### Outline of Competition Law and Policy

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- It is an honor and a pleasure for me to be here this morning to make a lecture on competition law and policy at this training program. First of all, I would like to express my appreciation to the Japan Federation of Bar Associations (Nichibenren) and the Association for Overseas Technical Scholarship (AOTS) for planning the program and inviting me to serve as a lecturer.
- As I will explain later, sound competition law and policy is indispensable for healthy development of national economy and promotion of consumer welfare. Needless to say, competition law is to be enforced by administrative or judicial procedures, and its enforcement requires legal experts who are familiar with competition law and policy.
- I believe that it is quite useful for the trainees in this program to learn the basics of competition law and policy. I do hope my lecture would contribute to your better understanding of competition law and policy.

**I. Introduction**

**A. Self-introduction**

- Teaching "economic law" or the Antimonopoly Act (AMA) at Chiba University: Since 2001, I am a member of the Faculty of Chiba University, which is located in Chiba, east to Tokyo, and between Narita and Tokyo. Now I belong to Law School and teach "economic law" or the Antimonopoly Act (hereinafter referred to as “AMA”), competition law of Japan.
- Working experiences at the Fair Trade Commission of Japan (JFTC), competition authorities in charge of enforcing the AMA: Before joining the Faculty of Chiba University in 2001, I had worked at the Fair Trade Commission of Japan (referred to as the “JFTC”) for some 25 years.
- I worked at various divisions at the JFTC, including investigation divisions, international office, and coordination division. You may easily understand the functions of investigation and international offices. It may need some explanation on coordination division, which is in charge of coordinating with other governmental agencies on various policy measures, including draft bills prepared by the various agencies, from a viewpoint of competition policy. The coordination
division also conducts surveys and analyses on regulated industries such as telecommunications, energy, and finance and publishes policy reports on these industries. As I will explain later, such activities are called as “competition advocacy” and they are quite important to regulatory reform.

- During my tenure at the JFTC, I also worked at other Ministries on a temporary basis. At the Ministry of Finance for 2 years, at the Ministry of Foreign Affairs (Japanese Embassy in Washington D. C.) for 3 years, and at the Ministry of International Trade and Industry (MITI) for 2 years. The experiences at these governmental agencies have provided me various experiences and broad horizons.

- Serving as a moderator at the 4th Session of APEC Competition Law Seminar held in Ho Chi Minh City, Vietnam, in August 2004: One of my recent research themes is “East Asian competition law”, focusing on Korea, Taiwan and China. I belong to several study groups on East Asian competition law and the JFTC also provided me an opportunity to analyze East Asian competition law and policy. Last summer I visited Ho Chi Minh City, Vietnam, to attend the APEC Competition Law Seminar to serve as a moderator in a group discussion on organization and procedure of competition agencies. All presentations at the Seminar can be accessed at the JFTC’s website at http://www2.jftc.go.jp/e-page/.

- Recently I also served as a lecturer on competition law at the Seminar on Civil and Commercial Law organized by the Research and Training Institute, Ministry of Justice. This seminar focused on Foreign Direct Investment (FDI), and my lecture also focused on competition law and policy issues related to the induction of FDI.

- Developing countries try to attract FDI to their economies and to establish favorable climates or environments to FDI. One of the favorable FDI climates is “legal environment”, that is, low-level of legal risks. Low level of legal risk is secured with clear provisions of laws, due process of law enforcement, and effective judicial system. There are many laws and regulations which relate to FDI, and competition law is one of the major areas of law related to FDI.

B. Actual Situation of Competition Legislation in Asian Countries

- Among Asian countries of the trainees, some countries such as Indonesia and Thailand have already promulgated their competition laws several years ago and have some enforcement experiences. Vietnam has just enacted her competition law last November and the law will take effect later this year. China is in a final stage of drafting comprehensive competition law.

- While I am not familiar with the situation in other countries of legislative developments in competition law and policy, these countries may be at the various stages of developing competition law and policy and competition culture.

- About 100 countries and regions around the world have already enacted respective competition laws and international competition rules will be established sooner or later under the auspices of the World Trade Organization (WTO) or other international fora. Competition law and cooperation in this field is also discussed in negotiations of free trade agreement (FTA) or regional integration.
I do hope sound competition law and effective enforcement will be disseminated among all countries and regions.

C. Contents of Lecture

- My lecture consists of 4 Parts:
  - After this Introduction in Part I, I will explain in Part II general frameworks of competition law, including purposes of competition law, basic means of competition law to safeguard competition in markets, various types of prohibited practices, and other areas of laws relating to competition law such as business regulation law, consumer law, intellectual property law, and external trade law.
  - In Part III, enforcement of competition law will be discussed, with particular emphasis on administrative enforcement. The Government enforcement is all the more important when and where private enforcement cannot be expected. Japan’s experiences in administrative enforcement may be useful for developing countries to newly establish competition law regime.
  - Finally, in Part IV, I will conclude my lecture by indicating common characteristics and critical issues of East Asian competition law.
- After my lecture general explanation on the framework of competition law, Mr. Ezaki, the other lecturer in this morning, will talk about more practical issues on competition law, such as mergers & acquisitions (M&A).
II. Overview of Competition Law
A. Purposes of Competition Law

1. Economic Law to Develop National Economy and Improve Consumer Welfare
   - Control-type economic law v. market-type economic law: Proto-type economic law was the former, but the current type is the later.
   - “Economic law” was born in Germany in early 20th century as legal instruments to address socio-economic problems accruing from advanced capitalism and to control economic activities by means of government interventions.
   - After the World War II, however, market economy has expanded its sphere gradually at the outset and since late 1980s rapidly, and economic law has changed to legal instruments to support market-based economy and competition law has become the core of economic law.
   - Contemporary economic law aims at promoting competition and securing market mechanism work well, thereby promoting national development and improving consumer welfare.
   - Let me take a simple example. Suppose that Country A establish a state-owned enterprise (SOE, “X”) and grant legal monopoly status to X. At this stage, a law to establish X and grant monopoly status and to supervise X can be called as “economic law” in Country A. At the next stage the Government of Country A decides to permit new entry into the industry and private company “Y” enters into the industry. At this stage economic law in Country A permits competition between X (SOE) and Y (private firm), but maintains SOE system and provides some privileges to X. The Government further decides to privatize SOE X, and privatized X and Y and other new entrants, if any, compete each other on an equal basis. At this stage, economic law has to discipline competition among them lest they collude to raise price or former monopolist X deter new entry into the industry. Such law as prohibiting “collusion” among firms and “exclusion” from the market is usually called as “competition law”, and in the United States called as “antitrust law”.
   - Vigorous competition in each market may improve efficiency and stimulate innovation and promote consumer welfare and choice. To achieve these purposes, competition law prohibits anticompetitive practices and provides sanctions against violations as well as enforcement procedures and organization of competition authorities.

2. Competition Law as Core of Economic Law
   - Competition law is one of the major areas of economic law. The less economic regulations by the government on economic activities, the more importance and greater role of competition law.
   - A court decision in Japan characterized the AMA as “basic law concerning economic activities, enacted to maintain and promote free competition order in Japan”.
   - Even if national economic system adopts market mechanism, some industrial sectors such as finance, telecommunications, and energy, have traditionally been heavily regulated and supervised by sector-specific agencies, based on such reasons as maintenance of prudence, assurance of universal services, and prevention of monopoly rent.
   - Since 1980s, such industrial sectors have been changing rapidly, because of technological innovations, increasing demands, and changing pattern of demand and supply. Inefficiency of
government intervention also has urged the regulatory reform in these sectors. Competition has been introduced into these sectors by means of dismantling legal monopoly, permitting new entry, and abolishing price control.

- Whether in regulated sectors or not, anticompetitive practices in a market injures competitive process, discourages innovations and transfers consumers surplus to producers. Market mechanism may be damaged by anticompetitive practices such as cartels and monopolizations. This is one type of market failures. Competition law prohibits such anticompetitive practices by economic entities, thereby restoring competition in a relevant market.

- The first competition legislation around the world was enacted in Canada in 1889, and then in the US in 1890. The US competition law has been called as “antitrust law”, and consists of Sherman Act (1890), Clayton Act (1914), and Federal Trade Commission Act (1914).

- After the World War II, in Japan the AMA was promulgated in 1947, in Germany the Act against Restraints of Competition in 1957. The European Community adopted competition law provisions in the Treaty of Rome in 1957.

B. Means of Competition Law

1. Economic Entities or Entrepreneurs

- Subjects of competition law are “economic entities” or “entrepreneurs”, which do business activities, whether for profit or not.
- Legal status, public or private, does not matter, and even national or local governments may be subject to competition law, as far as they conduct business activities.
- For example, the Supreme Court of Japan decided in 1998 that the AMA had jurisdiction over postal service provided by then Ministry of Post and Telecommunications (now operated by Japan Post, independent public corporation, to be privatized in a few years).
- By the way, in Japan the most controversial issue at political circles at this moment is privatization of Japan Post (“JP”). There have been various arguments on this issue and the Government plans to finalize the draft bill to privatize JP by the end of this month.
- From the viewpoint of the AMA, JP is an economic entity, which is subject to the AMA, whether or not JP will be privatized. Actually last fall Yamato Transportation Co. filed a private injunctive suit with Tokyo District Court against JP under the AMA, alleging unjust low price sales and unfair inducement of customers. The case is still pending.
- On the other hand, prerogative or administrative activities by the government are not subject to competition law, even if they hinder or distort competition.
- For example, service of correspondences is still reserved in principle to JP under the Law on Correspondence. This de facto monopoly itself is based on law. Such monopolistic situation or status created by law is not illegal under competition law, even though the monopoly may result in large inefficiency. Such an issue shall be handled by means of, not enforcement of competition law, but competition advocacy activities.
- Caveat: EC competition law has special provision to address state aids to local firms which may distort competition among Member countries. Regulation of state aids under EC competition law
may be equivalent to the WTO Agreement on Subsidies and Countervailing measures.

- China’s draft Antimonopoly Law also has a unique provision. It prohibits “administrative monopoly”, which creates local monopoly by means of excluding goods from other provinces or sector monopoly by means of banning new entries into specific business sectors.
- You may know “administrative guidance” utilized by Japanese governmental agencies, which is an informal means to persuade the party concerned to do something. Administrative guidance, even though it has no legal effect, may have de facto compulsory effect, and in the past was frequently utilized to urge industries to form a cartel so as to avoid disastrous outcome in the depressed industries. It had been debated in Japan whether such a government-assisted or -induced cartel may be illegal under the AMA. While the Supreme Court decision indicates that administrative guidance may be a defense in a quite limited situation, most of the legal scholars believe that the decision saves theoretical possibility for valid defense, but practically almost no chance to win.

2. Regulation of Conduct

- As a principle, competition law can not address conduct mandated by other laws and regulations. Voluntary conduct is subject to competition law.
- Competition law addresses “conduct”, not “structure”. Monopoly itself is not a violation of competition law, but if the monopoly is created, maintained or strengthened by specific artificial conduct, competition law addresses the conduct.
- Again put an example of JP. JP is still given a de fact monopoly position because the Law on Correspondence permits service of correspondence by private firms under strict conditions, and such a monopolistic position of JP itself does not infringe the AMA. Any exclusionary practices by JP, however, to hinder legitimate service by private firms under the Law may fall under a violation of the AMA.
- In this sense, the Anti-“monopoly” Act (AMA) is not an appropriate name, because the AMA prohibits not “monopoly”, but “monopolization”. The AMA prohibits “private monopolization”; this terminology has two connotations. One is that “public” monopoly or monopolization, mandated by laws or regulations, is not illegal, and the other is that mere “monopoly” is not illegal. Take note that the full name of the AMA is the “Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade”.
- Monopoly may be created by various reasons, such as legal protections or privileges, natural monopoly, patents and other intellectual property rights (IPRs), efficiency, and so on.
- Legal monopoly can not be addressed by competition law, and such a legal status itself has to be examined from policy perspectives.
- Until recently electric power companies have been given respective franchises or geographical areas under the Electric Power Business Law to exclusively supply power to end users. This legal monopoly may not infringe the AMA.
- Since late 1990s retail competition was introduced and any company may supply electric power to large-scale end users, irrespective of demand site.
• In case that an efficient firm gained monopolistic position in a relevant market, imprudent intervention vis-à-vis the monopoly under competition law may damage efficiency.

• Microsoft has de facto monopoly position in Operation Software (OS) market around the world, but such a monopolistic position itself does not infringe competition law.

• Various investigative cases against Microsoft all over the world have not addressed Microsoft’s position in OS market, but its specific practices, such as tying and non-disclosure of essential interface technical information, to monopolize the OS market or other relevant markets.

• In case that a breakthrough technology creates monopoly, legal intervention should be avoided. In exceptional circumstances, intervention may be warranted under competition law or patent law to order compulsory license.

3. Ad Hoc and Ex Post Intervention

• Competition law addresses specific practices employed by economic entities and prohibits them after careful examination.

• Illegality requirements usually consist of “conduct” requirement and “effect” requirement. Employing a specific type of practices in itself does not constitute a violation of competition law, and in case where the employed practice satisfies effect requirement, the practice is to be judged as illegal.

• Caveat: some types of practices are treated as “illegal per se”, or “illegal in principle” under the case law or binding precedents. Typical example is hardcore cartels, which include price-fixing, volume restriction, market allocation, and bid-rigging. As far as hardcore cartels are concerned, effect requirement has no meaning. They are treated as illegal, if they satisfy conduct requirement.

• Competition analysis, in principle, is ex post in nature, that is, after identifying a specific practice, competition authorities start investigation over the practice, alleging the practice falling under prohibited practices.

• Competition authorities tend to establish filing requirements with them on specific practices or transactions, such as international contracts and mergers and acquisitions. Ex ante regulations, however, may discourage free and unfettered competition and prior notification requirements shall be at a minimum.

• The AMA provided until mid-1990s filing requirement of international contracts, which might be problematic from the viewpoint of National Treatment, or non-discrimination between domestic and foreign, in addition to undue burdens and restraints on economic activities.

4. Substantial Examinations on Specific Cases

• It is indispensable to examine whether alleged practice has adverse effect on competition on a case-by-case basis. This is called as principle of “rule of reason” in the US.

• A list of practices falling under conduct requirement in competition law does not necessarily provide a quick answer. Formalistic judgment may cause serious side-effect, that is, competitively-neutral or even pro-competitive conduct might be wrongly prohibited.
It is sometimes difficult to analyze competitive effect of a specific practice, whether it may impede competition or promote it. For example, suppose that in response to a new entry with low-price setting, the incumbent cut its price to the same level as the new entrant. It is not clear whether this response by the incumbent is anticompetitive or pro-competitive, particularly in case of a dominant incumbent.

The most typical example is passenger airline industry, where deregulation attracted many new entries into profitable trunk routes with low-price and incumbents took countermeasures to cut their fares to the same level as or even lower level than those of new entrants.

Suppose that such responses by the incumbents successfully exclude new entrants and after the exit of new entrants the incumbents raise fare above the former level. Are such responses by the incumbents exclusionary or competitive?

There are such airline cases around the world, and the US Department of Justice filed monopolization case against American Airlines which aggressively responded to new entrants by means of lowering fare and increasing the number of seats on routes to-and-from Dallas-Fort Worth Airport, where is the hub of American Airlines. The case, however, was dismissed because of insufficient evidences of “below-cost” requirement.

The same is true in case of exemption system. Suppose that competition law adopts exemption system concerning joint activities by small and medium-sized enterprises (SMEs), and that a specific joint activity which satisfies requirements of exemption on its face, may have significant adverse effect on competition and national economy. Competition authorities should have power to apply competition law to the joint activity as an exception to the exemption, after careful examination.

C. Types of Prohibited Practices

As I said, competition law prohibits specific types of anticompetitive practices. Because competition law has jurisdiction over every industrial or commercial sectors, without exemption, prohibited practices are to be provided in a broad and abstract manner so as to apply any cases in any sectors.

Generally speaking, competition laws around the world provide 2 basic types of practices as well as mergers and acquisitions. 2 basic types are “concerted practices” and “monopolization” or “abuse of dominant position”.

Roughly speaking, concerted practices are those which restrain mutual competition between or among firms, and monopolization is one which excludes competitors.

Many East Asian competition laws have special provisions on unfair trade practices, which encompass a wide variety of practices, such as false advertisement, defamation, business obstruction, multi-layered transaction, and so on.

1. Concerted Practices

Concerted Practice, including agreement or arrangement between or among firms, decision or activity of trade association, is the first type of prohibited practices under competition law. It
includes both horizontal and vertical agreements. “Horizontal” means among competitors and “vertical” means between transacting parties.

- Horizontal agreements consist of hardcore type and non-hardcore type. Hardcore cartels, such as price-fixing, volume restriction, market allocation, and bid-rigging, are concluded behind the scene, and considered to be “per se illegal” or “in principle illegal”.
- Every business person knows well price-fixing is illegal under competition law, and a price-fixing agreement is concluded by means of a secret conference or correspondence. A loose agreement may be formed during the process of information-sharing or based on interdependence between or among firms. It is particularly true in oligopolistic industries. At any rate, mutual understanding among participants, tacit or implicit, is required to regulate as concerted practices.
- It is not easy for competition authorities to detect and prove hardcore cartels among firms, and heavy sanctions, such as criminal penalties (US), administrative fine (EU), or surcharges (Japan), have to be imposed on participants.
- Detection and punishment ratio of hardcore cartels is always less than 1, and optimal sanction theory teaches us that a detected cartel shall be punished with the amount of sanction as large as that obtained by dividing damages or gains of the cartel by detection ratio. If the detection ratio is 10 %, cartel participants shall be levied sanction amount to 10 times of their gains obtained or damages caused.
- Non-hardcore agreements, such as joint research and development, standard-setting, joint purchase or selling, statistical activities, and so-called “self-regulation”, are analyzed on a case-by-case basis. These types of concerted activities are usually competitively-neutral or rather pro-competitive, but in exceptional cases anti-competitive. To distinguish anti-competitive activities from other activities is sometimes difficult and careful analysis is required.
- Vertical restraints, that is, restriction on distributors by a manufacturer in relation to organizing distribution system, consist of price restrictions and non-price restrictions. In modern economy, distribution systems are organized by manufacturers and distributors, and these distribution systems compete with each other to attract consumers demand.
- Among vertical restraints, price restrictions, so-called resale price maintenance (RPM) are per se illegal or in principle illegal, and non-price restrictions, such as customer or territorial restriction, restriction on sales methods are analyzed on a case-by-case basis. RPM restricts price competition among distributors. On the other hand, non-price restriction may enhance efficiency in distribution system.
- Exclusive dealing arrangements, such as full-line forcing, can be classified in vertical non-price restrictions, but they have exclusionary effect on competitors, which warrants different analysis from other types of vertical restraints. Exclusive dealing arrangement may be used as a means of monopolization or abuse of dominant position by excluding competitors.
- In the US and EU, vertical restrictions are treated as a type of concerted practices between a manufacturer and distributors, but in Japan they are regulated as unilateral vertical conduct employed by a manufacturer toward its distributors.
2. Monopolization or Abuse of Dominant Position

- Monopolization or abuse of dominant position is unilateral conduct by a single firm or firms by means of utilizing artificial practices, thereby creating, maintaining, or strengthening market power or dominant position.
- As I explained before, monopoly power or dominant position itself does not infringe competition law, and unjustified exercise or abuse is required to regulate as monopolization or abuse of dominant position. It is necessary to identify artificial means, such as “raising rival’s cost” practices, exploitative practices, and predatory practices.
- It is sometimes difficult to distinguish improper practices from competitive and legitimate practices. Competition authorities have to be careful in analyzing monopolization cases, lest competitive practices be found illegal.
- Microsoft, with a market power or monopolistic position in a market of operation software for personal computer, has been a target by competition agencies around the world, including the US, EU, Japan, Korea, and Taiwan. Microsoft has been alleged because of its various exclusionary practices, not because of its market power or monopolistic position in itself.
- From a viewpoint of developing countries, monopolization provision can be utilized to address abusive or exploitative practices and exclusionary or monopolistic practices in local markets by powerful foreign firms.

3. Mergers and Acquisitions (M & A) or Business Combinations

- Business combinations, such as mergers and acquisitions (M & A), business transfer, business split, joint ownership, and interlocking of directorates, are usually competitively-neutral or pro-competitive.
- M & A activities may indicate well-functioning of “market for corporate control”, which disciplines corporate management and improve efficiency. M & A activities, however, in exceptional cases, may create concentrated market structure and diminish competition in a relevant market.
- M & A by foreign firms may cause concern from a viewpoint of economic policy or national security policy, and competition law is allegedly abused to prevent such mergers from implementing.

4. Unfair Trade Practices

- The 4th category of prohibited practices is unfair trade practices or its equivalent, characterized as unique in East Asian competition laws, and includes various types of practices.
- Unfair trade practices regulation under the AMA, which was originated from Section 5 of the US Federal Trade Commission Act, has multiple functions: supplement to private monopolization, consumer protection, protection of SMEs, prevention of unfair competition.
- Unfair trade practices regulation in Japan has developed in a significantly different manner from the original US law, and most of the East Asian competition law have similar or more diversified provisions for unfair trade practices regulation.
For example, Vietnamese competition law, enacted last November, provides “unhealthy competition practices”, including false advertisement, trade secret infringement, defamation, bribery, business obstruction, multi-layered transaction, and so on.

In relation to induction of foreign technologies, allegedly abusive or exploitative terms and conditions in international licensing contracts may have been regulated as unfair trade practices employed by foreign licensors.

D. Limits of Competition Law

1. State-owned Enterprises

- Legal monopoly: Monopolistic position or status itself is not illegal under competition law, and such legal status should be strictly examined on its necessity from policy perspectives.
- In case of electric power industry in Japan, power companies were given each franchise where they had exclusive right and obligation to supply power to end users. Under the system, geographical monopoly of each power company was not illegal under the AMA. Since late 1990s, this franchise system was changed to admit new entries by any firms to supply power to large-scale users. If incumbent power companies employ exclusionary practices vis-à-vis new entrants, such practices may infringe the AMA.
- Privileges under laws or regulations, or de facto favorable treatments: It is difficult to answer whether any special consideration is required in applying competition law.

2. Problematic Market Structure

- Legal monopoly: In case of monopoly protected under laws or regulations, if adverse effect, such as inefficiency, is significant, structural measures are to be explored from policy viewpoint.
- In Japan, there is almost no legal monopoly. Until recently, service of correspondence (mail delivery service) was reserved to the Post Office run by then Ministry of Post and Telecommunications (now Japan Post), and now private firms may enter this business under the strict conditions. From a viewpoint of competition policy, conditions for new entry into the business should be relaxed.
- I have taken again electric power industry in Japan. Regulatory reform in 1990s began, when high rate of electric power in Japan compared to those of foreign countries was criticized by industrial users and general consumers.
- Natural monopoly: In such industries as electric power or telecommunications, direct supervision is required to prevent adverse effect of monopoly and to secure universal service obligation. Whether a monopoly is really “natural” or not depends on the size of demand, technological development, and other various factors.
- Another reason for urging reform of power industry was technological innovations to supply power. Power industry had been deemed as typical natural monopoly, but efficient small-scale generation facilities, such as co-generation system, have been developed, and large-scale generation plants has not been necessarily efficient because of high cost and long period of construction.
Economy of scale or scope: In case of large equipment industries such as steel and chemicals, it is sometimes difficult for policy maker in a small economy to decide whether such industries have to be developed or maintained.

Monopoly protected by intellectual property rights (IPRs): IPRs do not necessarily confer monopoly in a relevant market. Competition law, however, has to safeguard competition by regulating abusive practices by IPRs holder, after careful market definition and market analysis.

3. Ex Ante Regulation If Necessary

As I said before, competition authorities initiate investigation after a specific alleged practice is identified, and in this sense competition law enforcement is ex post in nature. On the contrary, competition law usually adopts ex ante review system on M & A. This is the exception to ex post regulation under competition law.

Prior notification is required in case of large-scale transactions which exceed threshold provided in competition law.

I would like to add informal enforcement measures utilized at competition authorities. As is explained more specifically later at the Part of enforcement, many competition authorities adopt prior consultation or business review procedure to respond to inquiries from industries on specific business plans concerning whether the plans may have problems under competition law. This procedure is pursued before implementation of business plans usually categorized as “rule of reason” type, or non-hardcore type activities, such as joint research and development, standard-setting, and self-regulatory activities.

4. Expeditious Examination

Consumer fraud and other deceptive or unfair practices should be expeditiously regulated from a viewpoint of consumer protection, instead of competition.

Oppressive conduct by large firms toward dependent SMEs should also be expeditiously regulated of themselves.

Many East Asian competition laws provide these practices as unfair trade practices, which are provided, not in competition law, but in consumer protection law in other jurisdictions.

E. Relationship with Other Related Areas of Laws

1. Business Regulation Law

Regulated industries: Some industrial sectors, such as energy, communications, transportation, finance, and agriculture, are heavily regulated by sector-specific regulators (usually vested with wide jurisdictions over respective sectors).

In case of Japan, for example, financial sector is regulated by the Financial Services Agency, power sector by the METI (Agency for Natural Resources and Energy), and airlines by the Ministry of Land, Infrastructure and Transport.

Sector-specific (vertically-divided) regulation v. general (horizontal or functional) competition regulation: In the age of strict sector-specific regulation, competition law had little, if any, role in
regulating the sector. During and after the deregulation, competition law has to display its real worth.

- Put an example of rate in electric power industry. Before deregulation, rate of power for end users was strictly regulated and authorized by the regulator of power sector. Competition law has no role in regulating rate-setting by power companies. Suppose that after deregulation, rate-setting for large-scale end users is fully liberalized and the sector regulator has no authority to intervene the rate-setting. Who is competent in addressing rate-setting by a power company to exclude a new entrant? Only competition authorities may investigate the rate-setting under general competition law.

- Sector-specific regulators v. general competition authorities: There are many arguments on how to devise the relationship between the two agencies during the transition period from regulation to competition. During the transition period from regulation to competition, two authorities, sector-specific regulator and general competition authorities, co-exist and both have legal authorities to intervene the sector based on respective law, that is, sector business regulation law and general competition law. Some regulations are over-lapped and others are not. Industries under “dual regulations” by both agencies may feel bothersome and be confused in complicated regulatory system.

- Exemption system over specific industries: Policy consideration may necessitate exemption system of specific industries from the application of competition law. Exemption over specific practices by firms in industries is preferred rather than overall exemption of industries.

- Until recently, under the Japanese competition law system there were many exemption cartel systems, even though most of them had not been utilized for a long time. In late 1990s, most of the exemption cartel systems were abolished.

- Under the current AMA, one of the major exemption cartel systems is “cooperative”, which is an organization by small-and-medium sized firms or farmers for the purpose of mutual assistance and cooperation.

2. Consumer Law

- Competition law aims at securing consumers’ interest by means of prohibiting anticompetitive practices. In this sense, competition law may be characterized as consumer law.

- Expeditious regulation of deceptive or unfair practices vis-à-vis consumers may be provided in competition law. Such a role of consumer protection in competition law is not essential one, but during the under-developed stage of civil law system, competition law, which is enforced by administrative competition authorities, may be a powerful tool for consumer protection.

- The function of consumer protection in competition law and competition authorities may contribute to procuring supports from consuming public for competition law and competition authorities.

- In Japan, Premiums and Representations Act was enacted in 1962 as a supplementary law to the AMA, and empowers the JFTC to take expeditious measures vis-à-vis false advertisements and excessive premium offers.
3. Small and Medium-sized Enterprises Law

- Some competition laws have provisions to address abusive or exploitative conduct by a large firm vis-à-vis SMEs, such as unilateral price-cutting, compulsory purchase of unrelated goods, collection of money with no valid reason, and so on.
- Under such circumstances that voluntary complaints or other actions by SMEs are not expected, enforcement mechanism under competition law may provide effective means to inspect and eliminate abusive conduct.
- Caveat: Excessive protection of SMEs may discourage SMEs' incentive to innovate and improve efficiency, and reduce economic welfare in the long run.
- In recent years, the JFTC has taken strict measures against large retail chains for their abusive practices vis-à-vis small vendors who are dependent with the large retail chain. Under severe competition among retailers, such practices have been employed by retail chains as unilateral price-cutting, compulsory purchase of unrelated goods, collections of money or requests for labor forces with no valid reason. Dependent small vendors are forced to accept such unjust requests by retail chains which have large buying power.

4. Unfair Competition Law

- Disputes between or among firms occur on a day-to-day basis, and they are usually resolved by means of civil procedure under civil or commercial laws, including unfair competition law.
- Under insufficient civil judicial system, competition law, which is enforced by competition authorities, may provide alternative means to address such disputes in place of unfair competition law.
- The one party of disputes may file a complaint with the JFTC under the AMA, and in case where the JFTC investigate the dispute, the AMA works in place of civil law, including unfair competition law.

5. Intellectual Property Law

- National IP law is disciplined under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which provides minimum standards of protection of IPRs.
- Intellectual property (IP) law creates exclusive rights of inventors or creators for the purpose of providing economic incentive to innovation and creation. On the other hand, competition law prohibits exclusionary conduct in a relevant market.
- Are these two set of laws contradictory each other? Under what circumstances may exercises of IPRs infringe competition law?
- Does parallel importation of genuine trademark goods infringe trademark law? Parallel importation may promote intra-brand competition and lower the domestic price of branded goods. On the other hand, parallel importation may discourage incentive of sole import distributors to invest for the purpose of improving its branded goods, thereby promoting inter-brand competition.
The WTO TRIPS Agreement does not provide international rules on parallel importation of trademark goods or patented goods, except the application of most-favored-nation treatment (MFN) and national treatment (NT). That is to say, Member countries may decide on their own whether parallel importation is permitted or not under their respective IP laws, as far as these two principles are not infringed.

Patent may be utilized by compulsory licensing under patent law or as a remedial measure in competition cases. Under what circumstances can compulsory licensing are ordered?

The TRIPS Agreement provides various conditions for Member countries to abide by to order compulsory licensing, and compulsory licensing as a remedy of competition law infringement is considered to be legitimate under the Agreement.

6. External Trade Law

Policy measures in relation to induction of foreign direct investment (FDI) are disciplined by various international agreements, including the WTO Trade-Related Investment Measures (TRIMS) Agreement. The TRIMS Agreement explicitly prohibits such measures as local contents requirement, trade balancing requirement, foreign exchange restriction, and export restriction.

The WTO basic principles of most-favored-nation treatment (MFN) and national treatment (NT) prohibit differential treatment of foreign goods or services or preferential treatment of domestic goods or services.

Developing countries are constrained to adopt discriminatory measures to protect domestic infant industries or to support strategically sensitive industries.

Under such circumstances, competition law may provide “legitimate” means to address problems arising from FDI, such as international licensing contracts and international mergers. It is advisable for developing countries to examine legislative options as a whole.
III. Enforcement of Competition Law

A. Importance of Enforcement

1. Overview

- Promulgating substantive provisions of competition law is only the first step, and effective enforcement of the provisions by competition authorities is much more important. Without effective enforcement, competition law and competition authorities might be a “paper tiger”.
- First of all, it is sometimes difficult for the government to persuade parties concerned who are not familiar with competition law and policy, to introduce competition law.
- To procure supports for competition law, it may be necessary for the government to take various measures, including compromises with parties concerned: with industries, to add strict requirements to find violations and to establish exemption systems; with SMEs or consumers, to add such supplementary provisions as protecting them. In case of introducing exempted practices or industries, it is advisable to include so-called “sun-set” clause.
- After the enactment of competition law, it is not easy task for competition authorities to disseminate the law among economic circles and consuming public. Such efforts are required as providing information in print or on web to plainly explain the law and suggest “dos” and “don’ts”, indicating clearly how to use the law, and promulgating clear guidelines.
- It is indispensable to establish enforcement authorities and provide enforcement procedures. Some competition laws have only vague provisions on organization of and procedures before competition authorities. In particular, concrete administrative procedures have to be established before the law taking effect.
- Enforcement of competition law, needless to say, is dependent on professional staffs, such as lawyer, economist, accountant, and administrative staff: There may be few, if any, competition law experts in a newly-established competition law country.
- The government or competition authorities have to educate staff from scratch or employ foreign experts as advisors, and at any rate it takes time and costs much. Technical assistance from developed countries and international organizations has to be intensified.

2. Enforcement by Diversified Actors

- It is necessary for the government to establish administrative authorities, which are empowered and obliged to enforce competition law.
- Organizational structure of competition authorities, however, is various, and it is classified from such viewpoints as: ministerial v. collegial; general v. specialized; political v. independent. These aspects of organizational structure are inter-related.
- In addition to administrative enforcement, many competition laws provide private enforcement and some competition laws provide criminal enforcement. Such judicial enforcement is quite important under the budget constraints of administrative competition authorities.
- Private enforcement utilizes economic incentive of victims or injured parties to seek damages or injunctions against offenders. Private enforcement may also contribute to disseminating competition culture.
B. Administrative Enforcement

1. Industrial Ministry v. Special Authorities

- Incumbent government organizations in charge of industries have their personnel and budgets, and it may be easy for the government to give the organizations enforcement power of competition law. It may, however, cause serious conflict of interests, because the organizations are in charge of promoting and assisting the industries and such functions may be contrary to the new role of enforcing competition law.

- The government may establish independent authorities specializing in enforcement role of competition law, and such option can indicate strong commitment to competition law and its enforcement.

- Between the two, the government may establish special authorities attaching to the industrial ministry, while keeping independence from the main ministry. The minister may not instruct the authorities on specific cases.

2. Ministerial Organ v. Collegial Body

- Ministerial organ, on the one hand, can make expeditious decisions on a day-to-day business.

- On the other hand, collegial body (commission) may be suitable for deliberate fact-findings and non-discriminatory decision-makings.

- Most East Asian countries and regions which have competition law adopted commission-type competition authorities, such as the JFTC.

3. Enforcement Only v. Policymaking Also

- Some competition authorities exclusively devote to enforcement activities, and other agencies have mandates on policy such as drafting competition legislation and advocating regulatory reform.

- The role of “competition advocacy” is extremely important particularly in developing countries. It is advisable for the government to vest competition authorities to advocate liberalizations and regulatory reforms from a viewpoint of promoting competition and assuring consumers interest.

4. Independence from Political Circle

- It is indispensable for any competition authorities to be independent from political circle, as far as enforcement issues are concerned. On the other hand, competition authorities who have policy mandates may be vulnerable to political influences.

- In case of Germany, the Federal Cartel Office (FCO) is attached to the Federal Ministry of Economics and Labor, but the FCO is in charge of enforcement, and strictly secured for its independence on enforcement decision-makings. At the same time, Minister of Economics and Labor has authority to overturn the FCO decisions on merger cases and to permit exemption cartels under strict conditions, but these authorities have rarely invoked.
5. Administrative Procedures

- Procedures at competition authorities are to be constrained by general administrative procedures in each jurisdiction.
- Generally speaking, administrative procedures on competition cases at competition authorities are provided in a deliberate manner, more favorable to respondents (alleged offenders) than general administrative procedures.
- In particular, in case of independent regulatory commission, such as the US Federal Trade Commission and the JFTC, the procedures are modeled after judicial procedures, sometimes called as "quasi-judicial" procedures.

6. Informal Enforcement Measures: Their Roles and Functions

- Formal procedures are provided in competition law such as use of compulsory powers for investigation and hearing procedures for adjudication, and cease-and-desist orders.
- Competition authorities may utilize informal measures to enforce competition law, in addition to formal procedures provided in competition law, such as "warning" (administrative guidance to cease alleged violations), survey and guidance to problematic practices, if found, prior consultation and guidance on specific business plans, and promulgation of enforcement guidelines.
- These informal means of enforcement have been frequently utilized by the JFTC, and they may have significant advantages and disadvantages. Newly-established competition authorities may learn lessons from the JFTC's experiences.

7. Enforcement Guidelines and Prior Consultations

- In recent years, major competition authorities have made significant efforts to issue enforcement guidelines on major types of business conduct such as mergers, collaborations among competitors, and licensing of IPRs.
- By publishing draft guidelines, competition authorities exchange and share expertise among them and solicit comments from parties concerned, and improve guidelines so as to clearly provide analytical framework on "rule of reason" types of practices.
- Prior consultations and responses thereto by competition authorities also have advantages. For example, standard-setting activities in high-tech industries have obtained clearances from major competition authorities before implementation.

C. Judicial Enforcement

1. Criminal Enforcement

- In the US, hardcore cartels are prosecuted criminally for imprisonment for individuals and criminal fines for corporations. In Canada and Japan, criminal prosecutions for serious hardcore cartels are explored.
- Most of competition laws, however, adopt only administrative enforcement other than private enforcement under general civil law.
2. Civil Enforcement

- Civil enforcement of competition law is vigorously employed in the US, because of, at least partially, treble damages system and discovery process, and it supplements public enforcement.
- In other jurisdictions, however, private enforcement is rarely invoked, even if injured parties have private rights of action.
- Even in the US, private damage suits in cartels cases are filed following after government suits and in this sense government enforcement is the most important in competition law enforcement.
- In vertical restraints cases between transacting parties, private enforcement is important, because of the constraints of enforcement resources at competition authorities.

D. Summary

- Even in advanced countries in competition law enforcement, the most important enforcer is competition authorities, and competition law should provide competition authorities independence and powers to enforce the law and the government should allocate sufficient resources to competition authorities.
- Developing countries in competition law enforcement are all the more dependent on administrative enforcement, because judicial infrastructure is too under-developed to utilize for the purpose of enforcing competition law.
- Designing organization and power of competition authorities is no less important than drafting substantive provisions of competition law.
- Examinations and discussions on competition law in developing countries appear to have been focused on substantive provisions rather than procedural and organizational provisions. Practical considerations and designs have to be further explored in the future.
- Capacity-building and training of staff at competition authorities are quite important, but extremely difficult in developing countries. International technical assistance has to be intensified in the field of competition law and policy.
IV. Conclusion

A. Characteristics and Problems of East Asian Competition Laws

- East Asian competition laws have the following common characteristics and at the same time these characteristics may indicate defects.
- Purposes of competition laws: Ultimate goal of competition law is healthy development of national economy and in case of situations where competition is not suitable or workable from a viewpoint of national economy, it tends to introduce exemption system and refrain from applying competition law for that purpose.
- Minute substantive provisions: Compared to the US antitrust law and EC competition law, East Asian competition laws have minute substantive provisions and this may provide legal certainty and predictability for parties concerned. At the same time, it may discourage proper application of competition laws based on careful examinations on a case-by-case basis.
- Importance of fair competition: East Asian competition laws have various functions, by means of prohibiting unfair trade practices or their equivalents, such as consumer protection, protection of SMEs, and prevention of unfair competition. The multi-functionality may cause contradictory enforcement outcome and under-development of such related areas of laws as consumer law and unfair competition law.
- Government measures: In the developmental stage, government measures, formal or informal, against economic activities are of importance and may have implications for applying competition law.
- Enforcement entities: Enforcement is heavily dependent on the government or competition authorities, and other enforcement entities such as injured parties have minimal role.
- Sanctions: Administrative cease-and-desist orders are the major sanction vis-à-vis violations, and punitive measures such as criminal or administrative fines are too weak to deter violations.
- Procedures: Procedural safeguards are not sufficient to secure due process and procedural rights of parties concerned.
- It is necessary to make good use of these characteristics and to minimize demerits, and during legislative process it is required to examine these issues.

B. Competition Law Regime

- Competition law system depends on civil and commercial law system as well as administrative system.
- Business transactions would not be smoothly carried out without establishing civil and commercial laws and dispute resolution systems.
- Administrative organization and procedures are fully equipped to improve competition law system, because, at least for the time being, enforcement depends on the government or competition authorities.
- Competition law does not exist in a vacuum. Various areas of laws are so inter-wined that competition law would not be utilized without coordination and cooperation with other laws.
- In particular, civil and commercial laws are basis of business transactions, and civil procedures
are fundamental and final system to resolve business disputes. These areas of laws are prerequisites for well functioning of competition law.

C. Information Sources and Utilization of Training Courses and Seminars

- My lecture today only provides overviews on competition law and its enforcement system.
- Training courses and other technical assistance programs on competition law and policy have been provided for by international organizations such as the World Bank, OECD, UNCTAD, and so on, as well as on regional and bilateral basis.
- The JFTC implements training programs for competition authorities in developing countries in cooperation with the Japan International Cooperation Agency (JICA) and APEC.

References


Websites

The following websites of the JFTC provides useful information on competition law and policy in Japan, recent development of competition law and policy in APEC Member Economies, and technical assistance programs.
http://www2.jftc.go.jp/e-page/
http://www2.jftc.go.jp/eacpf/