



**Asia-Pacific  
Economic Cooperation**

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**Discuss the Relation Between Investment and  
Competition Policy Including Chapters on Free  
Trade Agreements and Economic Partnership  
Agreements**

Submitted by: Shumei University



**Free Trade Area of the Asia-Pacific  
Capacity Building Workshop on  
Competition Chapter in Free Trade  
Agreements and Economic  
Partnership Agreements  
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# Discuss the Relation between Investment and Competition Policy Including Chapters on FTAs · EPAs



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# Today's outline



- ❧ Competition policy essentials
- ❧ Japan's experience
- ❧ Relation between investment and competition policy
- ❧ International case study
- ❧ Takeaways

- ❧ Dr. Koki Arai is Professor of Economics at Shumei University, Japan
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- ❧ He was also in charge of Economic Research Office as a director, for merger and acquisition (M&A) issues in the M&A division of JFTC as the senior examiner, and in the International Affairs Office for the International Competition Network issues as senior policy planner
- ❧ Prior to joining JFTC, he was an associate professor of economics at the Institute of Social and Economic Research of Osaka University
- ❧ He received his Ph D from Osaka University, and his BA from Waseda University

# Competition Policy Essentials



- ❧ Competition between firms is usually the most effective way of allocating economic resources and achieving consumer and producer welfare
- ❧ At the same time, there is a balance to be struck; firms must not be over-regulated, but neither must they be completely free to create a monopoly or oligopoly giving them super-competitive profits or a quiet life
- ❧ Therefore, the role of competition policy is to maintain a balance by using the collaborative economics of industrial organization

# Competition Policy Essentials



- ❧ This presentation analyzes relation investment and competition policy based on the knowledge and experience of Japanese and international antimonopoly law and enforcement in cases such as cartel cases, private monopolization cases, and merger cases
- ❧ The JFTC implements a competition policy, primarily through the enforcement of the antimonopoly law, which promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition, thereby ensuring economic vitality and consumer benefit
- ❧ It is important to understand the competition policy from the point of view of Asia Pacific businesses

# Competition Policy Essentials



## ☞ Regulation of the Antimonopoly Act

### ☞ Prohibition of Private Monopolization

- ☞ If any entrepreneurs exclude or control competitors from the market by means of unjust low-price sales, discriminatory prices, etc. or monopolize the market by obstructing business activities of new-comers to the market, such acts are prohibited as “private monopolization”

### ☞ Prohibition of Cartels

- ☞ If any entrepreneurs consult with each other to jointly determine product prices, sales and production volumes, etc. and restrain competition as the result, such acts are prohibited as “unreasonable restraint of trade”

### ☞ Prohibition of Unfair Trade Practices

### ☞ Merger Control

# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Private Monopolization

- Where the music copyright management service provider currently operating in the market, in the course of granting blanket authorization to exploit musical works under its management in broadcasting, concludes a license agreement with almost all broadcasting organizations wherein fees are to be collected by a method on the basis of the amount calculated by multiplying the income from broadcasting business in each fiscal year by a predetermined rate or on the basis of a predetermined amount, and collects fees under such agreement, given the factual circumstances indicated in the judgment, including (1) through (3) below, such practice of the current music copyright management service provider has the effect of making it extremely difficult for other service providers to enter the market for licensing the use of musical works in broadcasting, which constitutes the element of "excluding business activities of other enterprises" referred to in Article 2, paragraph (5) of the Antimonopoly Act:



# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Private Monopolization

- ❧ (1) it should have been difficult in said market for broadcasting organizations to think of not concluding a license agreement based on blanket authorization with the current service provider who has been entrusted with the management of the majority of music copyrights even after the change from the permission system to the registration system for said management service;
- ❧ (2) since the current service provider adopts the abovementioned collection method wherein the ratio of use in broadcasting of the musical works under the current service provider's management is not reflected in the amount of fees, if broadcasting organizations pay broadcasting fees to other management service providers, the total amount of broadcasting fees payable thereby would increase; and
- ❧ (3) the current service provider's practice as described above continued for more than seven years

❧ Date of the judgment (decision): 2015.04.28, Supreme Court of Japan

# Competition Policy Essentials



## Recent Development of the Antimonopoly Act

### Prohibition of Cartels

- In the case where a cartel conducted by business operators engaged in the manufacturing and selling of cathode-ray tubes for televisions (CRT) in relation to the sales prices of CRT for subsidiary companies, etc. of business operators engaged in the manufacturing and selling of televisions in Japan that were located outside of Japan was agreed upon outside of Japan, under the circumstances held in the judgment, such as the following (1) to (3), such cartel infringed on the order of the free-competition economy in Japan, and therefore a provision related to a surcharge payment order of the Antimonopoly Act of Japan applies to a business operator who conducted such cartel

# Competition Policy Essentials

## Recent Development of the Antimonopoly Act

### Prohibition of Cartels



- ❧ (1) The business operators engaged in the manufacturing and selling of televisions in Japan controlled the business of the manufacturing and selling of cathode-ray tube televisions conducted by them and their subsidiary companies, etc., and instructed subsidiary companies, etc. that were located outside of Japan and that were manufacturing cathode-ray tube televisions to conduct manufacture, etc., and all or most of cathode-ray tube televisions manufactured by such subsidiary companies, etc. in accordance with the said instruction were purchased and sold by such business operators or their subsidiary companies, etc.
- ❧ (2) As part of conducting the business of manufacturing and selling cathode-ray tube televisions as mentioned in (1), the business operators engaged in the manufacturing and selling of televisions in Japan determined important trade terms and conditions, such as suppliers, purchase prices, and purchase volumes, for cathode-ray tubes, which are key parts of the televisions; instructed subsidiary companies, etc. that were located outside of Japan and that were manufacturing cathode-ray tube televisions to purchase such cathode-ray tubes; and had such subsidiary companies, etc. purchase cathode-ray tubes from business operators who conducted such cartel.
- ❧ (3) While the business operators engaged in the manufacturing and selling of televisions in Japan conducted negotiations directly by themselves pertaining to trade terms and conditions for cathode-ray tubes for televisions with business operators who conducted such cartel, sales prices presented in the negotiations by business operators who conducted such cartel were bound by such cartel.

❧ Date of the judgment (decision): 2017.12.12, Supreme Court of Japan

# Japan's experience

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## Economic Partnership Agreements

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Mongol	Agreement between Japan and Mongolia for an Economic Partnership	7-Jun-16
Australia	Agreement between Japan and Australia for an Economic Partnership	15-Jan-15
Peru	Agreement between Japan and The Republic of Peru for an Economic Partnership	1-Mar-12
India	Comprehensive Economic Partnership Agreement between Japan and the Republic of India	1-Aug-11
Switzerland	Agreement on Free Trade and Economic Partnership Between Japan and The Swiss Confederation	1-Sep-09
Viet Nam	Agreement between Japan and The Socialist Republic of Vietnam for an Economic Partnership	1-Oct-09
ASEAN	Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations	
Indonesia	Agreement Between Japan and The Republic of Indonesia for an Economic Partnership	1-Jul-08
Thailand	Agreement Between Japan and The Kingdom of Thailand for an Economic Partnership	1-Nov-07
Chile	Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership	3-Sep-07
Philippines	Agreement Between Japan and the Republic of the Philippines for an Economic Partnership	11-Dec-08
Malaysia	Agreement between Government of Japan and the Government of Malaysia for an Economic Partnership	13-Jul-06
Mexico	Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership	1-Apr-05
Singapore	Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership	30-Nov-01

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# Japan's experience

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## Anti-monopoly Cooperation Agreements

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Canada	Agreement Between The Government Of Japan And The Government Of Canada Concerning Cooperation On Anticompetitive Activities(PDF : 24KB)	6-Oct-05
European Communities	Agreement Between The Government of Japan and The European Community Concerning Cooperation on Anticompetitive Activities(PDF : 37KB)	9-Aug-03
United States	Agreement Between The Government of Japan and The Government of The United States of America Concerning Cooperation on Anticompetitive Activities	8-Oct-99

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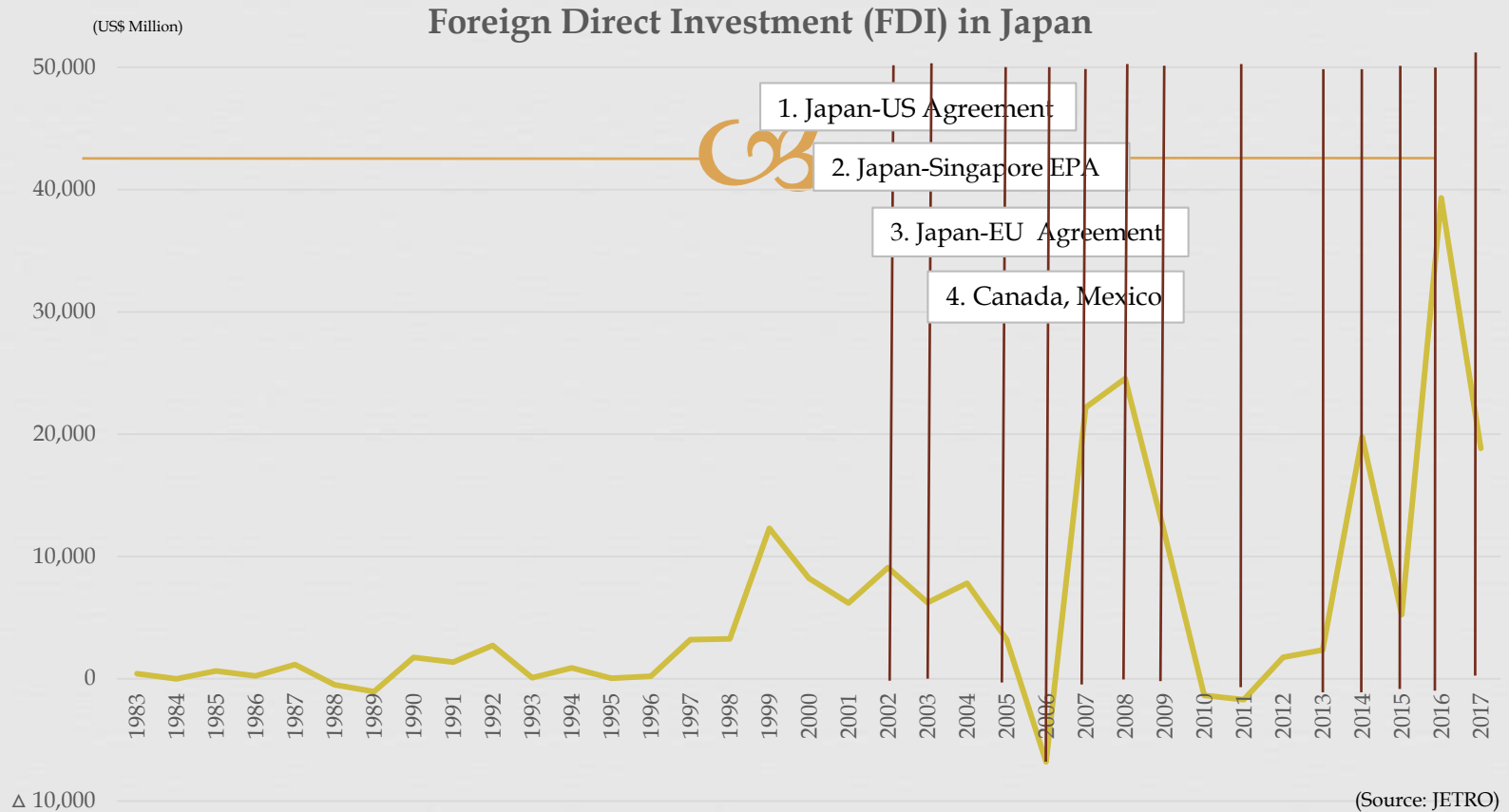
## Inter-agency Cooperation Memorandums/Arrangements/

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Singapore	Memorandum Of cooperation Between The Fair Trade Commission Of Japan And The Competition Commission Of Singapore	22-Jun-17
Canada	Cooperation Arrangement Between The Fair Trade Commission Of Japan And The Commissioner Of Competition, Competition Bureau Of The Government Of Canada In Relation To The Communication Of Information In Enforcement Activities	11-May-17
Mongolia	Cooperation Arrangement Between The Fair Trade Commission Of Japan And The Authority For Fair Competition And Consumer Protection Of Mongolia	15-Mar-17
Kenya	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Competition Authority of Kenya	9-Jun-16
China	Memorandum on Antimonopoly Cooperation between the Fair Trade Commission of Japan and the Ministry of Commerce of the People's Republic of China	11-Apr-16
	Memorandum on Antimonopoly Cooperation between the Fair Trade Commission of Japan and the National Development and Reform Commission of the People's Republic of China	13-Oct-15
Australia	Cooperation Arrangement between the Fair Trade Commission of Japan and the Australian Competition and Consumer Commission	29-Apr-15
Philippines	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Department of Justice of the Republic of the Philippines	28-Aug-13
Viet Nam	Cooperation Arrangement between the Fair Trade Commission of Japan and the Competition Authority of the Socialist Republic of Viet Nam	28-Aug-13
Brazil	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Administrative Council for Economic Defense of the Federative Republic of Brazil	24-Apr-14
Korea	Memorandum on Cooperation between the Fair Trade Commission of Japan and the Fair Trade Commission of the Republic of Korea	25-Jul-14

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# Japan's experience



These seems to be little relation between competition agreement and FDI

# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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- ❧ However, the role of competition policy has increased in the *Next Generation Trade and Investment Issues (NGeTIs)*, specifically in how competition policy affects investment activities
- ❧ Whether it is enough to have an investment treaty
- ❧ Whether it is enough to have a competition law

# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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## ❧ Investment Treaty and Competition Policy

❧ The factors of foreign direct investment are explained by the ratio of experts and managers in the business through the Knowledge-Capital model analysis, and the economy/country that has a large percent of internal direct investment has higher costs for investment than other economies/countries

❧ For the enhancement of investment in developed economies/countries, the ratio of experts and managers in the business as well as cost reduction are especially important

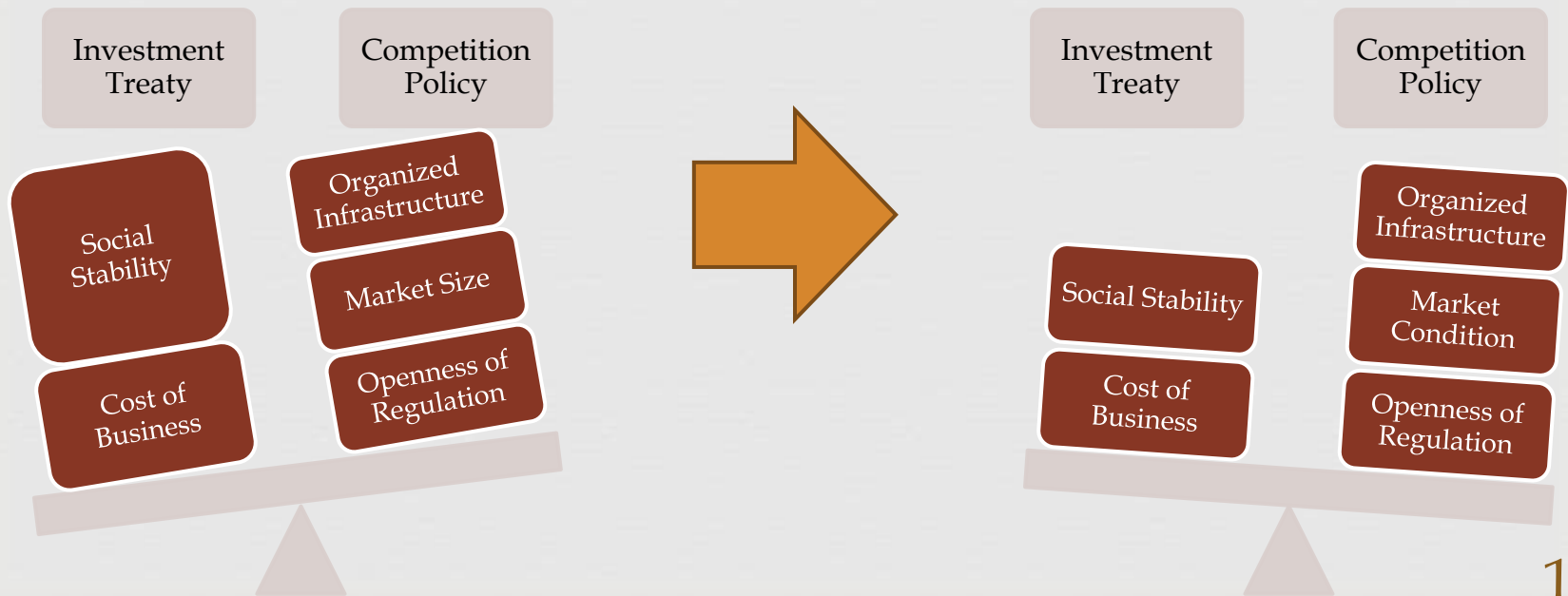
“Analysis of Factors of Internal and External Investment,” Cabinet Office, Japan, 2008



# Relation between Investment and Competition Policy

Including Chapters on FTAs/EPAs

## Investment Treaty and Competition Policy



# *Relation between Investment and Competition Policy*

*Including Chapters on FTAs/EPAs*

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- ❧ Whether it is enough to have a competition law
- ❧ Some criticized China's antimonopoly law enforcement
  - ❧ “Foreign companies are being disproportionately targeted”  
(European Chamber of Commerce, 2014),  
(The US-China Business Council, 2014)

# International Case Study

## ☞ China's antimonopoly law enforcement



☞ “They are not, say Chinese officials, ‘Everyone is equal before the law,’ declared Li Pumin, the secretary-general of the NDRC, the most powerful of three agencies involved in enforcing antitrust laws in China” (The Economist, Aug 23<sup>rd</sup> 2014)

# International Case Study

❧ If there were an antimonopoly cooperation agreement:



- ❧ The authority of other jurisdictions would express their intention to provide information to each other on individual cases that the authority investigates in accordance with the laws and regulations of their respective economies/countries, and subject to their respective reasonably available resources
- ❧ If firms in the jurisdiction are involved in a case investigated by the other authority, the authority conducting the investigation may notify the other authority of the case to the extent compatible with the laws and regulations
- ❧ These are only obligations to make an effort, but the rules are for restraining for the perceptions from the outside
- ❧ The authority of other jurisdiction would support the enforcement authority

# International Case Study

## Recent US Supreme Court decision

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- “ A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government’s submission, but the court is not bound to accord conclusive effect to the foreign government’s statements.”
- “The Second Circuit expressed concern about reciprocity, but the United States has not historically argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit’s rigid rule.”
- Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd. et al.
- No. 16-1220. Argued April 24, 2018--Decided June 14, 2018

# International case study

## Recent US Supreme Court decision



✧ The courts are not required to defer to a foreign government's interpretation of its own law

✧ The implication of this decision is that transparency must be required of foreign legal systems and their enforcement in such matters

✧ The competition chapters on FTAs • EPAs are potentially conducive to creating transparent law enforcement and communication between authorities

# Takeaways



- ❧ The competition policy, primarily through the enforcement of the antimonopoly law, promotes ingenuity and innovation in business by guaranteeing and enhancing fair and free competition, thereby ensuring economic vitality and consumer benefit
- ❧ There seems to be little relation between competition agreement and FDI; however, the role of competition policy has increased in the NGeTIs, specifically in how competition policy affects investment activities

# Takeaways



- ❧ For the enhancement of investment in developed economies/countries, the ratio of experts and managers in business as well as cost reduction are especially important; therefore the competition policy is needed in NGeTIs
- ❧ In China's case study, the rules are for restraining the perceptions from outside, and the authority of other jurisdiction would be able to support the enforcement authority



# Takeaways



- ✧ In the recent US Supreme Court case, the competition chapters on FTAs · EPAs are potentially conducive to creating transparent law enforcement and communication between authorities

# Thank you for your attention



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