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Working Group on the Interaction between Trade and Competition Policy

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MODALITIES FOR VOLUNTARY COOPERATION

I. INTRODUCTION

At the last Working Group meeting, the need of developing countries for capacity building in developing competition law and policies was discussed, and the importance of strengthening technical assistance to this end was emphasized. In doing so, there was a shared acknowledgement of the diversity of approaches applicable for both developing and developed countries in promoting competition law and policy, depending on their respective stage of development and cultural differences. The need to provide technical assistance in line with the various needs of the recipient countries was also recognized by the Working Group.

Comparing the development of competition legal institutions in various countries, a broad range of approaches is evident. These include: the prohibition of anti-competitive practices based on policies that prioritize action to protect consumers and prevent unfair competition; competition laws that regulate cartel activity and abuse of dominant positions (in some cases, this entails sector-specific business laws); and, the adoption of a comprehensive competition law, which includes, for example, merger regulation.

Whichever approach a country adopts, the country aims to strengthen its enforcement. Some countries, moreover, have established and are considering building mechanisms for enforcement cooperation with foreign countries. It appears that the motivation for such cooperative mechanisms stem from a desire to more effectively address anti-competitive practices that could adversely impact their own markets, especially when it is difficult for the enforcing country to address such practices alone.

Although the approaches taken vary, a common element is that each country is endeavouring to control anti-competitive practices by any means. Thus, whether or not the country has put in place a comprehensive competition law is not necessarily a vital issue. In fact, of the 144 WTO Members, approximated 90 have so-called general competition laws, while the others are assumed not to have such laws in place. Nevertheless, there may be some countries addressing specific anti-competitive practices through the development of other independent approaches such as sector-specific business laws.

Economic globalization may result in a single world market at some point in the future. If and as this comes to pass, it would be ultimately desirable for every country to address anti-

competitive restraints of trade at an equal or comparable level of enforcement, including with respect to the same range of issues that are covered by national measures. Some therefore argue that the convergence of competition legal institutions might be needed in the long run. However, a first step could be that every country should be under a commitment to control anti-competitive practices such as hardcore cartel activities, which may cause serious trade restrictions. It is understood, of course, that hardcore cartels undermine the operation of the global market system both domestically and internationally, and every country should recognize the harmful effects caused by such practices. We believe, therefore, that all countries should be encouraged to address these hard core cartels as serious offences in order to avoid an adverse impact on trade.

II. MODALITIES FOR PROMOTING INTERNATIONAL COOPERATION

There may be a general acknowledgement that it is vital for each country to promote cooperation, in order to more efficiently and smoothly promote the control of cross-border anti-competitive practices. A competition authority in a single country will experience difficulties of addressing such cross-border issues, even as economic globalization may inevitably result in anti-competitive practices producing economic harm in multiple jurisdictions.

Given this, the next point of debate is what should be done to promote cooperation, and how a framework for the cooperation should be arranged.

Some of those countries that have until now deepened economic relations with each other through trade and investment have established bilateral and regional frameworks to enhance cooperation between competition authorities, addressing the increasing need for cooperation in competition law enforcement.

Meanwhile, even in multilateral frameworks, a debate is underway with regard to promoting international cooperation. In the OECD, for example, the "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels" was adopted in 1998. This Recommendation provided that Member countries should promote international cooperation and comity in enforcing laws prohibiting hard-core cartels.

Furthermore, of particular note here is that regional frameworks, and particularly regional trade agreements, often contain a chapter on competition policy with a pledge to promote competition law enforcement in each country and cooperation with each other, in many cases, to establish frameworks for cooperation in order to facilitate trade and investment.

Although the Japan-Singapore Economic Partnership Agreement (JSEPA) is only designed to start with certain limited coverage, it is noteworthy that the two countries have pledged to take measures to the effective control anti-competitive practices, and to promote cooperation between the two countries. It is also worth noting that the "Canada-Costa Rica Free Trade Agreement" presented at the last Working Group Meeting contains obligations to ensure non-discrimination and transparency principles in measures adopted in competition law, as well as commitments to establish a framework for enforcement cooperation between the two countries.

III. EXAMPLE OF REGIONAL COOPERATION FRAMEWORKS: JSEPA

In January 2001, the Japanese government signed an Economic Partnership Agreement (JSEPA), including elements of a free trade agreement, with the government of Singapore (see the attached). Even though the approach to competition laws differs, the chapter on competition policy advocates that the two countries take measures against anti-competitive activities, in accordance with their applicable laws and regulations to facilitate trade and investment flows between the two countries. The two countries are also supposed to cooperate with each other in this field subject to their available resources. This results from a perception between the competition authorities in both

countries that there is an increasing need for cooperation in order to effectively address anti-competitive practices, in light of the prospect that the trade and investment relationship between the two countries will further be strengthened in the future.

Singapore has no independent, comprehensive competition law at present. It has, however, established competition provisions in the telecommunications, electricity and gas sector-specific business laws, and provides a prohibition against competition-restricting practices through an abuse of dominant position provision. This provision has been incorporated in recent legal amendments, and it is designed to promote the development of a competitive environment in publicly regulated sectors that are very important for the state economy.

As for the specific details of the competition chapter, it was agreed that, starting with sectors in which Singapore currently has legal institutions related to competition, both Japan and Singapore would engage in bilateral cooperation, including notification, enforcement cooperation through information exchange, and consultation, subject to their available resources. It should also be noted that the Agreement has provision on technical assistance between the two countries. This Agreement is the first ground-breaking attempt as a framework for cooperation between two countries with different systems of competition law, and will serve as a reference for the Working Group's discussion on modality for international cooperation.

In view of the growing globalization and progressive strengthening of economic relationships, the importance of building frameworks for cooperation in competition policy is reaffirmed. At the same time, it is suggested that, even if a particular country does not develop a comprehensive competition law, it can participate in international efforts to promote international cooperation.

IV. SIGNIFICANCE OF COOPERATION AT MULTILATERAL LEVEL - WHY DO WE SEEK A FRAMEWORK FOR MULTILATERAL COOPERATION?

While, until now, cooperation arrangements or frameworks have been constructed at the bilateral or regional level, there is now active consideration of multilateral measures and hence it would be worthwhile to once again clarify the significance of building up a framework for multilateral cooperation here.

When studying international cooperation in the area of competition policy, cooperation could have at least three dimensions at the multilateral level:

- cooperation in support of capacity building;
- information and experience exchange;
- cooperation on individual cases.

The merits of building multilateral frameworks in each category of international cooperation are thought to be as follows:

A. COOPERATION IN SUPPORT OF CAPACITY BUILDING

The importance of technical assistance for capacity building for each country, especially developing countries, to develop and implement competition law institutions, was stressed at the last Working Group meeting in April. In particular, it is considered desirable that various countries should mutually coordinate and cooperate with each other on their own individual efforts towards technical assistance, thereby making those efforts much more effective. We thus believe that a multilateral framework can make an important contribution towards the development of a better-

coordinated approach to technical assistance in this area. It would also be significant for them to share information on the present status and the needs of recipient developing countries at a multilateral level.

B. GENERAL EXCHANGES OF INFORMATION AND EXPERIENCE

Exchanging information on competition law and policy beyond individual cases, and sharing each other's experience and information on best practices in the application of competition law to cross-border anti-competitive activities having an adverse impact on plural markets, will be effective if implemented in more countries through a multilateral framework. Building up databases of legal institutions and guidelines in each country, creating opportunities for information exchange on the latest trends and sharing information at a multilateral level, would have a number of merits. For example:

(a) it would help the various countries to adopt and review their competition law institutions; and

(b) it would make it easier to obtain the information needed when a firm from one country wishes to enter another country's market.

Furthermore, discussion on the experience of policy development and implementation with a number of experts at a multilateral level, particularly from the perspective of international dimensions, could evolve into a peer review of members' competition legal institutions. This would be significant for the countries when reviewing and improving their competition legislation.

C. CASE-SPECIFIC COOPERATION

Since the advance of economic globalization may bring the possibility of an increase in anti-competitive practices that adversely affect one or more foreign markets, there is a growing need for each country to facilitate enforcement cooperation as well as to engage in careful consideration in order to avoid conflict with other countries.

Typical examples of this kind of enforcement cooperation concerning individual cases in bilateral agreements that have been concluded to date are as follows:

- notification;
- enforcement cooperation through exchange of information;
- enforcement coordination;
- positive comity;
- comity.

Since these kinds of cooperation are basically carried out between the countries involved, they are usually set out as bilateral frameworks. However, when one anti-competitive practice has an adverse impact on the markets in more than two countries, it would be effective to have cooperation among a larger number of countries or, in other words, at multilateral level.

As one element of a multilateral framework, it is meaningful to discuss and build the modalities for cooperation, even if this is of a voluntary nature. This is because methods of cooperation in this kind of framework can be used as a model when promoting cooperation in

individual cases between countries that have not concluded bilateral agreements. They would also be a useful basis for some countries to discuss and draft new bilateral cooperation agreements.

V. CONCLUSION

When promoting international cooperation in the area of competition policy, we should, rather than choosing between a bilateral or a multilateral framework, consider applying both of these by effectively combining advantageous elements of each framework.

Recognizing the diversity in the development and implementation of a domestic competition law, it would be unrealistic at this stage to build up a single or universal framework for cooperation and to require that all other countries apply this single framework at the same high level. We therefore believe that a certain level of a framework of cooperation should be build at a multilateral level, while countries continue to establish a deeper framework for cooperation at the bilateral level, based on the common experience, resource and legal institutions in the implementation of domestic competition law. Needless to say, this is because the two countries which have chosen to deepen their economic relationship will be aware of the potential need to address cross-border anti-competitive activities that may have a serious impact on trade and investment flows between the two countries.

For example, in bilateral frameworks, the focus ought to be on promoting individual cases of enforcement cooperation in a more evolved form. In multilateral frameworks, as well as providing a model framework for cooperation in individual cases, it will also be significant to utilise it as an opportunity for exchanging information and experience on policies, and promoting policy reviews based on agreed core policy principles.

ANNEX

THE JAPAN-SINGAPORE ECONOMIC PARTNERSHIP AGREEMENT (JSEPA)

Chapter 12: Competition

Article 1 - Objectives

The objectives of this Chapter are:

(a) to contribute to the effective control of anti-competitive activities to facilitate trade and investment flows between the Parties and the efficient functioning of the markets of the Parties; and

(b) to promote co-operation between the Parties in such control of anti-competitive activities.

Article 2 - Anti-competitive Activities

1. Each Party shall, in accordance with its applicable laws and regulations, take measures which it considers appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its markets.

2. Each Party shall, when necessary, endeavour to review and improve or to adopt laws and regulations to effectively control anti-competitive activities.

Article 3 - Co-operation

1. The Parties shall, in accordance with their respective laws and regulations, co-operate in the field of controlling anti-competitive activities subject to their available resources.

2. The sectors, details and procedures of co-operation under this Chapter shall be specified in the Implementing Agreement.

Article 4 - Dispute Settlement

The dispute settlement procedures provided for in Chapter 21 (Dispute Avoidance and Settlement) shall not apply to this Chapter.

IMPLEMENTING AGREEMENT

Article 1 - Purpose

The purpose of this Chapter is to implement the co-operation set forth in Article 3 of Chapter 12 (Competition) of the Basic Agreement.

Article 2 - Definitions

For the purposes of this Chapter:

(a) the term "contact point(s)" means:

(i) for Japan, the Fair Trade Commission; and

(ii) for Singapore, Ministry of Trade and Industry.

(b) the term "anti-competitive activity(ies)" means any conduct or transaction that may be subject to penalties or relief under the competition laws of the respective Countries;

(c) the term "competition laws" means:

(i) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 14 April 1947) and its implementing regulations; and

(ii) for Singapore, the Code of Practice for Competition in the Provision of Telecommunications Services pursuant to the Telecommunications Act 1999 (Act 43 of 1999), Part VIII "Competition" of the Electricity Act 2001 (Act 10 of 2001), and Part IX "Competition" of the Gas Act 2001 (Act 11 of 2001);

(d) the term "implementing authority(ies)" means:

(i) for Japan, the Fair Trade Commission; and

(ii) for Singapore, the Info-communication Development Authority for the telecommunications sector and the Energy Market Authority for the electricity and gas sectors;

(e) the term "enforcement activity(ies)" means any investigation or proceeding conducted by the implementing authorities of a Party pursuant to the competition laws of its Country, but shall not include:

(i) the review of business conduct or routine filings;

(ii) research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries; and

(iii) criminal proceedings; and

(f) the term "important interests" means such interests as are considered to be important by the Party undertaking the co-operation activity(ies) under this Chapter.

Article 3 - Notification

1. Each Party shall notify the other Party with respect to its enforcement activities that the notifying Party considers may affect the important interests of that other Party.

2. Enforcement activities that may affect the important interests of the other Party include those that:

(a) are relevant to enforcement activities of the other Party;

(b) are conducted against a national or nationals of the other Country, or against a company, association or body incorporated or organised under the applicable laws and regulations in the territory of the other Country;

(c) involve anti-competitive activities, other than mergers or acquisitions, carried out in any substantial part in the territory of the other Country;

(d) involve mergers and acquisitions in which:

(i) one or more of the parties to the transaction; or

(ii) a company controlling one or more of the parties to the transaction,

is a company incorporated or organised under the applicable laws and regulations in the territory of the other Country;

(e) involve conduct considered by the notifying Party to have been required, encouraged or approved by the other Party; or

(f) involve relief that requires or prohibits conduct in the territory of the other Country.

3. Notification pursuant to paragraph 1 of this Article shall be given by the contact point of a Party as promptly as possible, taking into account the important interests of the other Party.

4. Notifications shall contain such details that would, in the view of the notifying Party, enable the notified Party to make an initial evaluation of the effect on its important interests.

5. Each Party shall:

(a) promptly notify the other Party of any amendment of competition laws and any adoption of new laws and regulations of its Country that control anti-competitive activities; and

(b) provide the other Party with copies of its publicly-released guidelines or policy statements issued in relation to the competition laws of its Country.

Article 4 - Exchange of Information

Each Party shall, to the extent consistent the laws and regulations of its Country and its important interests, and within its reasonably available resources, endeavour to:

(a) inform the other Party with respect to its enforcement activities involving anti-competitive activities that the informing Party considers may also have an adverse effect on competition in the territory of the other Country;

(b) provide the other Party with any significant information, within its possession, which comes to its attention about anti-competitive activities that the providing Party considers may be relevant to, or may warrant, enforcement activities by that other Party; and

(c) provide the other Party, upon request and in accordance with the provisions of this Chapter, with information within its possession that is relevant to the enforcement activities of that other Party.

Article 5 - Technical Assistance

Each Party may render technical assistance to the other Party for the effective management and adoption of laws and regulations controlling anti-competitive activities.

Article 6 - Terms and Conditions on Provisions of Information

1. Unless the Party providing the information has approved otherwise, information which has been communicated by a Party to the other Party pursuant to this Chapter shall:

   (a) be used by the implementing authorities of the receiving Party only for the purpose of effective enforcement of the competition laws of its Country; and

   (b) not be communicated to a third party.

2. Each Party shall, maintain the confidentiality of any information which has been communicated to it in confidence by the other Party pursuant to this Chapter, unless the latter Party consents to the disclosure of such information.

3. Each Party may limit the information it communicates to the other Party when the latter Party is unable to give the assurance requested by the former Party with respect to confidentiality or with respect to the limitations of purposes for which the information will be used.

4. Notwithstanding any other provision of this Chapter, a Party shall not be required to communicate information to the other Party if such communication is prohibited by the laws or regulations of the Country of the former Party or if the former Party considers such communication incompatible with its important interests.

Article 7 - Use of Information in Criminal Proceedings

1. Information communicated by a Party to the other Party pursuant to this Chapter shall not be presented by that other Party to a court or a judge in criminal proceedings.

2. In the event that information communicated by a Party to the other Party pursuant to this Chapter is needed for presentation to a court or a judge in criminal proceedings, that other Party shall submit a request for such information to the Party that communicated the information (hereinafter referred to in this Article as "the requested Party"), through the diplomatic channel or other channel established in accordance with the laws of the Country of the requested Party. The requested Party will make its best efforts to respond promptly and favourably to meet any reasonable deadlines indicated by the other Party.

Article 8 – Scope

1. Articles 3 and 4 of this Chapter shall only apply to the sectors of telecommunications, electricity and gas.

2. When the Parties adopt new laws and regulations controlling anti-competitive activities, the Parties shall, upon the request by either Party, consult with each other to consider whether or not to amend this Chapter for the purpose of extending the scope of co-operation specified in paragraph 1 above.

Article 9 - Review and Further Co-operation

1. The Parties shall, not more than three years after the entry into force of this Agreement, review the co-operation pursuant to Articles 3 and 4 of this Chapter.

2. Upon such review, the Parties may consider extending the co-operation pursuant to this Chapter to any of the following activities:

(a) Co-ordination of enforcement activities;

(b) positive comity; and

(c) comity.

3. Any such extension of co-operation shall be subject to the applicable competition laws and regulations and available resources of the Parties.

Article 10 - Consultations

The Parties may, as necessary, hold consultations on any matter which may arise in connection with this Chapter.

Article 11 - Communications

Communications under Articles 3 and 4 of this Chapter may be directly carried out between the implementing authorities through the contact points of the Parties. Notification under Article 3 of this Chapter, however, shall be confirmed in writing through the diplomatic channel. The confirmation shall be made as promptly as practically possible after the communication concerned between the contact points of the Parties is made.

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