why Competition Chapters in FTAs/EPAs?

(5) Tentative Conclusion of Section 3

Reality may be mixtures of several rationales

- Rationale 1: Most persuasive based on, and consistent with, the text
- Rationale 2: Relatively recent one after 2001
- Rationale 3: Relatively persuasive
- Rationale 4: Maybe applicable on case-by-case basis

4. Typology of Provisions in Competition Chapters

(1) **Obligation to adopt competition law etc.**

- a. Adopt or maintain competition legislations
- b. Take appropriate actions
- c. Maintain competition authorities

NAFTA (1992) Article 1501, para.1 (“Each Party shall **adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action** with respect thereto...”):

Most basic element since NAFTA until present

US-Singapore FTA Art.12.2, footnote 12-1 (“12-1 Singapore **shall enact general competition legislation** by January 2005”), Enact Oct.2004, Partly in force Jan.2005

4. Typology of Provisions in Competition Chapters

(2) Cooperation

- a. Recognizing Importance of Cooperation
- b. Notification and Exchange of Information

NAFTA (1992) Article 1501, para.2 (“Each Party **recognizes the importance of cooperation and coordination** among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including **mutual legal assistance, notification, consultation and exchange of information...**”).

4. Typology of Provisions in Competition Chapters

(2) Cooperation (cont.)

c. Negative and Positive Comity (Figure 3)

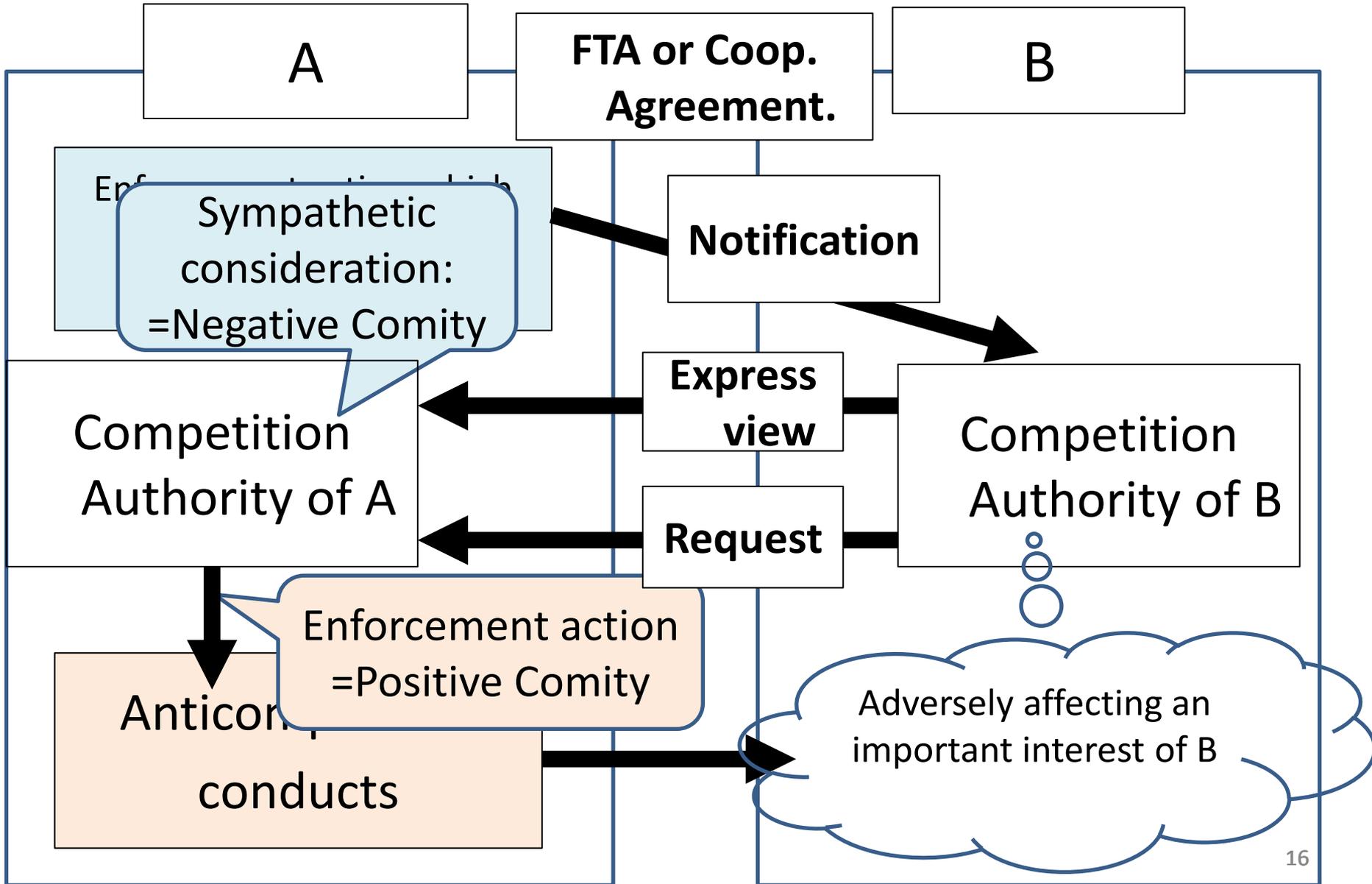
E.g., Canada-EFTA FTA (2008) Art.15 (“2. ... **a Party shall notify another Party when a proposed or actual competition law enforcement action may have an effect on that other Party’s important interests, and give full and sympathetic consideration** to the views expressed by that other Party... *(Cf. Some without sympathetic consideration)*)

3. If a Party considers that any specified anti-competitive business conduct carried out within the territory of another Party is adversely affecting an important interest..., that Party may notify the other Party and may request that the Party or its competition authority initiate appropriate enforcement action.”)

See also Japan-Mexico EPA(2004) Implementing Ag. Arts.5/6

d. Cooperation for Consumer Protection (US/Aus/Korea)

Figure 3 Negative and Positive Comity



4. Typology of Provisions in Competition Chapters

(3) Enforcement Principles:

- a. Transparency
- b. Non-Discrimination
- c. Procedural Fairness and Rights of Defense

Not in the original NAFTA, but introduced around 2000 in NAFTA 2nd generation FTAs (three quarter):

Non-discrimination and Rights of Defense: Mexico-Israel (2000) & Chile-Costa Rica (2001); Three of them: US-Chile & US Singapore (2003); Three plus **timeliness and comprehensiveness**: Aus-Thailand (2003); AusKor (2014)

Cf. [APEC Principles to Enhance Competition and Regulatory Reform](#) (1999)

4. Typology of Provisions in Competition Chapters

(3) Enforcement Principles (cont.)

c. Procedural Fairness and Rights of Defense:

Detailed in Chile-Costa Rica (2001) Art. XI.2.6 and KORUS (2007) Art.16.1.3 (3. “shall ensure that a respondent ... is afforded **the opportunity to present evidence in its defense and to be heard in the hearing.** In particular, ... ensure that the respondent has a **reasonable opportunity to cross-examine any witnesses ... and to review and rebut the evidence and any other collected information...**”) and

Followed by TPP Art.16.2.

4. Typology of Provisions in Competition Chapters

(4) Scope of Application

a. Endeavor to apply to all business, including public enterprises

E.g., Aus-Thailand 2003 Art.1203 para.1

cf. EU FTA Model

b. If exempted, transparent and based on public policy *E.g.*, Aus-Thai. Art.1204

See also NZ-Thai 2005; Aus-Singapore 2007; Aus-Chile 2008; NZ-Malaysia 2009; Aus-Malaysia 2012; Aus-Korea 2014 and

followed by TPP Art.16.1 para.2

4. Typology of Provisions in Competition Chapters

(5) Non-Application of Dispute Settlement:

Constant since NAFTA through TPP

Why Competition Chapters not subject to DS and why agreed those without DS? (Sokol, D. (2007)

[“Order Without \(Enforceable\) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”](#))

- Difference of culture between trade and competition communities?
- Difficulty to deal with competition law issues in DS?
- Even without DS, signaling effects and voluntary compliance?

4. Typology of Provisions in Competition Chapters

(6) Designated Monopoly and State Enterprises

NAFTA Arts.1502 and 1503 **Note: Both subject to DS!**

(For Both DM/SEs)

- a. Not prevent from designating
- b. Anti-circumvention (“ensure...acts in a manner that is not inconsistent with the Party's obligations ... wherever such a monopoly exercises any regulatory, administrative or other governmental authority”)
- c. Non-discrimination treatment

(For DM only) Commercial Considerations

Constant except for US-Singapore (2003) and EU-Singapore (ND/CC to both DM/SEs for Singapore only)

US/EU-Singapore model followed by TPP Art.17.4

4. Typology of Provisions in Competition Chapters

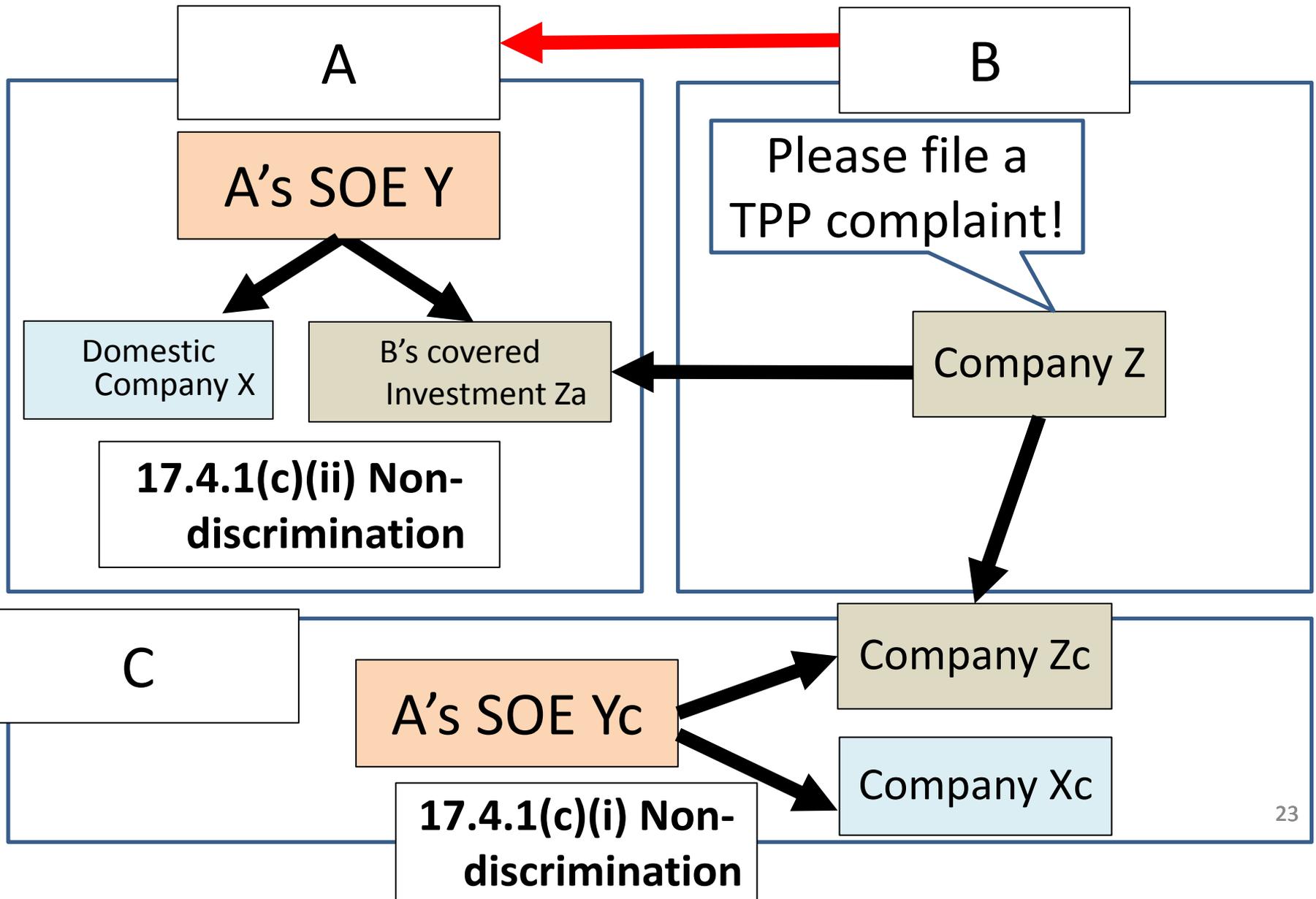
(6) Designated Monopoly and State Enterprises (cont.)

TPP Article 17.4 (subject to DS)

1. Each Party shall ensure that each of its state-owned enterprises, when engaging in commercial activities:
 - (a) **acts in accordance with commercial considerations** in its purchase or sale of a good or service...;
 - (b) in its purchase of a good or service (Omit) ; and
 - (c) in its sale of a good or service,
 - (i) accords to **an enterprise of another Party treatment no less favourable** than it accords to enterprises of the Party, of any other Party, or of any non-Party; and
 - (ii) accords to **an enterprise that is a covered investment in the Party's territory treatment no less favourable** than it accords to enterprises **in the relevant market in the Party's territory** that are investments of investors of the Party, of any other Party, or of any non-Party.

In (a),(b)(i) and (c)(i), **no limitation of market** like (c)(ii)?

Figure 4 Non-discriminatory not only at home but also abroad?



4. Typology of Provisions in Competition Chapters

(7) Subsidies: Characteristics of EU FTA Model

EU effort to extend State Aid rules to FTAs:

Very recently successful also with Asia-Pacific economies (subject to DS)

E.g., EU-Korea 2010 (WTO+ but for goods only)

EU-Sin 2015 & EU-Vietnam 2016 (WTO+ also for services)

covering debts without any limitation/support to insolvent undertakings without a credible restructuring plan

NAFTA Model: Constantly silent on subsidies, but TPP Ch.17 brand-new rules on Non-Commercial Assistance, but for SOEs only

Table 1 Selected Recent FTAs' Competition Chapters at a Glance

	1 Law	2 Coop	3 Principle	4 Scope	5 DS	6 DM/SOEs	7 Subsidies
NAFTA 1992	✓	✓	—	—	No	ccnd/nd+DS	—
USinFTA 2003	✓	✓	✓ tpndpf	Inc.GE	No Con	ccnd/Sccnd+DS	—
UAusFTA 2004	✓	✓ +cp	✓ tpntpf	Inc.SEs	No Con	ccnd/nd+DS	—
KORUS 2007	✓	✓ +cp	✓ tpntpf+		No Con	ccnd/nd+DS	—
EKorFTA 2010	✓	✓	✓ tptindpf	PE/SM	No Con	SM:nd	Goods+DS
AusKorFTA 2014	✓	✓ +cp	✓ tptindpfco	All tp/pp	No Con	CompN	—
ESinFTA 2015	✓	✓	✓ tpndpf	PE/SM	No Con	S:ccnd/ccnd	Gd/Serv+DS
TPP 2016	✓	✓ +cp	✓ tpndpf++	All tp/pp	No	ccnd/ccnd+DS	SOEsNCA+DS
EVFTA 2016	✓	—	✓ tpndpfrd	All pp	No	ccnd/ccnd+DS	Gd/Serv+DS

Note: +cp=consumer protection; tpndpf=transparency, non-discrimination and procedural fairness; GE, SE, PE, SM=government enterprises, state enterprises, public enterprises, state monopoly; All tp/pp=all but if exempted, transparent and public policy; Con=consultation; JC=joint committee; DM/SOEs=designated monopolies and state-owned enterprises ccnd/ccnd=commercial consideration and non-discrimination for both DM/SOEs; CompN=Competitive Neutrality; Gd/Ser=Goods and Service

5. Competition and Convergence between Models of Competition Chapters?

(1) NAFTA Model:

- a. NAFTA Prototype: Obligation to adopt measures/ Cooperation, DM/SEs rules without Subsidies
- b. NAFTA 2nd Generation: Add & Develop Principles, Scope and Cooperation (See Table 1 above)
- c. TPP as NAFTA 3rd?: Incorporate all the developments and innovate Non-Commercial Assistance rules for SOEs

(2) EU FTA Model:

- a. EC itself as a prototype: Comprehensive Competition law also applied to Public Enterprises & Monopolies with State Aid Rules
- b. EU model meets NAFTA 2nd: EU-Columbia/Peru 2012 (EU model with NAFTA 2nd Principles); EU-Singapore/Vietnam 2015/6 (EU model but nd/cc for both DM/SEs)
Cf. EU- Canada CETA with two elements

5. Competition and Convergence between Models of Competition Chapters?

(3) Japan EPA Model:

- a. Basic Agreement: Obligation to take measures/Principles/ Cooperation without DM/SEs & Subsidies (**Almost no substantive**)
- b. Implementation Agreement: Detailed content of co-operation such as Notification (inc. scope/timing), Exchange of Info, Negative Comity (list of factors), Positive Comity, Coordination, Technical Assistance
(**Focusing on cooperation**)

E.g., JMEPA IA almost same as Japan-US Coop. Ag.

E.g., TA to Indonesia KPPU & Vietnam VCA

5. Competition and Convergence between Models of Competition Chapters?

Table 2 Three Models in Comparison

	Law	Coop	Princi.	DM/SOEs	Subsidies
NAFTA	✓	✓	✓	Non-discrimination/ Commercial Consideration	— but TPP NCA rule
EU FTA	✓	✓	After 2010 ✓	After 2015 ✓	Goods only to Gd/Service
Japan EPA	✓	✓ Detailed In IA	✓	— but TPP	— but TPP NCA rule

6. Recent Trend and Challenges

(1) More Concern about Discriminatory Application

E.g., Some economies' M&A review

- Non-conditional approval for mergers between **SOEs leading to monopoly or high market share** while conditional approval for **M&As between foreign business with lower market shares**
- ✓ Comp. Chapters have Non-Discrimination, but not subject to DS
- However, provisions requiring impartial or neutral regulations (TPP Art.17.5.2; EVFTA Art.5.2/5.3, DS)
- Detailed Transparency & Procedural Fairness also relevant

6. Recent Trend and Challenges

(1) More Concern about Discriminatory Application (cont.)

Impartial regulation (Article 17.5.2) *See also* EVFTA Art.5.2, 5.3

Not highly profiled but **potentially important** provision:

“2. ...shall ensure that any administrative body that regulates a state-owned enterprise **exercises its regulatory discretion in an impartial manner** with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises.”

- Requiring so-called “Regulatory Neutrality”
Judged “not impartial” if enforcing agencies frequently intervene non-SOEs while rarely SOEs?

6. Recent Trend and Challenges

(2) More Concern about SOEs

- Expanding Presence of SOEs not only at home markets but also abroad & complaints about preferential treatment (inc. subsidies) to SOEs and lack of competitive neutrality

E.g., [OECD \(2016\), State-owned Enterprises As Global Competitors: A Challenge or an Opportunity?](#)

- Symbolically, TPP/EVFTA have separate chapter on SOEs.
- Non-Discrimination & Commercial Consideration for both DM/SOEs: TPP Art.17.4 & EVFTA Ch.10 Art.5.5 (converging with each other)
- Non-Commercial Assistance Rules for SOEs: TPP Art.17.6 vs. Subsidies rule covering both goods/service: EVFTA (colliding with each other)

6. Recent Trend and Challenges

Existing IEL on Subsidies: WTO SCM & GATS; BITs

Full-equipped tools for goods, while **lacking tools for trade in service and investment**

Table 3 Existing IEL Rules on Subsidies

Markets/ Sectors	Assisting Market	Importing Market	Third Market	World Market
Trade Goods in	✓ (Red, Yellow)	✓ (CVD)	✓ (Red, Yellow)	✓ (Red, Yellow)
Trade Service/ Investment in	△ (National T) △ (FET, National Treatment)	—	—	—

Table 4 Filling the Gaps by TPP SOEs Rules

Market/ Sectors	Assisting Market E.g. Vietnam	Importing Market E.g., U.S.	Third Market E.g. US v. Vietnam in Australia	World Market (Non-TPP)
Trade in Goods	✓ (Red, Yellow) + 17.7.1a, 1c(i)	✓ (CVD)	✓ (Red, Yellow) + 17.7.1b(i), 1c(i)	✓ (Red, Yellow) + 17.7.1 b(ii), c(ii)
Trade in Services	△ (NT) ⇒ Domestic Service Exemption (17.6.4)	— ⇒ 17.7.1d, e ✘ Figure 4	— ⇒ 17.7.1d, 1e	— ⇒ No rule (Annex17C, renegotiation)
Supply of Goods by Investment	△ (FET, NT) ⇒ 17.7.1a	— ⇒ 17.6.3 ✘ Fiigure 5	— ⇒ 17.7.1b(i), c(i)	— ⇒ No rule

Note: 17.6.x or 17.7.x above means the number of relevant provision in TPP Ch.17.
 NT: National Treatment; FET: Fair and Equitable Treatment

Figure 5 Function of TPP Ch.17 SOEs Rules (Case of Trade in Services)

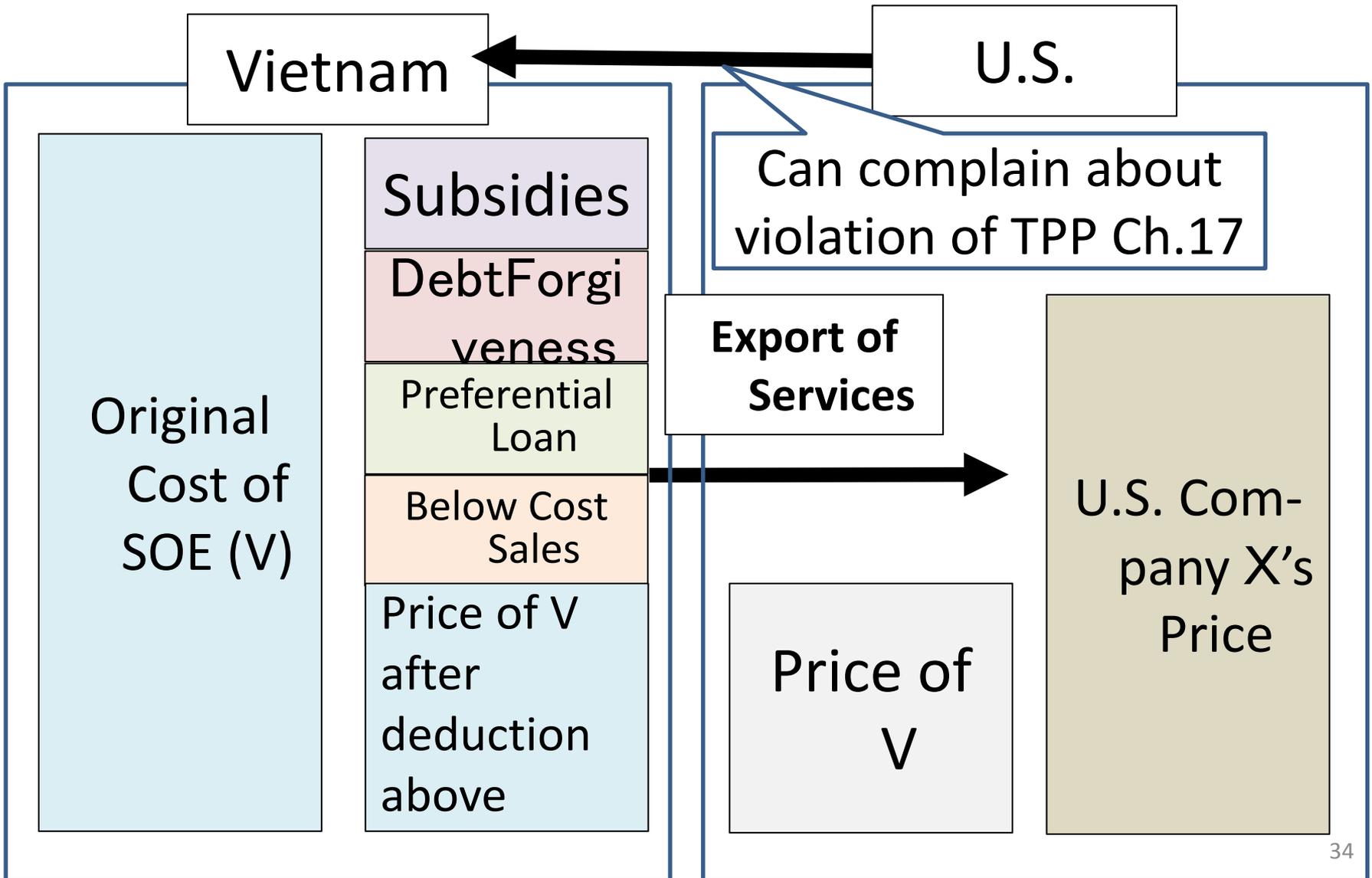
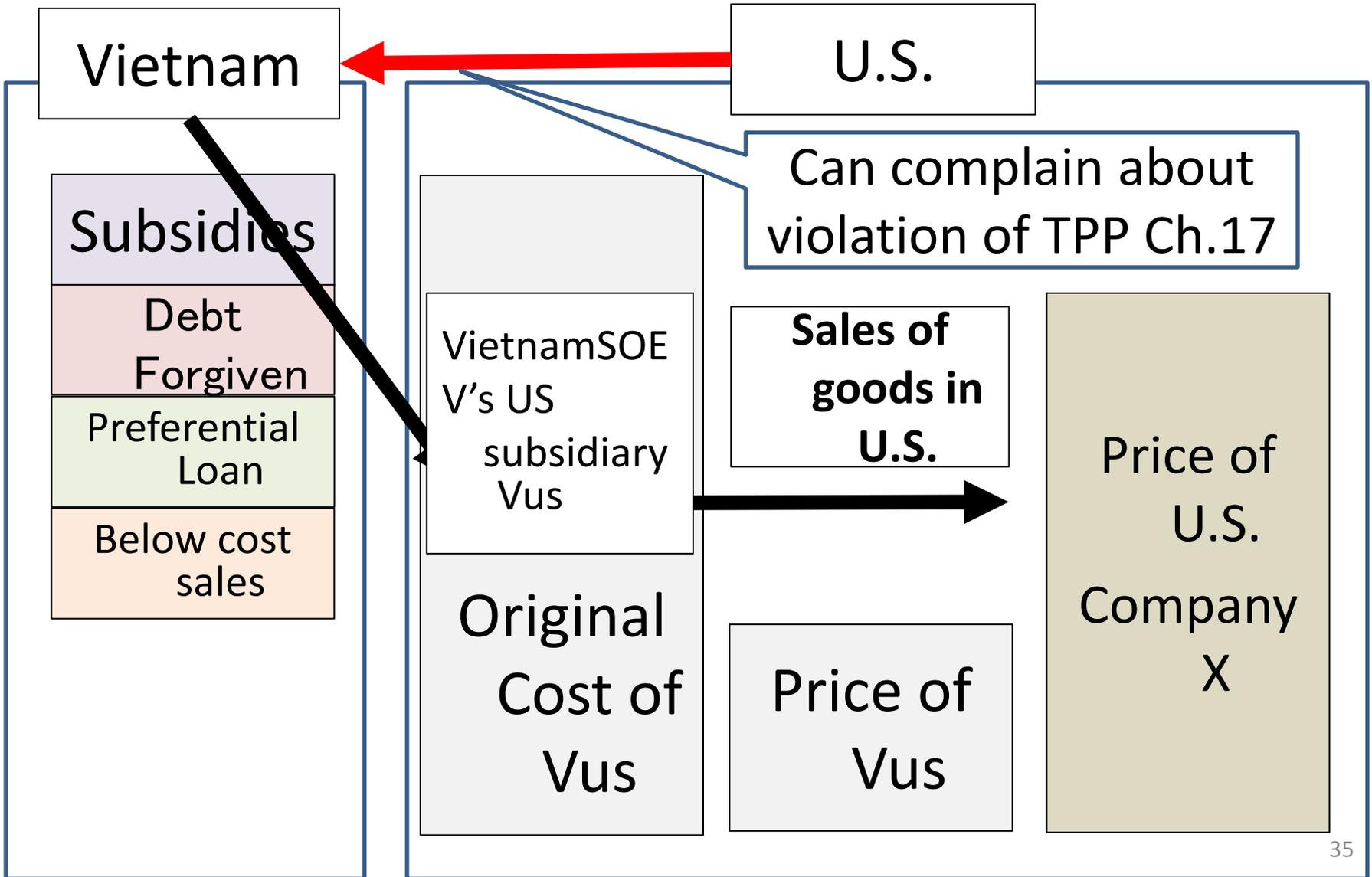


Figure 6 Function of TPP Ch.17
(Investment injuring Domestic Industry)



6. Recent Trend and Challenges

(2) More Concern about SOEs (cont.)

Non-Commercial Assistance Rules for SOEs: TPP Art.17.6 vs. Subsidies rule covering both goods/service: ES/EVFTA (converging or colliding here in Vietnam with TPP& EVFTA?)

Table 5 TPP NCA Rules vs. ES/EVFTA Subsidies Rules

	Recipients	Scope	Markets	Rules
TPP NCAs Rules	SOEs only	Any type of subsidies	Home/Third but domestic service exemption	Need to prove adverse effects as Yellow Subs.
ES/VFTA Subsidies Rules	All enterprises	Certain Types of Subsidies	Home market only (EVFTA)?	Prohibited <i>per se</i>

6. Recent Trend and Challenges

(2) More Concern about SOEs (cont.)

Introducing more and more stringent rules on SOEs is in return leading to **another challenge**:

How to strike a delicate balance between:

1. **safeguarding public policy mandate or public service mandate** (such as universal service obligation, or regional development); and

2. **ensuring competitive neutrality or level playing field** between public and private enterprises

➤ Economies concerned about 1. will try to secure broad exemption *E.g.*, Long lists of SOEs carved out by some negotiating economies in TPP

➤ $1 > 2$ at home while $2 > 1$ abroad?

Thank you for your attention!



Benefits and Issues of the Competition Chapter of EPA - Experience of Japan-

FTAAP Capacity Building Workshop on FTA Negotiation Skills on Competition,
APEC-CTI, in Ho Chi Minh, Vietnam, Aug.19,2017

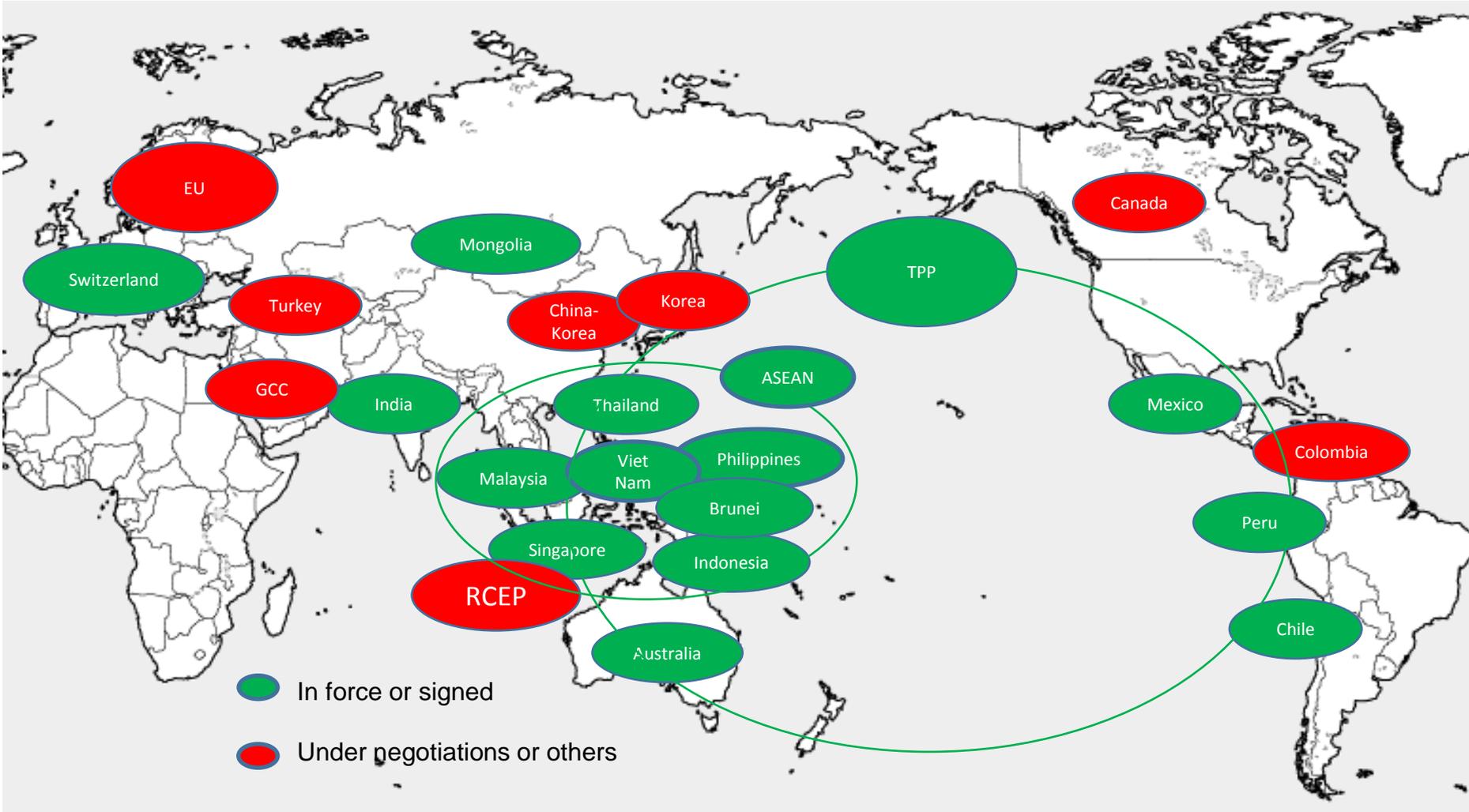
Toru ISHIGURO
Assistant Director, International Affairs Division,
Japan Fair Trade Commission

Contents

1. Overview of Japan's EPAs
2. Benefits of the Competition Chapter
3. Issues on the Competition Chapter

1. Overview

FTA/EPAs between Japan and Other Economies and Regions



(as of March 2017)

1. Overview

EPAs containing competition-related provisions

	Economies and Regions	Signature Date	Effective Date
1	Singapore	2002.1	2002.11
2	Mexico	2004.9	2005.4
3	Malaysia	2005.12	2006.7
4	Philippine	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	Partly effective
9	Vietnam	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	Not yet effective

1. Overview

EPAs and other International Agreements

1	EPA * (Basic Agreements) <i>: Economy to Economy (or Region)</i>	✓	✓	✓	✓			
1'	EPA * (Implementing Agreements) <i>: Government to Government</i>		✓	✓				
2	Anti-monopoly Cooperation Agreements <i>: Government to Government</i>					✓	✓	
3	MOU (Memorandum of Understanding) <i>: Agency to Agency</i>			✓	✓		✓	✓
Economies and Regions		Chili, ASEAN, India	Mexico, Malaysia, Thailand, Indonesia, Switzerland, Peru	Singapore, Philippines, Mongolia	Australia, Vietnam	US, EC	Canada	Brazil, Korea, China**, China***, Kenya

* competition-related provisions only
 ** MOFCOM
 *** NDRC

Basic Elements of EPA

A competition chapter of EPA covers basic elements as follows:

- a. Appropriate measures against anticompetitive practices
- b. Non-Discrimination
- c. Procedural Fairness
- d. Cooperation on issues relating to competition law enforcement
- e. Transparency
- f. Technical Cooperation
- g. Consultation
- h. Non-Application of Dispute Settlement

Benefits of the Competition Chapter

- Cooperation articles in EPA make enforcement cooperation between competition authorities easier.
 - Enforcement cooperation includes:
 - a. Coordination of timing of Dawn Raid
 - b. Information Exchange on Progress of Investigation
 - c. Provide information on Legal Measure etc.

2. Benefits

- Through the dialogue in the negotiation for the competition chapter, each agency builds mutual understanding and trust, which leads to a shared awareness of sound enforcement activities.
- EPA contributes to improve the predictability for enterprises engaging in cross-border business and makes the market more attractive for them.

Issues on the competition chapter (1)

How are the elements of “Cooperation” contained in the EPA’s chapter?

- Elements of cooperation include:
 - i. Notification;
 - ii. Cooperation in enforcement activities (such as exchange of information etc.);
 - iii. Coordination of enforcement activities;
 - iv. Request for enforcement activities (positive comity);
 - v. Consideration of important interests of the other party (negative comity)

- Need to consider the existence of comprehensive competition law and levels of competition policy experience of the counterparty

3. Issues (1)

Matrix of the Contents of Cooperation

(contained in the competition chapter of EPA)

Economies	Notification	Enforcement Cooperation (Exchange of information)	Coordination of Enforcement	Positive Comity	Negative Comity	Technical Cooperation
US (*Anti-monopoly Cooperation Agreements)	✓	✓	✓	✓	✓	
<u>Economy Type1</u>	✓	✓	✓	✓	✓	
<u>Economy Type2</u>	✓*	✓*	✓*			✓
<u>Economy Type3</u>						✓

* general and brief prescription

3. Issues (1)

- Economy Type 1 has comprehensive competition law and enough experience of competition policy
 - Full-fledged elements of cooperation (as in Anti-monopoly Cooperation Agreements with US, EC and Canada) are contained.
- Economy Type 2 has comprehensive competition law but less experience of competition policy
 - Elements on Notification, exchange of information and coordination of Enforcement are contained in general and brief description.
 - Positive/negative comity are not contained.
 - Cooperation will be reviewed and enhanced as appropriate.

3. Issues (1)

- Economy Type 3 doesn't have comprehensive competition law
 - No detailed elements of cooperation is contained.
 - The cooperation will be reviewed and enhanced when comprehensive competition law is adopted.
 - Technical cooperation is contained and JFTC will contribute to building capacity.
- We are considering an approach tailor-made for the counterparty regarding the elements of cooperation.

Issues on the competition chapter (2)

Challenges in relation to “Exchange of Information”

- Exchange of information is a key activity when cooperating between competition agencies.
- Article 43-2 of Japanese Antimonopoly Act (AMA) offers Fair Trade commission the legal basis for providing foreign competition authorities with information.
- In addition, Article 43-2 of Japanese AMA makes some conditions for providing information; reciprocity, confidentiality, prohibition of utilization for unintended purposes, non-use for criminal proceedings.

Legal Frameworks in the Japanese AMA for “Exchange of Information” (1)

Article 43-2

(1) The Fair Trade Commission may provide ...Foreign Competition Authority...with information that is deemed helpful and necessary for the execution performance of the Foreign Competition Authority's duties (limited to duties equivalent to those of the Fair Trade Commission as provided in this Act...); provided, however, that this does not apply if the provision of relevant information is found likely to interfere with the proper execution of this Act or to infringe on the interests of Japan in any other way.

Legal Frameworks in the Japanese AMA for “Exchange of Information” (2)

Article 43-2

(2) Whenever the Fair Trade Commission provides information to a Foreign Competition Authority pursuant to the provisions of the preceding paragraph, the Fair Trade Commission must confirm the matters listed in the following items:

(i) that the relevant Foreign Competition Authority is capable of providing information equivalent to the information provided pursuant to the provisions of the preceding paragraph

Legal Frameworks in the Japanese AMA for “Exchange of Information” (3)

(ii) that the secrecy of information provided as secret pursuant to the provisions of the preceding paragraph will be protected under the laws and regulations of the relevant foreign country to a degree that is equivalent to the degree to which the secrecy of such information is protected in Japan

(iii) that the information provided pursuant to the provisions of the preceding paragraph will not be used by the relevant Foreign Competition Authority for purposes other than those contributing to the performance of its duties

Legal Frameworks in the Japanese AMA for “Exchange of Information” (4)

Article 43-2

(3) Appropriate measures must be taken so that the information provided pursuant to the provisions of paragraph (1) is not used for criminal proceedings undertaken by a court or a judge in a foreign country.

TPP and “Commitment Procedure”

- TPP puts emphasis on procedural fairness.
- TPP includes an article which prescribes that "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".
- A bill for relevant law amendments associated with the conclusion of the TPP has been passed by the National Diet. (*to be put into effect concurrently with TPP)
 - The bill includes an amendment of the AMA to introduce a commitment procedure.

Thank you.

The views expressed in this presentation are solely those of the speaker and do not necessarily reflect those of the agency that the speaker belongs to.
All errors in this presentation are mine.



Opportunities and Challenges in the Acceptance of a Chapter on Competition in FTAs

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Outline

1. Free Trade Agreements of the Philippines
2. Opportunities arising from a Chapter on Competition
3. Challenges in the acceptance of a Chapter on Competition
4. Disciplines on State-Owned Enterprises



FTAs of the Philippines

Agreement	Signed	In Effect
ASEAN Free Trade Area	Jan 1992	Jan 1993
Japan-Philippines Economic Partnership Agreement	Sep 2006	Dec 2008
ASEAN-People's Republic of China Comprehensive Economic Cooperation Agreement	Nov 2004	Jul 2005
ASEAN-[Republic of] Korea Comprehensive Economic Cooperation Agreement	Aug 2006	Jun 2007
ASEAN-Japan Comprehensive Economic Partnership	Apr 2008	Dec 2008
ASEAN-India Comprehensive Economic Cooperation Agreement	Aug 2009	Jan 2010
ASEAN-Australia and New Zealand Free Trade Agreement	Feb 2009	Jan 2010
Philippines-European Free Trade Association Free Trade Agreement	Apr 2016	Pending
Regional Comprehensive Economic Partnership	Negotiations launched May 2013	
ASEAN-Hong Kong, China Free Trade Agreement	Negotiations launched Jul 2014	
Philippines-EU Free Trade Agreement	Negotiations launched Dec 2015	

Source: Asia Regional Integration Center (ARIC), 2017



FTAs with Competition Provisions

AFTA	JPEPA	AANZFTA
<ul style="list-style-type: none"> Other Areas of Cooperation 	<ul style="list-style-type: none"> Promotion of Competition by Addressing Anti-competitive Activities Cooperation on Promoting Competition by Addressing Anti-competitive Activities Non-Application of Chapter 15 (Dispute Avoidance and Settlement) 	<ul style="list-style-type: none"> Basic Principles Cooperation Contact Points Non-Applicability of Chapter 17 (Consultations and Dispute Settlement)
PH-EFTA FTA	RCEP	PH-EU FTA
<ul style="list-style-type: none"> Rules of Competition Cooperation Consultations Dispute Settlement 	<p>Negotiation for the Chapter on Competition are ongoing.</p>	<p>Negotiation for the Chapter on Competition are ongoing.</p>

Opportunities

Competition provisions have become integral to modern FTAs.

A Chapter on Competition is now recognized as an important element to ensure that the potential benefits of an FTA can be fully realized.



Competition Provisions in FTAs

Competition-related chapters and provisions cover a range of issues, including:

- 1) Obligations to promote competition
- 2) Obligations to adopt or maintain competition laws
- 3) Obligations to regulate designated monopolies, SOEs, and enterprises entrusted with special or exclusive rights
- 4) Obligations to regulate state aid and subsidies
- 5) Provisions that lay down competition-specific exemptions
- 6) Provisions that abolish trade defenses
- 7) Provision that set forth competition enforcement principles
- 8) Provision that set forth cooperation and coordination mechanisms
- 9) Principles governing the settlement of competition-related disputes



Benefits

Benefits from the inclusion of competition-related provisions in FTAs:

- Preserve gains made through trade liberalization
- Foster further cooperation and convergence in enforcement matters
- Reinforce internal reform and advocacy
- Prevent strategic enforcement
- Vehicle for incremental harmonization of competition laws and policies



ASEAN Regional Cooperation Agreement

- The need for regional cooperation between AMSs on CPL is formally recognized in the **ASEAN Competition Action Plan 2016-2025**
- A **Regional Cooperation Framework** will serve as an interim, non-binding agreement prior to a formal **Regional Cooperation Agreement** by **2020**

Five Main Areas of Cooperation:

1. Sharing resources
2. Exchange of information
3. Technical assistance and capacity building
4. Enforcement cooperation
5. Cooperation in merger investigation



Challenges

- Differences in competition laws and policies
- Differences in capacity and level of development in the area of competition policy and law



Convergence/Divergence in CPL

Issues	2008 Study	2016 Update
Laws, regulations and institutions	Requirements for the maintenance or adoption of measures to counter anticompetitive activities and an enforcement agency.	Same as 2008, but obligations in 6 FTAs are mandatory. 4 FTAs do not include such provisions.
The implementation of competition policy and law	Some FTAs include obligations to ensure non-discrimination, transparency, procedural fairness, and provide opportunity for judicial review. Details vary.	All except 1 FTA (Chile-Hong Kong, China) include these obligations.
Designated monopolies and state enterprises	Some FTAs include requirements, for example, to avoid acting in a manner inconsistent with the obligations of the agreement and to act in accordance with commercial considerations.	6 FTAs include these obligations.
Cooperation and consultation	Most FTAs contain such provisions.	All except 1 FTA (Chile-Hong Kong, China FTA) include the obligations.
Cooperation on consumer protection	Most FTAs contain such provisions.	Only 5 FTAs include such provisions.
Dispute settlement	Many FTAs exclude dispute settlement from the chapter on competition policy.	7 FTAs exclude dispute settlement from the chapter on competition policy.

Source: *Collective Strategic Study on Issues Related to the Realization of the FTAAP (APEC, 2016)*



Challenges

- New agency
- Confidentiality and exchange of information
- Jurisdiction over subsidies and state-owned enterprises (SOEs)



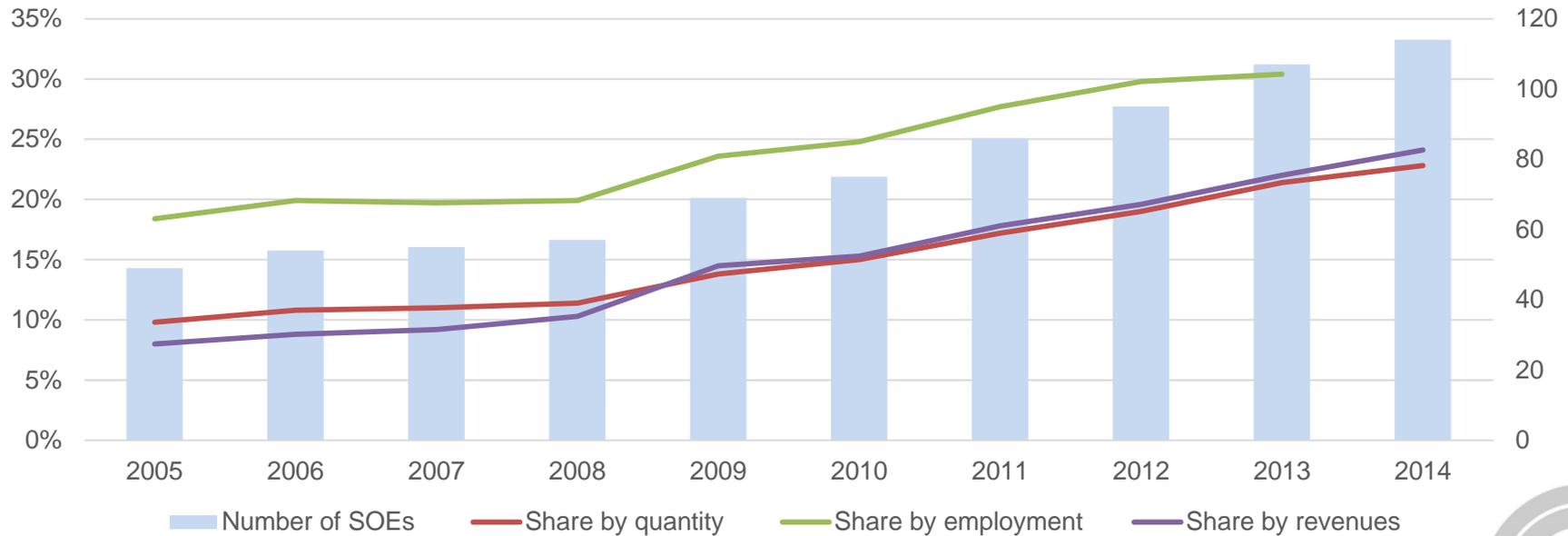
State-Owned Enterprises

- Many of the world's largest firms are state-controlled companies
- SOEs have grown beyond national borders and expanded their activities globally
- There has been a surge of SOE-led international M&A activity over the last decade



Importance of SOEs

Number and shares of SOEs on Fortune Global 500



Source: *State-Owned Enterprises in the Global Economy* (Kwiatkowski and Augustynowicz, 2015)



Concerns Related to SOEs

Potential anti-competitive conduct from privileged position of SOEs:

Predation

Margin squeeze

Raising rivals' costs and raising barriers to entry

Increased market power through anti-competitive merger

Price fixing, market allocation, or output restrictions



Concerns Related to SOEs

Other considerations that can have an impact on competition:

Commercial and non-commercial objectives of SOEs and impact on incentives to compete

Entrenched positions

Subsidies and public services obligations

SOEs and industrial policy



Addressing Concerns through CPL

- Antitrust enforcement to address anti-competitive behavior of SOEs
- Merger control in transactions involving SOEs
- Other non-enforcement powers (e.g., advocacy)
- International enforcement cooperation
- Competitive neutrality frameworks



Benefits

An FTA can discipline policies that give SOEs an unfair advantage over private firms.

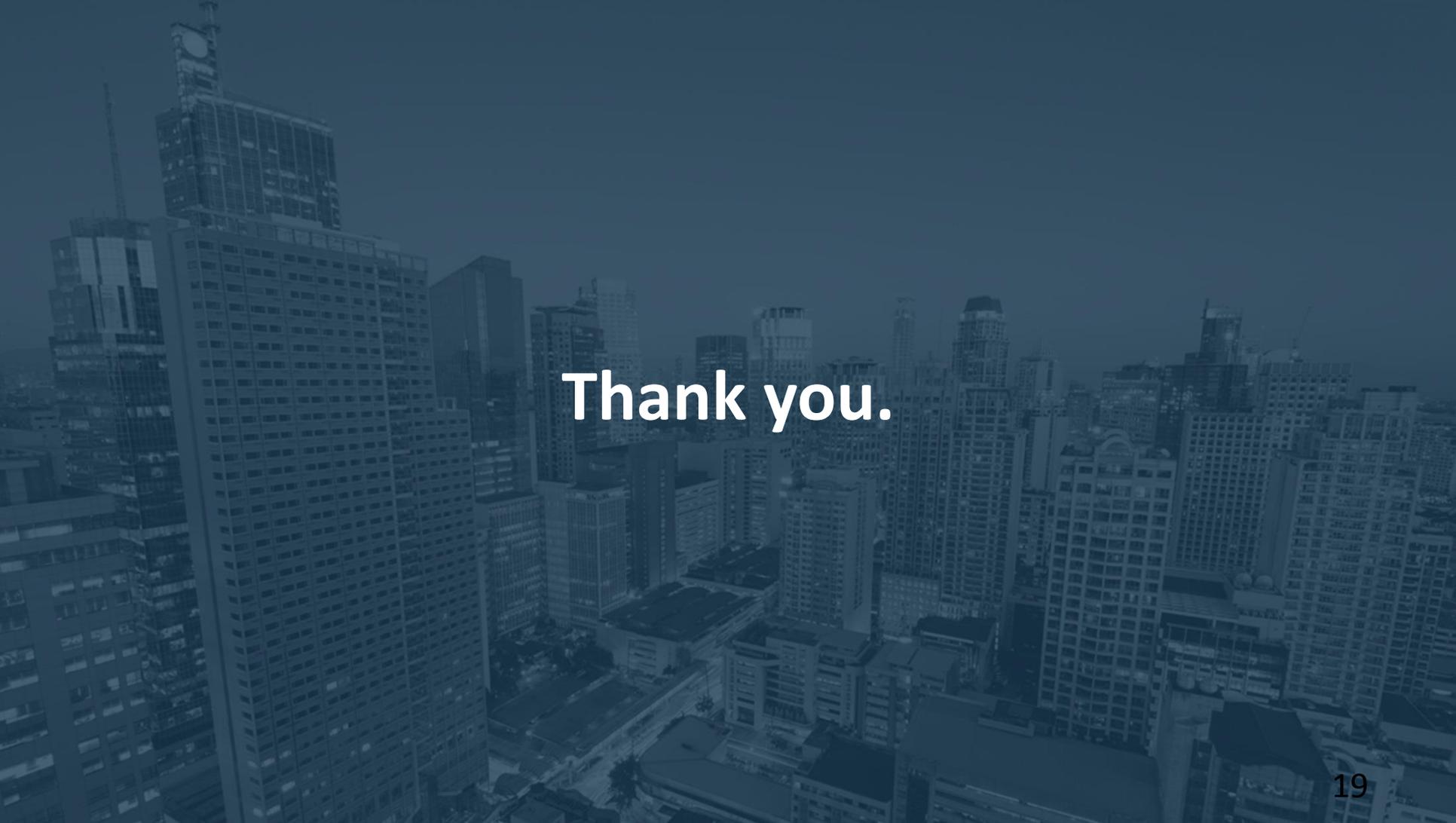
- Businesses trading with SOEs would benefit from an obligation to ensure that an SOE does not use its position to engage in anti-competitive practices
- Non-discrimination helps ensure certainty and a level playing field for businesses when they are trading with SOEs
- Transparency and greater access to information would enable businesses to make more informed decisions about operating in APEC markets



Challenges

- **Enforcement/institutional challenges**
- **Conceptual/substantive challenges**
- **Political/practical challenges**





Thank you.

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Challenges and Opportunities in Relation to Acceptance of the Chapter on Competition in FTAs/EPAs

FTAAP Capacity Building Workshop on
FTA Negotiation Skills on Competition

@Ho Chi Minh City, Vietnam

Parima Damrithamanij
Senior Trade Officer
19 August 2017

Outline

- Development of negotiations of FTAs/EPAs
- Competition policy and international trade
- Examples of competition chapters in FTAs/EPAs of Thailand
- Negotiating Competition Chapter as a Developing Country - Thailand's Experience

Development of negotiations of FTAs/EPAs

Typical Issues (MA oriented)

- **Market Access**
 - Tariffs
 - Services MA limitations
- **Non-Tariff Measures**
 - Domestic taxes Standard of goods
 - Food safety
 - Technical requirements
 - Subsidies & Countervailing duties
 - Anti-dumping duties
 - Safeguard measures
 - Custom valuation
 - Import licenses

New Issues (Related to trade)

- Intellectual property
- Competition policy and law
- Environment
- Labour
- Government procurement

Competition policy and International trade

- From the start, competition policy has domestic nature in itself.
 - promoting and protecting the competitive process
 - attaining greater economic efficiency / economic welfare / the welfare of society
 - providing consumers with competitive prices and product choices
 - promoting efficient resource allocation

THINK : “MARKET”

Competition policy and International trade (2)

- With “**market**” has expanded beyond borders
 - Not only more goods and services are crossing the borders, but also more businesses / investments.
 - International business operations / foreign business people’s conducts can affect domestic business environments.

Competition Chapter in Thailand's FTAs/EPAs

	FTAs/EPAs	Effective Date	With Competition Chapter	Without Competition Chapter
1	TH – Australia	1 Jan. 2005	✓	
2	TH – New Zealand	1 Jul. 2005	✓	
3	TH - Japan	1 Nov. 2007	✓	
4	TH – India	1 Jun. 2010		✓
5	TH - Peru (early harvest)	31 Dec. 2011		✓
6	TH - Chile	5 Nov. 2015		✓
7	ASEAN - China	20 Jul. 2005		✓
8	ASEAN - Japan	1 Jun. 2009	✓	
9	ASEAN - Korea	1 Jan. 2010		✓
10	ASEAN - India	1 Jan. 2010		✓
11	ASEAN-Australia-New Zealand	12 Mar. 2010	✓	
12*	RCEP	under negotiations	✓	

Competition Chapter Structure

Competition Principles
Objective and Definitions
Promotion of Competition
Application of Competition Laws
Exemptions
Cooperation
Exchange of Information
Consultations
Review
Transparency
Dispute Settlement

Negotiating Competition Chapter as a Developing Country - Thailand's Experience

- RCEP's Competition Chapter provisions – relatively more comprehensive than competition provisions in Thailand's other FTAs/EPAs.
- Some examples of obligations
 - Competition laws and regulations to apply to all entities engaged in commercial activities. Exclusions / exemptions are allowed on grounds of public policy or public interest.

Negotiating Competition Chapter as a Developing Country - Thailand's Experience

- Some examples of obligations (con't)
 - Transparency : publication of the law and grounds of decisions with sufficient grounds to safeguard confidential information.
 - More concrete steps to undertake regarding cooperation, confidentiality of information, cooperation and capacity building.

Thailand has been in the process of reforming its competition law and policy

- In 2016, the Department of Internal Trade submitted a proposal for an amendment to the Trade Competition Act B.E. 2542 (1999)
- Aims for the new competition law:
 - to become more up-to-date, flexible, and efficient as well as more independent law enforcement;
 - to play a key part in building up a confidence of all domestic and foreign business operators of all sizes;
 - to nurture trade and investment environment of the country coherent with the government's policy.

Reforming Thailand's competition law and policy

- **Key amendments:**
 - **Coverage:** under the new law, state-owned enterprises will be subject to the law except for conducts undertaken for the purposes of national securities, public policy or public interest.
 - **Efficiency and effectiveness:**
 - clearer main provisions on anti-competitive conducts and M&As
 - different levels of punishments proportionate to seriousness of each anti-competitive conducts.
 - **Independence:** The Commission and competition authority will become more independent with a transparent selection process and new establishment of the Office of Trade Competition Commission.

When negotiating, it is very important to know:

- Your country's and other Parties'
 - interests (past and present, how they developed over time)
 - positions (past and present (government's policy and direction))

Yours/Other's	Interests	Positions
Interests		
Positions		



**Thank you for
your kind attention!**

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All the views expressed here are solely mine and do not necessarily reflect the agency's views.

