The Role of Competition Policy in Economic Partnership Agreements

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Outline of Presentation

- Framework of Competition Policies & Development of Competition Policies in Japan
- Trade Liberalization & Competition Policies
- Competition Policy as an Element of EPAs
Framework of Competition Policies &
Development of Competition Policies in Japan
Competition policy framework in Japan

- The Act Concerning Prohibition of Private Monopolization and Maintenance of Unfair Trade Practices Etc. (Law No. 54 of 1947)
  - Prohibition of cartels, international cartels
  - Prohibition of private monopolization
  - Prohibition of unfair trade practices

- Introduced by occupation forces after WWII
  - Faced antipathy from industries at the outset
Competition policy framework in Japan

- The Act Against Unjustifiable Premiums and Misleading Representations (Law No. 134 of 1962)
  - Controlling unfair sales with unjustifiable premiums or disguising representations
- The Act Against Delay in Payment of Subcontract Proceeds, Etc. (Law No. 120 of 1956)
  - Controlling delay in payments of parent firms making use of their advantageous bargaining position

Both Acts are controlling specific unfair trade practices – special laws complementary to the Antimonopoly Act.
Development of Competition Policy in Japan

(1) Before World War II

- Concentration of economic power to large conglomerates and cartel organizations
- National policy for strengthening of economic control
(2) After World War II (1945-)

- Occupation under USA and alliance
- Democratization of Japanese economy
- Dissolve of Conglomerates and economic de-concentration
(3) In 1950s

- Claims against AMA by Business sector for its too strict regulation
- Relaxation of AMA (1951, 1953)
- Introduction of Depression Cartels and Rationalization Cartels (1953)
- Introduction of Cartel Exemption Systems based on respective laws (1950-)

(4) In 1960s

- Japan’s high economic growth era
- Limited interest in competition policy
(5) In 1970s

● The first oil crisis (1974)
  – Inflation of commodity prices, “follow-up” cartel
  – End of high economic growth

● Amendment to strengthen AMA (1977)
  – Introduction of surcharge system, etc
(6) In 1980s

- Facility disposal cartel for structurally-depressed industries
- Trade friction with foreign partners
(7) 1990s to date

- Amendment to strengthen AMA
  - Quadrupling the surcharge rate (1991)
  - Increasing upper limit of penalty for corporations (1993): 5 mill -> 100 mill Yen
- Further amendment of AMA (2005)
  
  Increase of surcharge rate, introduction of leniency program and compulsory measures for criminal investigations
Development of Competition Policy in Japan (summary)

- Competition policy has been stagnant and enforcement of competition law has been dull during the rapidly growing period.
- It took long time for Japan to escape from the mindset of policy implementation with excessive governmental intervention and heavy regulation, namely the convoy fleet approach.
- It was only after 1990’s that the general support for competition policy was generated.
Why Do We Need Competition?

- **Competition makes business strong**
  "Cartels were not found in successful industries.... Cartels were common in declining industries in Japan. The legal cartel has brought lack of competitiveness rather than competitive edge." (Prof. Michael Porter and Prof. Hirotaka Takeuchi, “Can Japan compete?”)

- **Competition brings consumers’ benefit**
  High quality and low cost products by competition
  -> Rational choice of goods
Enforcement of the Antimonopoly Act

- Total of **290 legal actions** (1995 FY ~ 2004 FY)
- Of which, **219 were against cartels** (including bid-riggings).

The JFTC has been making strenuous efforts against cartels.
However

- Not a few repeated violations
- The JFTC made warnings in cases of international cartels.
  - Graphite Electrode Cartel (1999)
  - Vitamin Cartel (2001)
JFTC’s efforts toward strengthening the Antimonopoly Act

- The Antimonopoly Act was comprehensively reviewed.
  - Discussions were on the characteristics of administrative surcharge and effectiveness of leniency program and so forth.
- The amended Act was promulgated on Apr. 2005 and will be put into effect on Jan. 2006.
Review of surcharge system

- Raising the rate of calculating the surcharge amount
  - 6% of the sales of the goods and services in question (3% for SMEs)
  - 10% of the sales (4% for SMEs)
- Extra surcharge (50%) against repeating violators
Review of surcharge system (cont’d)

- **Enlarging the range of conducts** subject to the surcharge system
  - Bid riggings, price cartels and quantity cartels
    - allocation of market share or customers
    - purchasing cartels
    - private monopolization through controlling the business activities of other firms
Introduction of a leniency program

- **Before start of the JFTC investigation**
  - **First informant**: amnesty (100% reduction of surcharge, no criminal accusation)
  - **Second informant**: 50% reduction of surcharge
  - **Third informant**: 30% reduction of surcharge

- **After start of the JFTC investigation**
  - 30% reduction of surcharge (first, second and third informants)
Introduction of compulsory powers for criminal investigations

- Introducing compulsory powers for criminal investigations for active criminal accusation (e.g. search warrant)
Review of hearing procedures etc.

- JFTC can issue elimination orders without having hearing procedures.
- Hearing procedures shall be started upon objection to the elimination order (Recommendation system was abolished.)
Trade Liberalization & Competition Policies
Problems related to competition policies

Here are examples of difficulties which business entities wishing to enter the local markets in East Asia are facing:

- Anti-competitive activities by economic giants in developing countries
  - Inefficient functioning of competition law
  - Lack of competition law
- Discriminatory and non-transparent application of government regulations – non tariff barriers
Cases observed in certain countries (1)

- Tie-in sales of beer by the giant whisky manufacturer (Abuse of its dominant position)
- Unfair pricing of CATV service providers (Abuse of their dominant position)
- Foreign-invested large stores requesting their tenants to pay commission fee, sales promotion fee and advertisement fee (Abuse of their buying power)
Cases observed in certain countries (2)

- Monopolistic goods seller charging commission fee which is disadvantageous to agent retailers (Abuse of its dominant position)
- Uniformed starting salaries (Cartel?)
- A state-owned company binding a land lease contract which is disadvantageous to its customers (Abuse of its dominant position)
Liberalization of trade and competition policies

- It is true that WTO regime (multilateral) and FTA/EPA (bilateral) brought trade liberalization and have been eliminating tariff and non-tariff barriers.
- However, in the progress of globalization of economy, borderless anti-competitive activities such as international cartels have been observed as well. This may harm the benefit of such liberalization.
Examples of borderless anti-competitive activities

- Price/Quantity cartels, market allocation
  - Vitamin cartel case, Lysine cartel case
- Abuse of dominant position by giants
  - Microsoft case
- International mergers which may cause domination of a market
  - GE/Honeywell case
Examples of borderless anti-competitive activities (cont’d)

• Such anti-competitive activities may
  – restrict imports of goods and internal trades
  – interfere free flow of trade and investment to/from overseas

• They may harm not only domestic economy but also oversea economies
Competition Policy as an Element of EPAs
What is EPA/FTA?

- **EPA (Economic Partnership Agreement)**
  - It seeks liberalization and facilitation of movement of natural persons, trade and investment by eliminating tariff and other trade barriers and immigrating regulation and harmonizing economic systems between specific partner countries.

- **FTA (Free Trade Area) agreement**
  - It seeks liberalization and facilitation of movement of natural persons, trade and investment by eliminating tariff and other trade barriers within certain area.
Number of RTAs Reported to WTO

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<th>Year</th>
<th>1970</th>
<th>1990</th>
<th>2004</th>
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<td>6</td>
<td>27</td>
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(Source: Ministry of Economy, Trade & Industry)
Why competition clause is needed in EPA? (1)

- Competition policy is an inevitable element to ensure the free flow of goods and services stemming from the liberalization of trade and investment
  - Mutual assurance of countermeasures against anti-competitive activities leads to promotion of trade
  - International anti-competitive activities cannot be efficiently controlled by trade remedy tools such as anti-dumping measures.
Why competition clause is needed in EPA? (2)

- Pre-requisite for building up integrated economic community
  - Global anti-competitive activities often require coordination among competition authorities
  - International cooperation to tackle with international anti-competitive activities – elimination of “loop hole”
  - Active competition policy in each country leads to better competition environment in the community as a whole
Why competition clause is needed in EPA? (3)

- Many FTA/EPAs have competition clauses worldwide
  - EPA gives strong thrust to competition policy because of simultaneous effort by both sides to facilitate trade in every sector
International cooperation on competition policy (bilateral competition agreements)

- Japan–US: Enacted in 1999
- Japan–EU: Enacted in 2003
- Japan–Canada: Signed in September 2005
- Japan–Australia: Preparing for negotiation
International cooperation on competition policy (EPA Competition Chapter)

- Japan–Singapore: Enacted in Nov. 2002
- Japan–Mexico: Enacted in Apr. 2005
- Japan–Korea: Negotiating since Dec. 2003
- Japan–Thailand: Negotiating since Jan. 2004
- Japan–the Philippines: Agreed in principle in Nov. 2004
- Japan–Malaysia: Negotiating since Jan. 2004
- Japan–Indonesia: Negotiating since Jul. 2005
- Japan–ASEAN: Negotiating since Apr. 2005
Possible elements of competition chapter in EPA (in general)

- Declaration of taking appropriate measures to control anticompetitive activities within each side’s applicable laws and regulations,
- Declaration of ensuring consistency with the core principles of non-discrimination, transparency and procedural fairness in implementing relevant laws and regulations, and
- Cooperation in the field of controlling anticompetitive activities.
Possible elements of competition
chapter in EPA
(Example of full-fledged EPA)

- **Notification**
  - Competition authority of each party shall notify the competition authority of the other party with respect to the enforcement activities that the notifying competition authority considers may affect the important interests of the other party.

- **Cooperation**
  - Competition authority of each party shall render assistance to the competition authority of the other party in its enforcement activities to the extent consistent with the laws and regulations of the party.

- **Coordination**
  - Competition authorities of both parties shall consider coordination of their enforcement activities, in case of pursuing mutually related matters.
Possible elements of competition chapter in EPA
(Example of full-fledged EPA)

- Requests for Enforcement Activities (Positive Comity)
  - A competition authority may request the other competition authority to initiate appropriate enforcement activities within its territory when the important interest of the requesting party is adversely affected by foreign anti-competitive activities.

- Consideration of Important Interests of the Other Party (Negative Comity)
  - The competition authority of each party shall give careful consideration to the important interests of the other party throughout all phases of its enforcement activities.
Information Sharing

- Information sharing through Web site database and e-mail magazine
  - JFTC established web based database and has been providing monthly e-mail services
  - Please visit http://www2.jftc.go.jp/eacpf/