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

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

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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?

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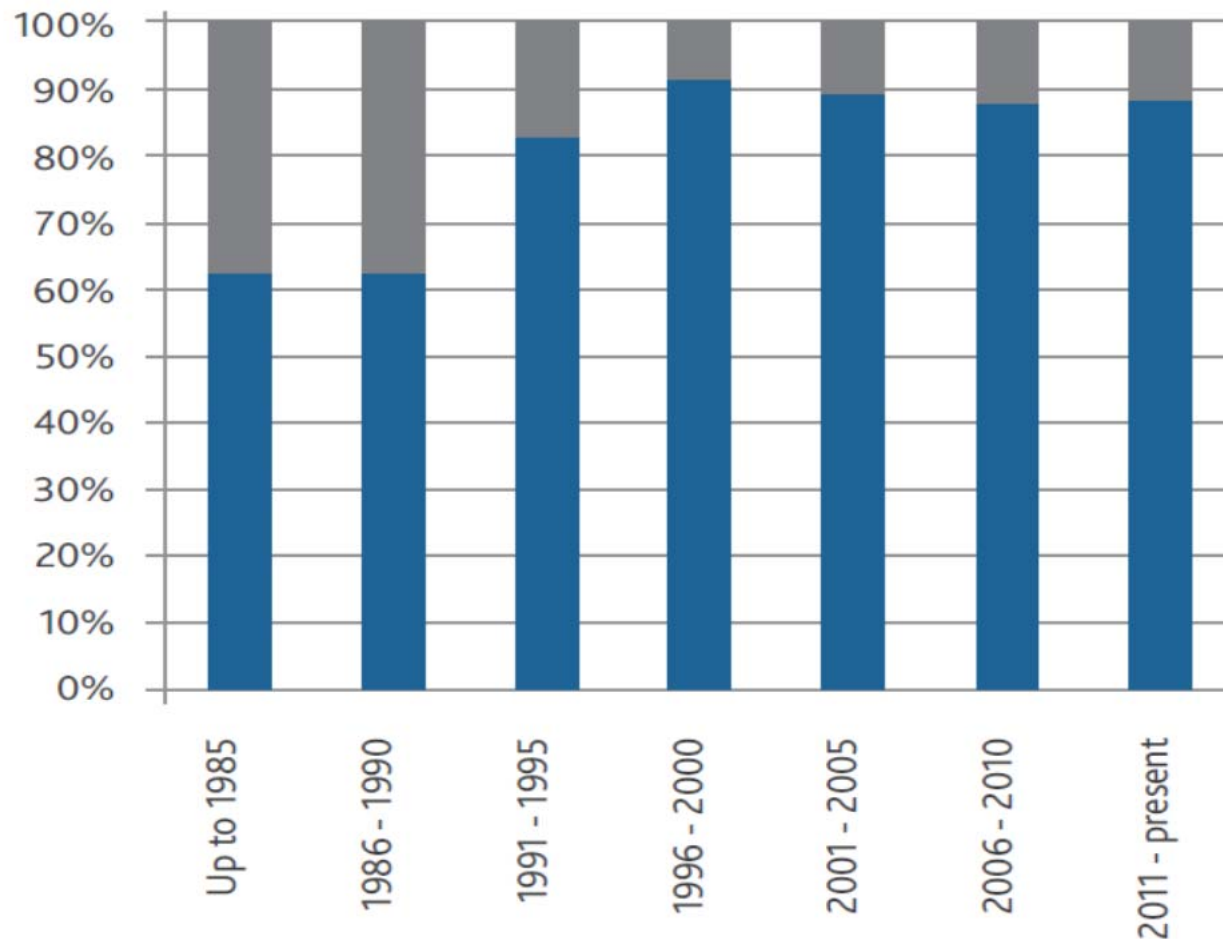
2. Competition Chapters in the existing FTAs/EPAs

(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.
- Lapr v te, 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 Lapr v te 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 v te et al. (2015), p.2

2. Competition Chapters in the existing FTAs/EPAs

(3) Statistics of Competition Chapters only

Note: Lapr v te 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

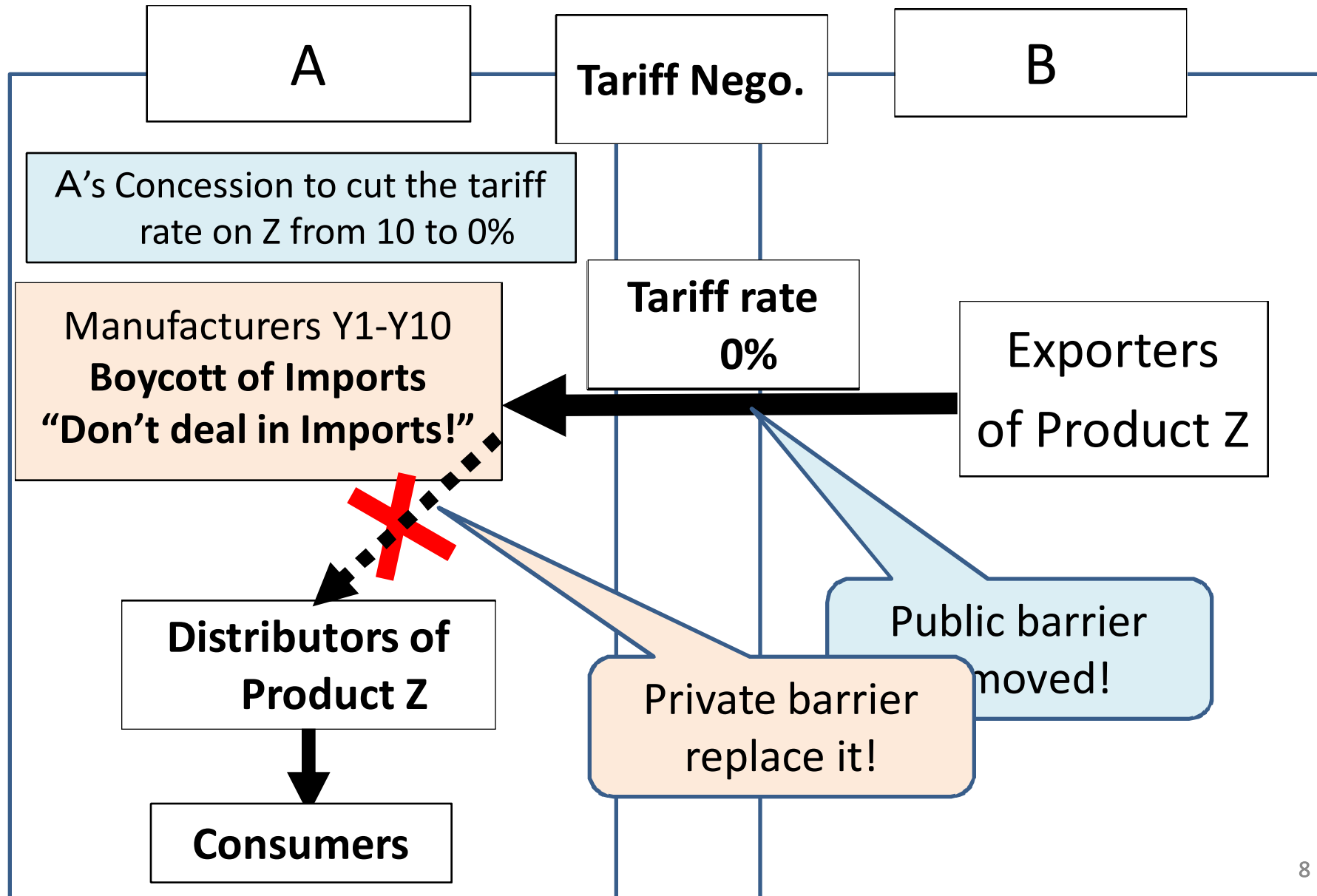
(1) Trade policy justifications No.1: Combatting Private Barriers replacing Public Barriers *E.g.*, EEC Treaty of Rome Arts.85/86(1957): Trade liberalization with competition law

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)

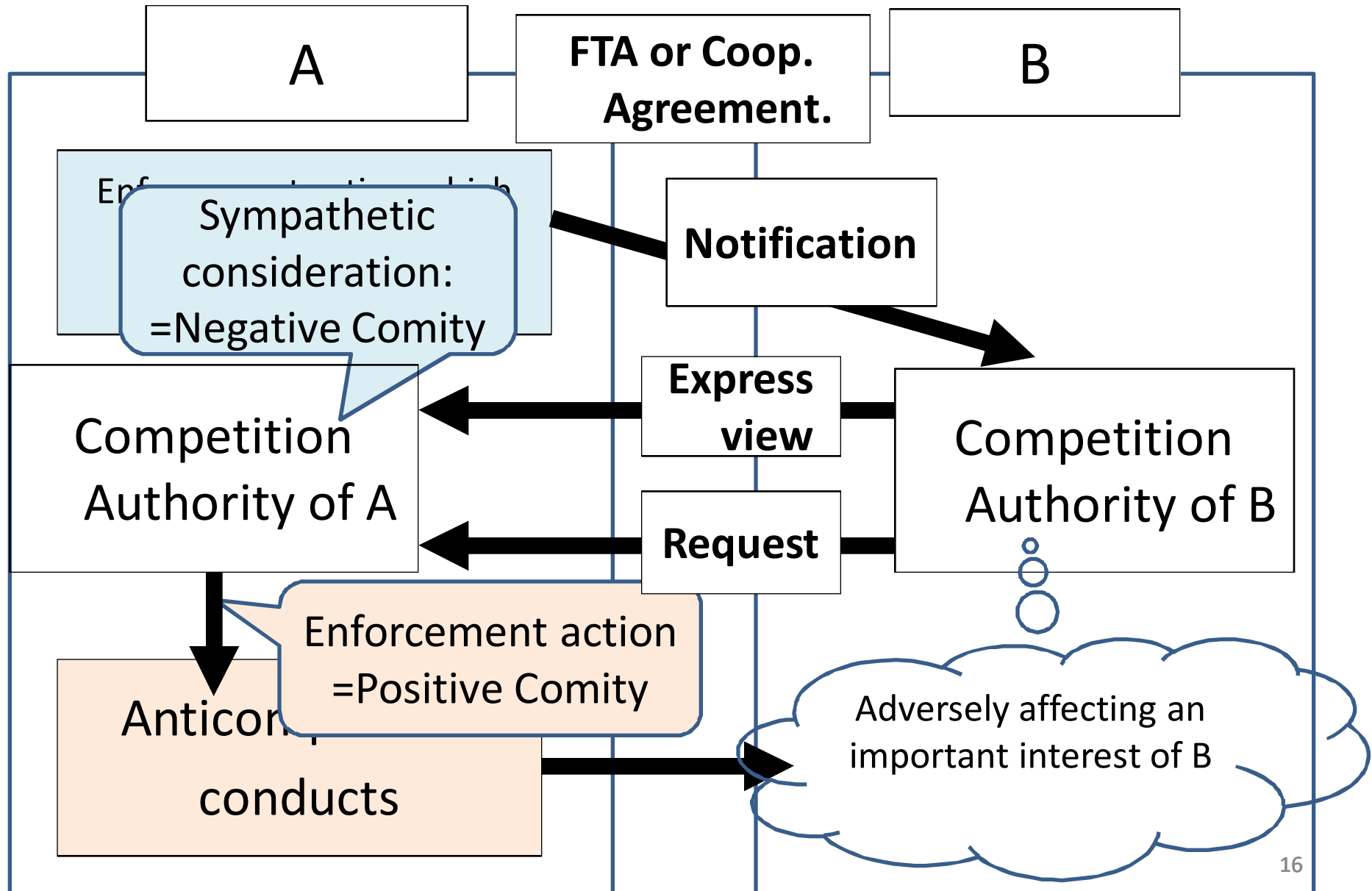
E.g., Canada-EFTA FTA (2008) Art.15 (“2. ... **a Party shall notify another Party when a proposed or actual competition law enforcement action may have an effect on that other Party’s important interests, and give full and sympathetic consideration** to the views expressed by that other Party... *(Cf. 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...”)

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

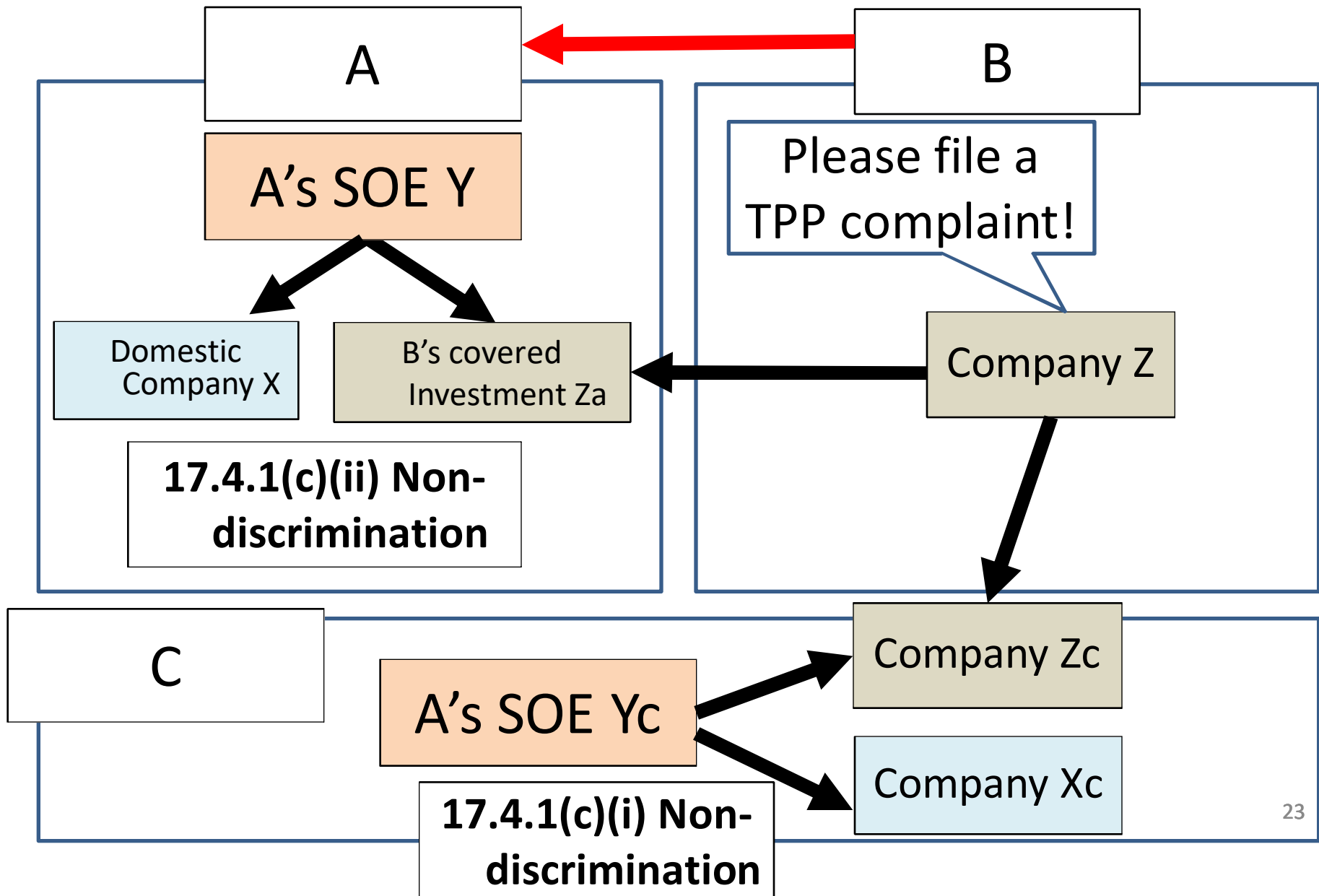
(6) Designated Monopoly and State Enterprises (cont.)

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/ S ccnd+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	S M: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/ cc nd+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 in Goods	✓ (Red, Yellow)	✓ (CVD)	✓ (Red, Yellow)	✓ (Red, Yellow)
Trade in Service/ Investment	△ (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)

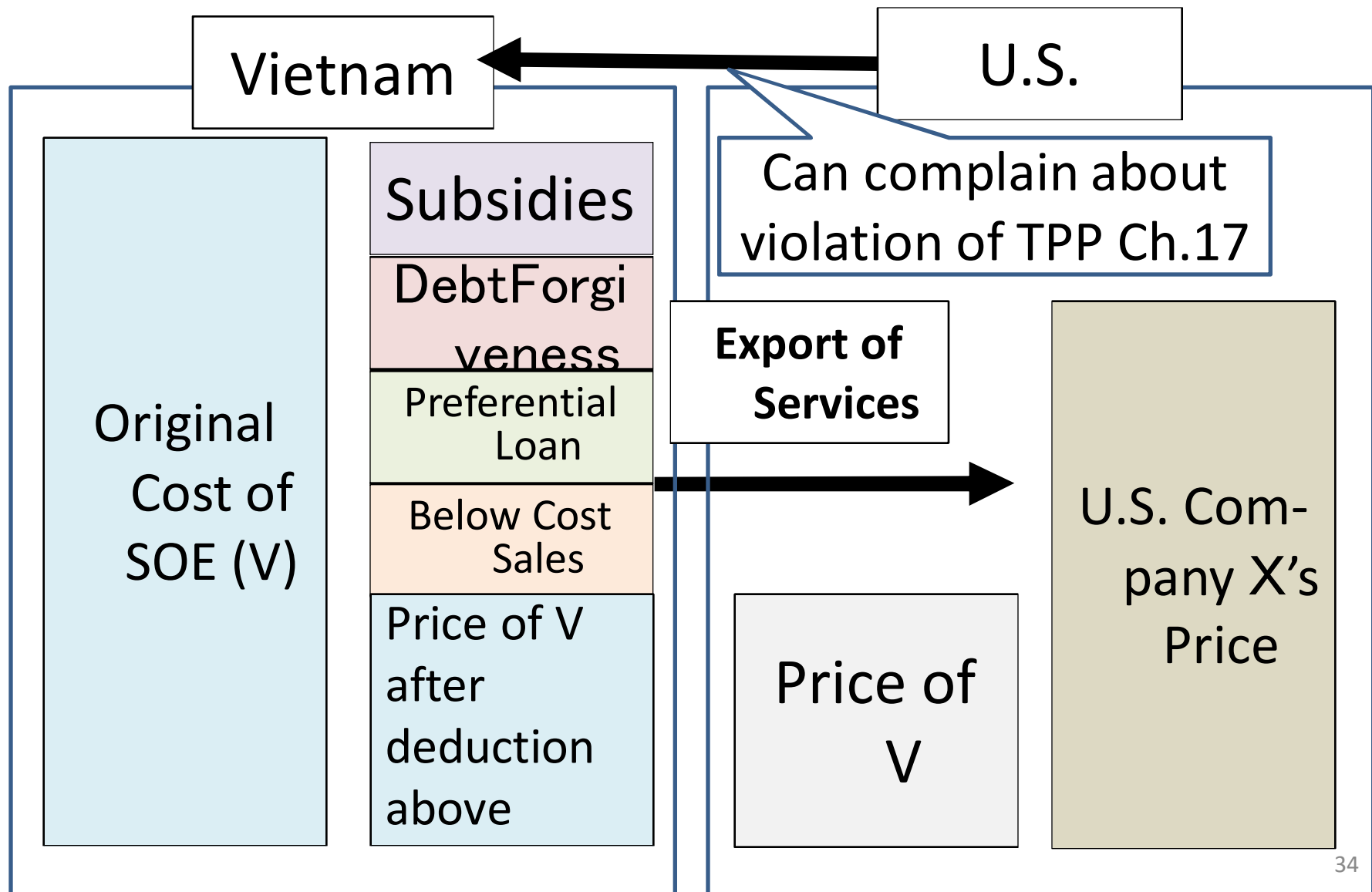
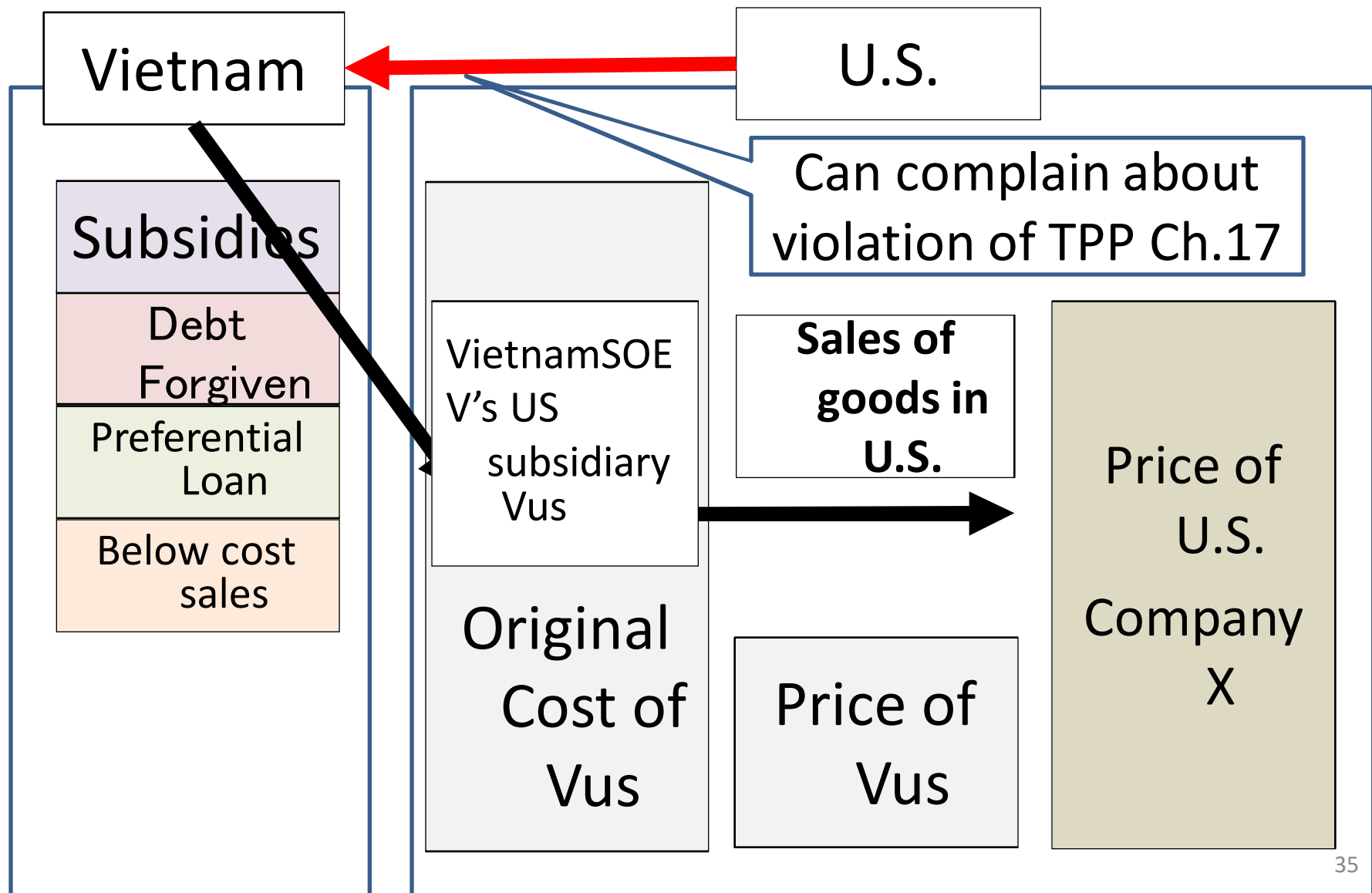


Figure 6 Function of TPP Ch.17
(Investment injuring Domestic Industry)



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 curved out by some negotiating economies in TPP
 - $1 > 2$ at home while $2 > 1$ abroad?

Thank you for your attention!