

Summary Report

(CTI 04 2019T) FTAAP Capacity Building Workshop on Competition Policy under the 3rd REI CBNI: Sharing Good Examples of FTAs/EPAs

Puerto Varas, Chile

August 24, 2019

1. Introduction

This project is developed based upon the mutual understanding achieved through the previous two projects implemented in 2017 and 2018; namely “desirable elements” and “optional elements”. This project has been implemented under the 3rd Regional Economic Integration Capacity Building Needs Initiative (REI CBNI), which is recognised as the continuity from the 2nd CBNI outlined in the Beijing Roadmap for APEC’s Contribution to the realisation of Free Trade Area of the Asia-Pacific (FTAAP) adopted in November 2014. It also intends to ultimately lead to the achievement of trade and investment liberalisation and facilitation objectives articulated in the Osaka Action Agenda (OAA), particularly at its section C, 8. Competition policy.

These objectives are thought to be realised through enhancing the capacity of trade policy makers and negotiators. This is expected to be done by further deepening their understandings of and spreading the importance of competition chapter with the “desirable elements” and “optional elements” (outcome), which will be achieved by delivery of a workshop (output), where participants share “best practices” of high-quality and comprehensive FTAs/EPAs.

The workshop has been composed as below;

- (1) Opening remarks
- (2) Introduction: Report on the results of collecting data on components of the Competition Chapter on FTAs/EPAs recently concluded by APEC economies
- (3) Session 1: Examples of FTAs/EPAs including “desirable elements” in the Competition Chapter
- (4) Session 2: Examples of FTAs/EPAs including “optional elements”
- (5) Session 3: Impacts of high-quality and comprehensive FTAs/EPAs on the economic circumstances
- (6) Wrap-up and closing

2. Summary of the workshop held on 24 August 2019

- (1) Opening remarks

In the morning session, *Mr. Justin Allen, CTI Chair, Senior Policy Officer, APEC Policy Division, New Zealand, Foreign Affairs and Trade*, gave welcome remarks to participants and outlined some context of the workshop, such as history of REI CBNI and the role of Competition Policy as driver of innovation, efficiency and consumer welfare. He noted the importance of competition policy to address cross-border trade, in order to ensure all firms compete fairly in a market. He also quoted a 2015 paper by the International Centre for Trade and Sustainable Development and the World Economic Forum, which reported that 88 percent of FTAs in force at that time devoted specific provisions or entire chapters to

competition-related matters, and stressed the importance of international cooperation on competition policy to create the predictable, transparent and non-discriminatory market conditions that lead to consumer welfare gains and economic growth.

Following these opening words, *Ms. Naoko UEDA, Director APEC Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan*, provided a recent evolution on trade agreements, such as TPP11, Japan-EU EPA and RCEP, and stressed the importance of CPTPP and RCEP as pathway to the eventual realisation of FTAAP in the view of its quality and comprehensiveness.

(2) The results of collecting data on components of the Competition Chapter on FTAs/EPAs recently concluded by APEC economies

Mr. Hiroshi Kudo, Negotiator for Economic Partnership Agreements, Economic Partnership Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan, presented the results of data collection on components of the Competition Chapter on FTAs/EPAs recently concluded by APEC economies. The survey was conducted ahead of the workshop and gathered self-reported data of the last five intra-APEC FTAs/EPAs from Chile; Hong Kong, China; China; Malaysia; Mexico; Peru; Philippines; Russia; Thailand; Viet Nam and Japan, in the period of 1998-2019.

The main findings from the survey are below:

- a. High-quality and comprehensive FTAs/EPAs have been mostly concluded in recent years: Role and impact of high-quality and comprehensive competition policy provisions have been widely recognised by the APEC economies. The competition authorities' role has been enhanced.
- b. The majority of FTAs/EPAs has desirable elements and covers part of optional elements, particularly consultation/regular meeting between competition authority, cooperation and coordination of enforcement activities. It is therefore observed that the importance of desirable elements as well as optional elements has been widely recognised.
- c. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is the latest example of high-quality and comprehensive agreement in the APEC region, incorporating a chapter with substantial provisions covering competition policy.
- d. Research conducted by Regional Economic Integration Working Group at APEC Business Advisory Council shows positive GDP effect of mega regional FTAs/EPAs to APEC Economies.

(3) Examples of FTAs/EPAs including “desirable elements” in the Competition Chapter:

- a. Good practice of “addressing anti-competitive activities” was presented by *Ms. Nadia Vassos, Former Negotiator for Competition Policy Chapters for the Government of Canada*.

Firstly, it was underlined that addressing anti-competitive activities was the key to ensure market access gains secured during negotiations are actually achieved, therefore the rules are the foundation for market access. She emphasised that Canada had included competition policy provisions in all their comprehensive FTAs/EPAs after NAFTA 1994, the first trade agreement with a chapter for competition policy, and the CPTPP marked an important turning point toward more robust and detailed provisions.

She presented the key principles of the specific provisions addressing anti-competitive activities in different jurisdiction; (1) Competition Law is fundamental to address anti-competitive activities. It has different approaches such as CUSMA-type approach requiring to maintain competition law that proscribe anticompetitive business conduct without getting into specifics, and Mercosur-EU-type

approach listing types of conduct that are incompatible with the trade agreement. (2) Application of Laws: the good practice is that competition law should apply to almost all commercial activities in the territory, however exceptions are acceptable as long as they are transparent, established in the law and based on public interest or public policy grounds. One example of such exception is state-owned enterprises such as post services (eg. Canada Post door to door service is exempted from the application of competition law, whereas the commercial side including courier services are treated the same as any other courier service, such as FEDEX or DHL). (3) It is important to include a requirement to maintain a competition authority – ideally an independent authority – to administer and enforce the law. (4) Key principles are non-discrimination, procedural fairness and transparency, as well as consumer protection.

Finally the complimentary relationship between FTAs/EPAs and competition policy was stressed. FTAs/EPAs are about reducing barriers between markets, Competition law and policy are about reducing barriers in the market.

- b. *Mr. Hideyuki Shimozu, Senior planning officer, International Affairs Division, Secretariat, General Secretariat from Japan Fair Trade Commission (JFTC)* shared a wide range of good practices and concrete examples of technical cooperation implemented by its institutions through Japan International Cooperation Agency (JICA), Japan-ASEAN Integration Fund (JAIF) and Multilateral Framework.

It was underscored that the essence of technical cooperation was sharing knowledge and experience, which are beneficial for both recipient and donor economies. The articles in EPAs could serve not only as a boost for approval of technical cooperation application, but also promotion and harmonisation of existing technical cooperation. In this context, it was stressed that the main purpose of technical cooperation was indeed to harmonise competition law and policy, and deepen cooperative relationship between authorities concerned. The good practices of technical cooperation were also introduced: understand the needs of recipient economies through interactive discussion, evaluation, mutual assistance between donor authorities, feedback of knowledge to economies of the participants- it consequently and ideally establishes positive spiral, which is also an important good practice of technical cooperation.

- c. *Mr. Benjamin Radoc, Economics Office from Philippine Competition Commission (PCC)* presented good practice of technical cooperation and its benefits.

Benefits of technical cooperation were described from the experience of the Philippines. It was underlined that the technical cooperation and assistance were pivotal in ensuring PCC establish a stable base to realise fast growth after its foundation in February 2016. PCC's situation as a young competition authority with a new competition law, limited domestic knowledge base on the practice of competition policy, and resource constraints was supplemented by a wealth of experience and expertise from more matured jurisdictions from EU, US, Australia and Japan. Therefore PCC's competition policy architecture was consequently quickly established at the same time, forging long-standing partnerships with other jurisdictions. It was particularly underlined that well-targeted activities enhanced sense of ownership, commitment and accountability.

(4) Examples of FTAs/EPAs including “optional elements”

- a. *Mr. Timothy Longman, International Counsel in the Antitrust Division of the Department of Justice of the USA* discussed cooperation between agencies, best practices of cooperation/coordination of enforcement activities, and policy.

Firstly it was noted that there were multiple cooperation channels such as multilateral, bilateral, and informal channels of competition cooperation outside of the trade context, either on the enforcement and/or policy.

In terms of international civil case cooperation, it was presented that a significant amount of cross border cooperation would take place for ATR merger challenges as well as for civil non-merger matters. He pointed out that exchanges of evidence and theories utilising party waivers facilitated more efficient investigations and effective remedies, while minimising risk of divergence.

Re international cartel case cooperation, the existence of formal and informal cooperation was displayed, while stressing the importance of the use of waivers, the maximisation of the value of mutual leniency applicants and co-operators, as well as possibility to get evidence from abroad via mutual legal assistance treaties (MLATs).

About formalisation of cooperation in the form of bilateral agreement, three different forms were presented: agreements/MoUs, soft agreement and enhanced provisions. He also presented goals of FTAs/EPAs in terms of competition policy as to ensure each party has a non-discriminatory legal framework for addressing anti-competitive restraints (USMCA 21.1) as well as to include procedures to ensure enforcement transparency (USMAC 21.2).

Finally the three basic categories of cooperation under FTAs/EPAs – capacity building, investigative assistance and policy cooperation – were underlined, and concluded that FTAs/EPAs cooperation when done properly reinforces rather than supersedes other cooperation efforts.

- b. *Ms. Julie Glasgow, Director, Competition Law Implementation Programme, Australian Competition and Consumer Commission (ACCC)* also shared good practice of cooperation and capacity building on competition among the competition authorities, highlighting experience from ASEAN-Australia-New Zealand FTA (AANZFTA) signed on 2009 and Competition Law Implementation Programme (CLIP) commenced at 2014.

It was emphasised that AANZFTA and its competition chapter was aiming at building support for policy reform and institutional capacity building, developing a shared understanding of approaches to competition policy and law enforcement, developing common interest in preventing hard core cartels, and creating a proactive investigatory culture and a capacity for high-quality decision making.

Re CLIP, which aims to promote competition in markets through support for ASEAN economies, she emphasised some lessons learnt of cooperation in enforcement activities: being sustained over multiple years was helpful and important, the importance of developing tailored support, being mindful of absorption capacity, and encouraging engagement with senior management in the programme.

Finally she affirmed the challenges re FTAs and competition policy; the effective implementation of trade agreement required leadership and good inter-governmental stakeholder consultation to manage reform processes, the benefits to be gained from trade agreements did not happen automatically, and new-generation FTAs addressed “behind the border” issues, meaning FTAs would engage more deeply with internal policy reform processes.

(5) Impacts of high-quality and comprehensive FTAs/EPAs on the economic circumstances

- a. Echoing the result of the research conducted by Regional Economic Integration Working Group at APEC Business Advisory Council showing positive GDP effect of mega regional FTAs/EPAs to APEC Economies, *Mr. Nick Malyshev, Head of OECD Regulatory Policy Division* emphasised the importance of nexus between Trade policy and Competition Policy.

His presentation underlined RTAs as a vehicle to promote GRPs and IRC, and also the benefits of RTAs in terms of investment provisions, trade in services and international regulatory cooperation.

His major findings in terms of IRC were: deep provisions in SPS and TBT in RTAs have significant and positive effect on trade flows; binding commitments are important in maximising post-RTA trade flows; transparency IRC are significant and robust factors in increasing trade.

- b. *Ms. Ximena Rojas Pacini, Competition and International Trade Advisor* from Chile, explained the impacts of high-quality and comprehensive FTAs/EPAs on private sector and pointed out certain way to improve them.

She stressed that while high-quality and comprehensive Competition Policy provisions in RTAs/FTAs improve coordination mechanisms already in place, cooperation between Competition Authorities has become more complex. She pointed out that the risk of inconsistent decisions could generate negative impact on trade and investment flows, and emphasised that although extensive cooperation exists, its level is far from enough, which in turn imposes large costs on companies and the public sector alike.

Furthermore, it was underscored that high-quality and comprehensive Competition Policy provisions could help addressing the issue of export cartels. However there are currently no international rules or mechanisms addressing export cartels, the practical disenfranchisement of private companies that compete with state-sponsored export cartels in international markets thus occurred. The most promising way to advance this issue is precisely through the inclusion of high-quality and comprehensive provisions in FTAs/RTAs.

(6) Wrap up and closing

Mr. Kudo summarised discussion and findings of the workshop as following: (1) good practices and concrete examples of desirable elements as well as optional elements of competition chapters in FTAs/EPAs are shared; (2) majority of competition chapter in FTAs/EPAs concluded by APEC economies has desirable elements and covers part of optional elements. Thus importance of desirable elements as well as optional elements in competition chapter has been widely recognised; (3) impacts of high-quality and comprehensive FTAs/EPAs on the economic circumstances were highlighted. He closed the workshop by expressing wishes that today's discussions on good practices and concrete examples of desirable and optional elements of competition chapters were beneficial and that these elements will serve as useful guidelines for future FTAs/EPAs negotiations, including toward eventual realisation of FTAAP.