



**Asia-Pacific
Economic Cooperation**

2018/SOM3/CTI/WKSP1/005

**Essential Elements on Competition Chapter in Free
Trade Agreements and Economic Partnership
Agreements from Japan Fair Trade Commission's
Experience**

Submitted by: Japan



**Free Trade Area of the Asia-Pacific
Capacity Building Workshop on
Competition Chapter in Free Trade
Agreements and Economic
Partnership Agreements
Port Moresby, Papua New Guinea
11 August 2018**

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



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

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

<CHAPTER11 COMPETITION POLICY>

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



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

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1. Necessity for International Cooperation Frameworks on Competition

Globalization of economic activities

- Globalization of supply chains
- Increase of international mergers



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



Necessity for International Cooperation
Frameworks on Competition



2. Overview of Japan's International Cooperation Frameworks

I

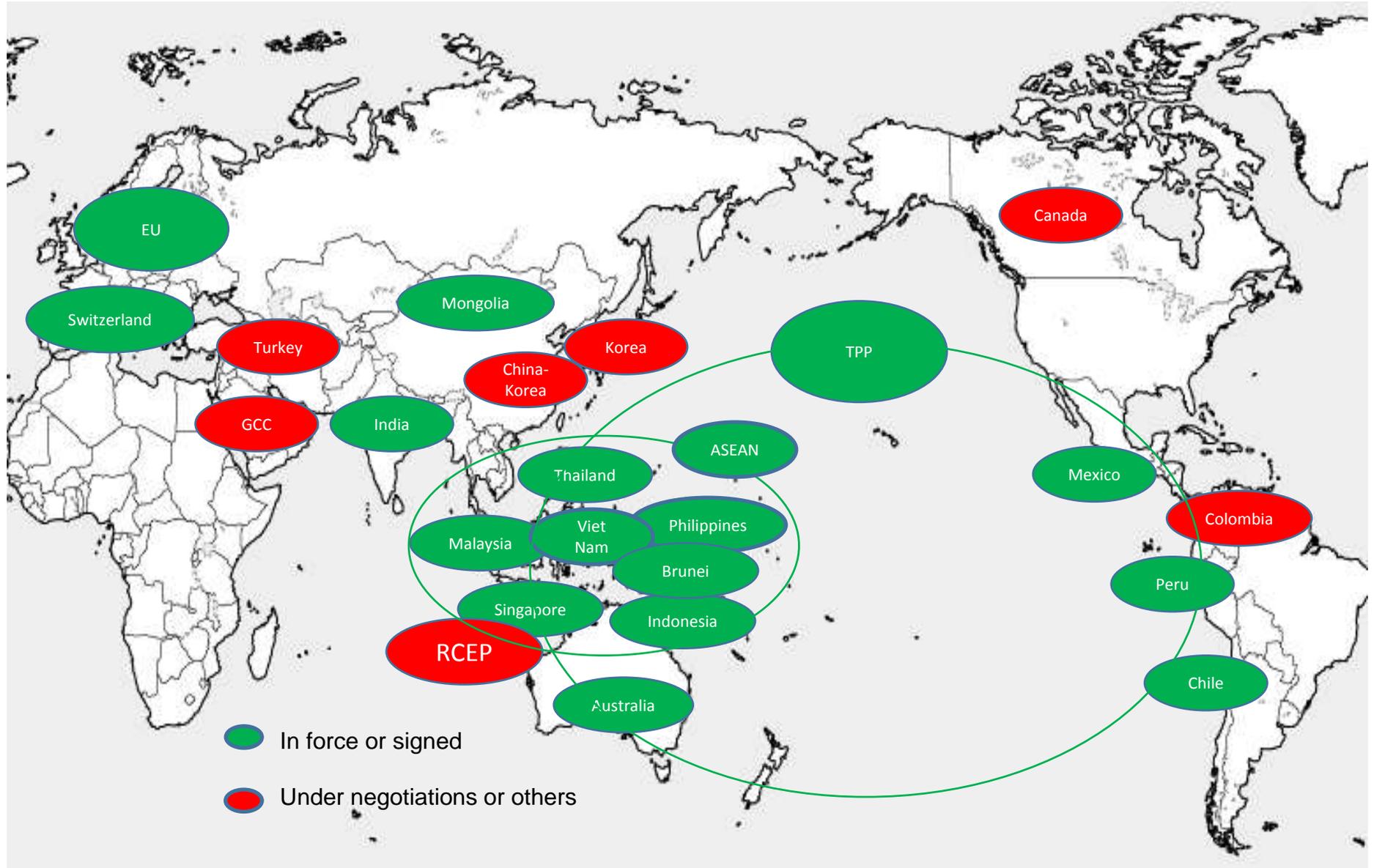
FTA/EPA (competition chapter)

II

Anti-monopoly Cooperation Agreement

III

MOU (Memorandum of Understanding)



(as of July 2018)

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

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

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

* 'Economy' means 'Economy / Country / Region'

1999

2002-

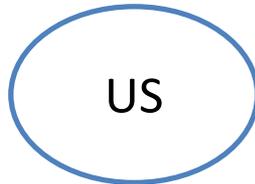
2013-



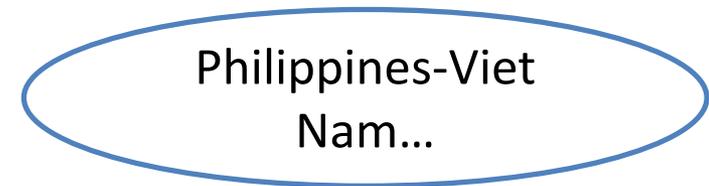
FTAs/
EPAs



Cooperation
Agreements



MOUs





3. Elements in FTAs/EPAs's Competition Chapter

I

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

II

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

III

Others

● Examples of basic Principles in Enforcing Competition

Law

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



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

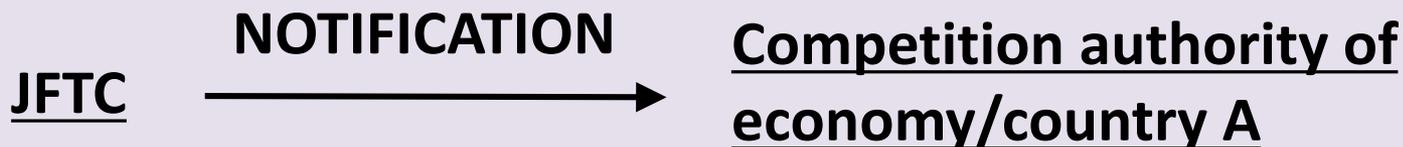
● : FTA /EPA ◎ : FTA/EPA and MOU

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



	SINGAPORE	MEXICO	MALAYSIA	PHILIPPINES	CHILE	THAILAND	INDONESIA	ASEAN	VIETNAM	SWITZERLAND	INDIA	PERU	AUSTRALIA	MONGOLIA	TTP	EU
Notification	◎	●		○		●	●		◎	●		●	◎	●	●	△
Cooperation in enforcement activities	◎	●		○		●	●		◎	●		●	◎	◎	●	△
Coordination of enforcement activities	○	●				●	●		◎	●		●	◎	●	●	△
Negative comity		●								●		●	○	●		△
Positive comity	○	●								●		●	○	●		△

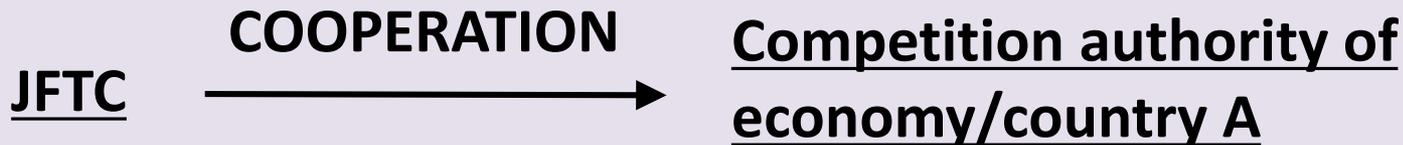
◎ : FTA/EPA and MOU ● : FTA/EPA ○ : MOU △ : Anti-monopoly Cooperation Agreement



Examples

JFTC notifies the competition authority of economy/country A,

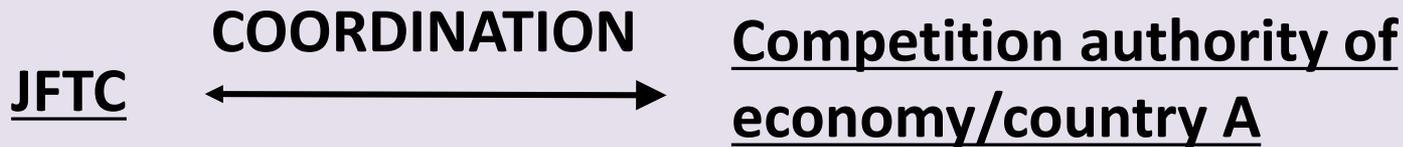
- ◆ in a case which JFTC has launched an investigation against branch office in Japan of a company of economy/country A.
- ◆ In a case which merger review including a company of economy/country A goes to the second stage.



Examples

◆ JFTC provides information with respect to anti-competitive activities which may be relevant to the enforcement activities of the competition authority of economy/country A.

◆ JFTC provides information it possesses upon the request of the competition authority of economy/country A.



Examples

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

● Examples of possible enforcement cooperation

Pre-investigation stage

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

Investigation stage

- Exchange of progress of investigation

Decision making stage

- Provide information on legal measures

- Examples of international cartel case

Marine hose
(Feb. 2008)

Air freight
forwarder
(Mar. 2009)

Auto parts
(2012-2013)

International
ocean shipping
(Mar. 2014)

Capacitor
(Mar. 2016)

Comity

Negative (traditional) comity

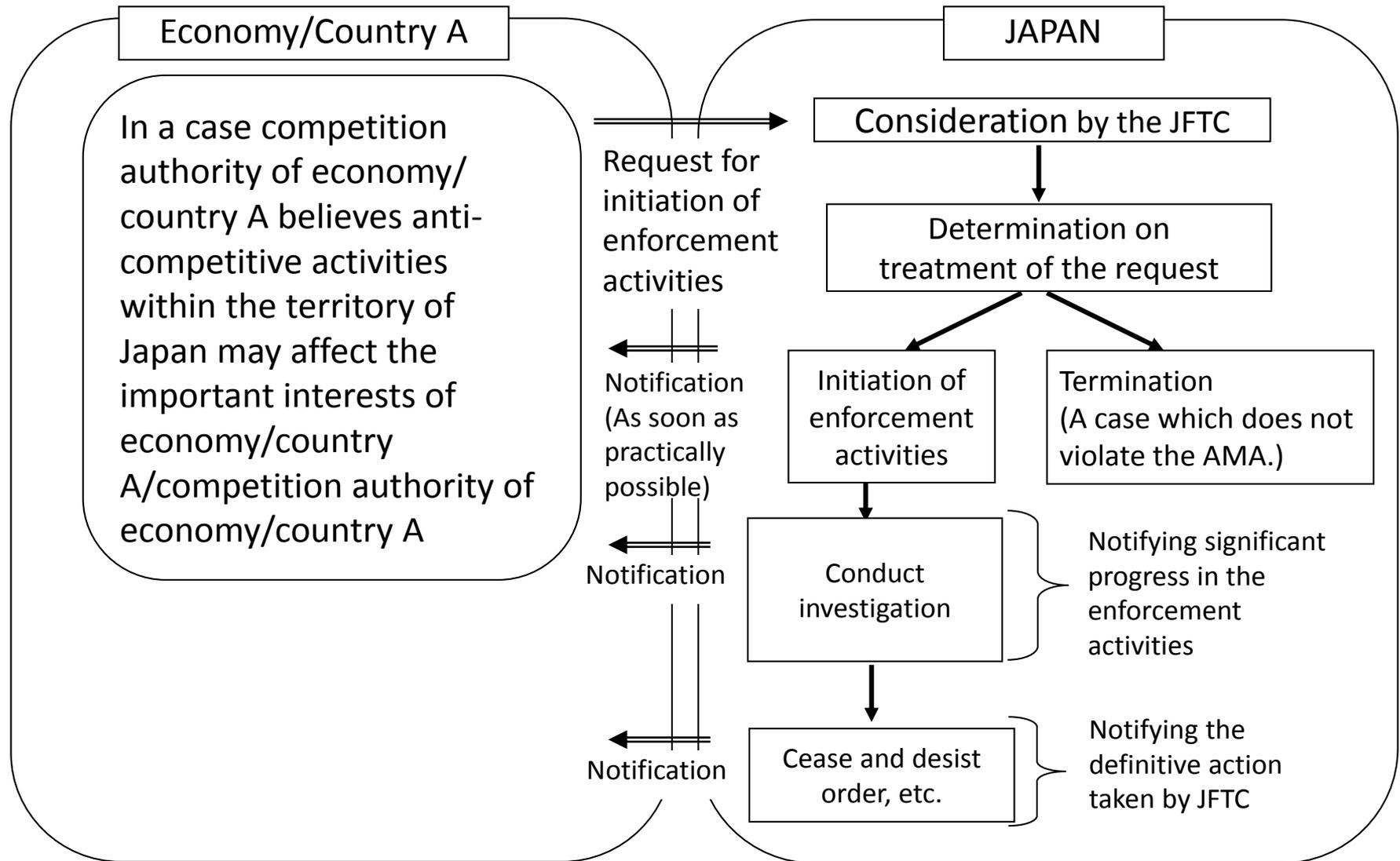
- Consideration of how to prevent its law enforcement actions from harming important interest of another economy/country

Positive comity

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



Examples



● Examples of other articles

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



	SINGAPORE	MEXICO	MALAYSIA	PHILIPPINES	CHILE	THAILAND	INDONESIA	ASEAN	VIETNAM	SWITZERLAND	INDIA	PERU	AUSTRALIA	MONGOLIA	TPP	EU
Technical cooperation	◎	●	●	◎		●	●		◎			●		◎	●	
Consultation/regular meeting between competition authority	○	●	●	◎		●	●		◎	●		●	◎	◎	●	△
Confidentiality of information	◎	●				●	●		○	●		●	◎	●		△
Review of articles	●		●	●		●	●	●					◎	○		■

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

■ : FTA/EPA and Anti-monopoly Cooperation Agreement



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

Chapter

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

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

● In terms of contents of enforcement cooperation

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

* general and brief prescription

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

Trend to stipulate “Operationally Independent competition authority”

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

Trend to specify basic principles in detail

(Especially about Procedural Fairness)

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

	Contents of related provision
TPP	<p>Each Party shall provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that Party's laws.</p> <p>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.</p>



5. Conclusion

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

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

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

How does JFTC consider the elements ?



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

Thank you for your kind attention !!



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