



**Asia-Pacific  
Economic Cooperation**

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2018/SOM3/CTI/WKSP1/006

## **Competition Chapters in Free Trade Agreements: The Malaysian Experience**

Submitted by: Malaysia



**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**



**COMPETITION CHAPTERS IN FTAs:  
THE MALAYSIAN EXPERIENCE**  
**FTAAP Capacity Building Workshop on  
Competition Chapter in FTAs/EPAs**  
**Third APEC Senior Official's Meeting**  
**Port Moresby, Papua New Guinea**  
**11<sup>th</sup> August 2018**

***ARUNAN KUMARAN***  
***Lead Negotiator for Malaysia***  
***Competition Policy and State Owned Enterprises Chapters***  
***Free Trade Agreements***

# MALAYSIA AND FTAs



## Concluded and implemented

7 bilateral FTAs : **Japan, Pakistan, New Zealand, India, Australia, Chile and Turkey.**

6 regional FTAs : **China, Korea, Japan, Australia, New Zealand and India.**



## Signed but yet to implement

Comprehensive Partnership Agreement for Trans-Pacific Partnership (**CPTPP**)



## Under negotiations

Malaysia- EU FTA (**MEUFTA**)

Malaysia-EFTA Economic Partnership Agreement (**MEEPA**) – **Iceland, Liechtenstein, Norway and Switzerland**

Regional Comprehensive Economic Partnership Agreement (**RCEP**)

# ***WHAT WILL WE COVER?***

- Malaysia Japan Economic Partnership Agreement
- Malaysia New Zealand Free Trade Agreement
- ASEAN-Australia New Zealand Free Trade Agreement
- Malaysia Australia Free Trade Agreement
- Comprehensive and Progressive Agreement for Trans Pacific Partnership
- Regional Comprehensive Economic Partnership Agreement



# ***Pre Competition Act***

**Malaysia entered into many FTAs but.....**

- **Avoid Competition Policy Chapter**
- **Cautious Approach**
- **Minimal Commitments**
- **Focus on Technical Cooperation**



## Chapter 10 – Controlling Anti Competitive Activities



- Measures Against ACP
- Review/Improve/Adopt Law or Measures to Control ACP
- Cooperate in Controlling ACP
- No Dispute Settlement Provisions

The first time where Malaysia agreed to have a Competition Chapter in a FTA

Cooperation

Technical  
Cooperation

# MALAYSIA – AUSTRALIA FREE TRADE AGREEMENT

## Chapter 14 – Competition Policy



- **Adopt/Maintain/ Enforce Measures on ACP**
- **Commercial Activities to be Subjected to the Measures**
- **Exemptions to be Transparent/Public Policy/Public Interest**
- **Cooperation and Technical Cooperation**
- **Consultation**
- **No Dispute Settlement Provisions**

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**More substantive obligations on implementation of Competition Law**

**Timeliness**

**Procedural  
Fairness**

# MALAYSIA – NEW ZEALAND FREE TRADE AGREEMENT

## Chapter 12 – Competition



- **Measures/Laws to be Consistent with Competition Principles**
- **Commercial Activities to be Subjected to the Law**
- **Exemptions to be Transparent/Public Policy/Public Interest**
- **Cooperation and Technical Cooperation**
- **Discussion on developing measures to address ACP**
- **Non Application of Dispute Settlement**

**Began to Focus on substantive obligations such as ACP and Exemptions**

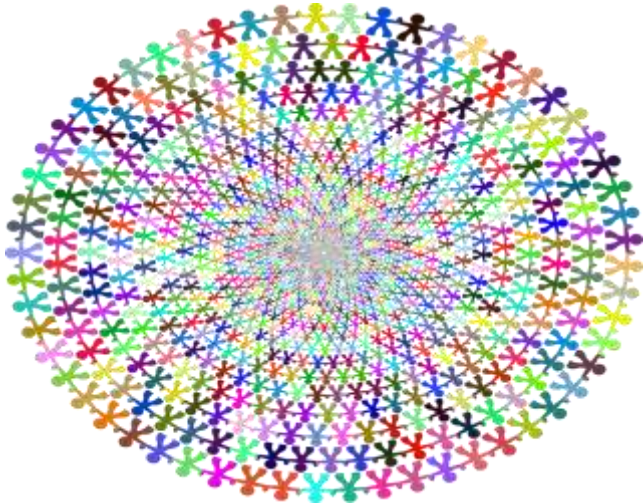
**Measures/Law**

**Exemptions**



# ASEAN AUSTRALIA NEW ZEALAND FREE TRADE AGREEMENT

## Chapter 14 – Competition



- **Cooperation in promotion of competition, enhance efficiency, consumer welfare and curtailment of ACP**
- **Exchange of Information/experience**
- **Technical Cooperation**
- **No Dispute Settlement Provisions**

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**Focus on Cooperation/Technical Cooperation and Information Exchange**

**Cooperation**

**Information Exchange**

# ***Post Competition Act 2010***

- **Broad Approach**
- **Consider Commitments**
- **Cooperation on Enforcement**
- **Technical Cooperation**



# ***TPPA AND CPTPP***

- **21<sup>st</sup> Century Agreement**
- **A Step Further**
- **Strong Commitments**
- **Prescriptive**
- **Onerous**



# ***CPTPP COMPETITION CHAPTER***



# ***CPTPP Competition Chapter***

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## ***Scope***

- **Applies to all commercial activities in Malaysia regardless of ownership**

# ***CPTPP Competition Chapter***

## ***Competition Law and Authorities***

- **Adopt or Maintain Law**
- **Exemption – Transparent, Public Policy and Public Interest**
- **Authorities to Enforce Law**
- **Non Discrimination of Enforcement Policies**

# ***CPTPP Competition Chapter***

## ***Procedural Fairness***

- **Reasonable Opportunity to be Represented by Counsel**
- **Opportunity to be Heard and Present Evidence**
- **To Allow Analysis of Qualified Expert**
- **Cross Examine Witnesses; Rebut Evidence**
- **Written Investigation Procedures**
- **Review Sanction or Remedy in Courts and Tribunals**
- **Settlement Mechanisms**

# ***CPTPP Competition Chapter***

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# ***CPTPP Competition Chapter***

## ***Private Rights Of Action***

- **To provide for Private Rights of Action**
- **Available to all affected Parties**

# ***CPTPP Competition Chapter***

## ***Transparency***

- **Enforcement Policies to be Transparent**
- **Maintain Central Electronic Database**
- **Competition Law Enforcement Activities**
- **Exemptions and Immunities**
- **Decisions – Written and Published**
- **Reasoning – Legal and Economic Analysis**

# ***CPTPP Competition Chapter***

## ***Consultation & Cooperation***

- **Consultation Between Parties on Matters That Affects Trade and Investment**
- **Cooperation and Coordination**
  - **Notification**
  - **Consultation**
  - **Exchange of Information**
  - **Cooperation Agreement between Competition Authorities**
- **Technical Cooperation**
  - **Training**
  - **Advice**
  - **Exchange of Officials**
  - **Promote Competition Culture**

# ***RCEP Competition Chapter***

## ***Some of the Elements***

- **Measures on ACP**
- **Procedural Fairness**
- **Cooperation**
- **Confidentiality**
- **Cooperation**
- **Technical Assistance and Capacity Building**
- **Consumer Protection**

# Emerging Issues in FTA Competition Chapters

**State Owned Enterprises**

**Consumer Protection**



**CONSUMER  
PROTECTION**

# Disciplines on State Owned Enterprises - Is it New?

## GATT Article 17 (1) – State Trading Enterprises

- (a) A State Trading Enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment.
- (b) Such enterprise shall make any such purchases and sales solely in accordance with commercial considerations, including, price, quality, availability, marketability, transportation and other conditions for purchase or sale.



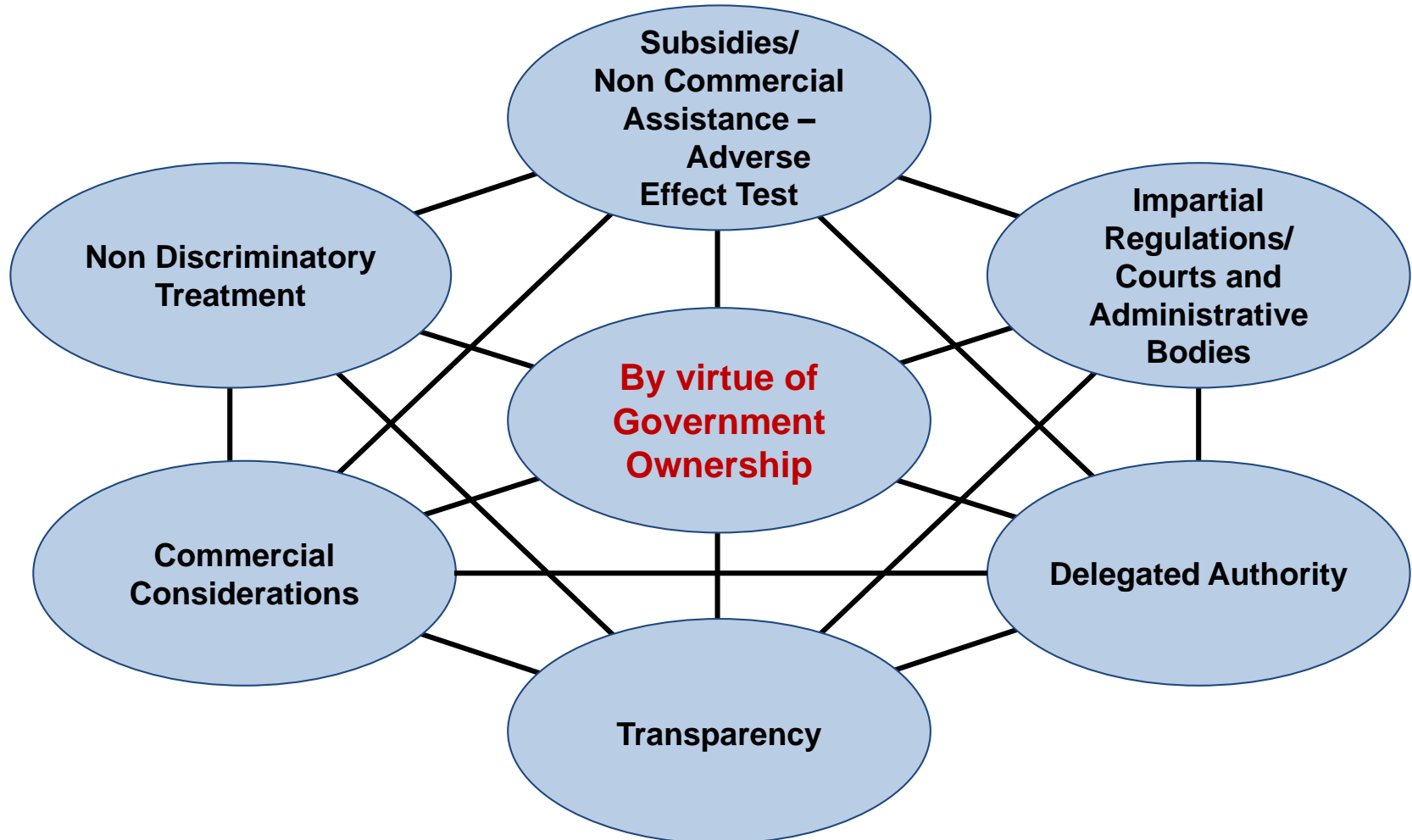
# Disciplines on State Owned Enterprises - Is it New?

WTO Agreement on Subsidies and Countervailing Measures

- i. Definition of Subsidies
- ii. Adverse Effects
- iii. Serious Prejudice
- iv. Transparency



# Disciplines on State Owned Enterprises – Possible Elements





# Disciplines on State Owned Enterprises

## – *Is It Needed?*

### Factors to be Considered

1. Efficiency
2. Better Governance
3. Accountability
4. Government Policies
5. Socio Economic Development
6. Role of SOEs in Nation Building
7. Country Specific Flexibilities



# ***CONSUMER PROTECTION***

- **To maintain Consumer Protection Laws to Address Fraudulent and Deceptive Commercial Practices**
- **Cooperation and Coordination on Enforcement**



# Concluding Remarks

|                              |            |   |
|------------------------------|------------|---|
| Malaysia's Approach          | <b>YES</b> | <ul style="list-style-type: none"><li>• Progressive Step for Malaysia</li><li>• Cautious/Case by Case</li><li>• More FTAs Soon</li><li>• Efficient and Competitive Market</li></ul> |
| Assess Needs of Stakeholders | <b>YES</b> | <ul style="list-style-type: none"><li>• Extensive Consultation</li><li>• Gauge Readiness to Accept Commitments</li></ul>  |
| Assess Approach to FTAs      | <b>YES</b> | <ul style="list-style-type: none"><li>• Competition Chapter – Permanent Feature in FTA</li><li>• Open to Consider New Issues – Identify Positive Issues</li></ul>                   |
| Way Forward                  | <b>YES</b> | <ul style="list-style-type: none"><li>• To Depart from Defensive Mode</li><li>• Best Interest of the Nation</li></ul>   |

**THANK YOU**

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