

## **CHAPTER 6**

# **COMPETITION, GOVERNMENT PROCUREMENT AND TRADE FACILITATION**

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### **COMPETITION**

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#### ***1. BACKGROUND OF THE RULES***

The purposes of the competition-related provisions in Japan's EPAs/FTAs are to: (a) maximize the effects of liberalization of trade and investment by restricting anti-competitive practices; and (b) establish common understanding and cooperative framework regarding necessity for regulating anti-competitive practices with the other party country.

As discussed in this section, with respect to purpose (a), Japan's EPAs incorporate the principles regarding competition policy discussed in the WTO; with respect to purpose (b), they place greater emphasis on coordination and cooperation with other EPA/FTA countries, similar to bilateral cooperation/mutual assistance agreements on competition policy. In order to facilitate a better understanding of the rules on competition policy contained in the EPAs/FTAs, the following paragraphs will provide an overview of: (1) the discussion on the "trade and competition policy" issue in the WTO; and (2) bilateral cooperation/mutual assistance agreements.

#### **(1) "TRADE AND COMPETITION POLICY" AT THE WTO**

Pursuant to the Singapore Ministerial Declaration of 1996, issues relating to "trade and competition policy," together with those of "trade and investment," "transparency of government procurement" and "trade facilitation" were studied and examined at WTO forums as one of the so-called "Singapore" issues. The examination of competition policy at the WTO is based on the concern that the market access conditions of imports improved as a result of trade liberalization, including tariff reductions, might be impaired by international anti-competitive practices. The discussion of "trade and competition policy" in the WTO has been suspended since the Cancun Ministerial Conference.

#### **(2) BILATERAL COOPERATION/MUTUAL ASSISTANCE AGREEMENTS**

Bilateral cooperation/mutual assistance agreements have been executed between competition authorities (primarily of developed countries) since the 1990s. These agreements provide 1) negative comity (*i.e.*, they require consideration of the interest of the relevant foreign country in applying one country's domestic competition law, which might lead to domestic competition law not being applied); 2) positive comity (*i.e.*, they require the competition authorities of countries to enforce their own laws when any anti-competitive practices occur within their borders but have an impact in another country); 3) consultation and notification; and 4) information exchange and cooperation in enforcement.

These provisions are needed because the purpose of bilateral cooperation/mutual assistance agreements is: (1) to settle conflicts of sovereign rights caused by extraterritorial application of competition laws; and (2) to avoid inconsistencies arising from the concurrent application of competition laws of different countries to the same set of facts and cases, rather than to correct the trade-distortive effects of the anti-competitive practice. Japan has executed bilateral agreements concerning cooperation on anticompetitive activities with the competition authorities of the U.S. (1999), EU (2003) and Canada (2005). Japan has also executed inter-agency memorandums on cooperation or cooperation arrangements with other countries including China, Korea, Brazil, Australia, Kenya, Mongolia, Singapore, Philippines, and Viet Nam. As a result of such agreements and the sharing of information, there are more cases of international cartels involving the simultaneous initiation of global investigations between the authorities of the respective countries. Examples of such cases include the marine hose cartel (2007), high-voltage electrical power line cartel (2009), wire harness cartel (2010), and bearings cartel (2013), etc. Japan also engages in close information sharing with the competition authorities of other countries, such as the United States, the EC and Korea, in relation to review of business combination, including investigation of the merger between BHP Billiton and Rio Tinto (2008), examination of the iron ore production JV project (2010), and examination of the integration plan between Western Digital, and SanDisk, and examination of the integration plan between NXP and FSL (2016), examination of the integration plan between Qualcomm and NXP (2017) and examination of the acquisition of Brocade by Broadcom. Discussions based on the latter case continue not only pursuant to bilateral agreements but also within multilateral frameworks such as the OECD, UNCTAD, APEC and, the International Competition Network (ICN), which was established in 2001 with the competition authorities of interested countries as members.

## **2. OVERVIEW OF LEGAL DISCIPLINES**

### **(1) PROVISIONS RELATED TO COMPETITION POLICY IN EPAs/FTAs**

As mentioned above, the provisions related to competition policy contained in Japan's EPAs/FTAs have a goal consistent with both: (a) the discussions at WTO forums, an objective of the EPAs/FTAs; (b) developing coordination and cooperation [in the competition policy area] with EPA/FTA countries, a goal typically pursued in bilateral cooperation/mutual assistance agreements. Keeping in mind the difference in the underlying concerns between the discussions at WTO forums and bilateral cooperation/mutual assistance agreements, we will provide an overview of the provisions related to competition policy contained in Japan's EPAs/FTAs.

The provisions on competition policy contained in EPAs/FTAs and regional agreements can be categorized as follows: (a) treaties and agreements which have no substantive regulatory provisions (*i.e.*, they create no common substantive competition rules) but provide for the manner of implementing the substantive provisions of the parties' respective competition laws so as to resolve intra-regional problems related to competition (*e.g.*, NAFTA); and (b) treaties or agreements which provide substantive regulatory provisions (*i.e.*, a common substantive competition law) specifying prohibited and restricted practices, which may be different from the relevant laws of the signatory countries. In the case of the EU/EEA, there is stronger market integration than a simple FTA, which is in the background of such common competition laws. Keeping in mind that the competition-related provisions in Japan's EPAs/FTAs belong to category (a), we will analyze three different types of competition-related provisions in the EPAs that have been executed between Japan and Singapore, Mexico, Malaysia, the Philippines, Chile, Thailand, Brunei, Indonesia, Viet Nam, Switzerland, India, Peru, Australia, Mongolia, European Union (EU) and the CPTPP, respectively: (a) provisions specifying the objectives [of the chapter on competition] (the

“Objectives Section”); (b) those providing substantive rules (the “Substantive Section”); and (c) those providing procedural rules (the “Procedural Section”).

## **(2) JAPAN-SINGAPORE EPA (SIGNED JANUARY 2003, EFFECTIVE IN NOVEMBER OF THE SAME YEAR)**

### ***(a) Objectives Section***

The Japan-Singapore EPA provides in item (x) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions,”) that one of the objectives of the EPA is “encouraging effective control of and promoting co-operation in the field of anti-competitive activities.”

### ***(b) Substantive Section***

The Substantive Section is contained in the chapter on “Competition”. Paragraph 1 of Article 103 (“Anti-competitive Activities”) of Chapter 12 (“Competition”) provides that “[e]ach 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.” The EPA adopted a framework under which the competition authority of the country within whose jurisdiction anti-competitive activities are conducted enforces its own competition law. In addition, paragraph 2 of the same Article provides that “[e]ach Party shall, when necessary, endeavour to review and improve or to adopt laws and regulations to effectively control anti-competitive activities”. This provision was included in part because Singapore had no domestic competition law at the time of the execution of the EPA.

### ***(c) Procedural Section***

As part of the Procedural Section, paragraph 1 of Article 104 of Chapter 12 provides that “[t]he 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”. As also contemplated in the Substantive Section, the EPA adopted a framework under which the competition authorities of the contracting parties enforce their respective laws [within their own jurisdiction]. In addition, paragraph 2 of the same Article provides that “[t]he sectors, details and procedures of co-operation under this Chapter shall be specified in the Implementing Agreement”. The Implementing Agreement contains provisions on: 1) “Notification” (Article 17 of Chapter 5); 2) “Exchange of Information” (Article 18 of the same Chapter); 3) “Technical Assistance” (Article 19 of the same Chapter); 4) “Terms and Conditions on Provisions of Information” (Article 20 of the same Chapter); 5) “Use of Information in Criminal Proceedings” (Article 21 of the same Chapter); 6) “Scope” (Article 22 of the same Chapter); 7) “Review and Further Co-operation” (Article 23 of the same Chapter); 8) “Consultations” (Article 24 of the same Chapter); and 9) “Communications” (Article 25 of the same Chapter).

Since Singapore had no domestic competition law at the time of the execution of the Japan-Singapore EPA, the “scope” of “notification” and “exchange of information” is limited to “the sectors of telecommunications, electricity and gas” (Article 22 of the Implementing Agreement). This outcome reflects a flexible approach to establishing the scope of cooperation that takes into account the diversity of the substance and development of competition laws of the other party country. It is noteworthy that the Japan-Singapore EPA includes concepts similar to those of bilateral cooperation/mutual assistance agreements between developed countries, such as (a) coordination of enforcement activities, (b) positive comity, and (c) negative comity. In addition, the exclusion of the competition chapter from the application of the dispute settlement procedures of

the Japan-Singapore EPA (Article 105) is similar to exclusions contained in EPAs executed with other countries. Incidentally, Singapore enacted “the Competition Act 2004” in 2004 (which was put into effect on January 1, 2006) and, based on the law, established the Competition Commission of Singapore (CCS) the following year. As a result, the names of Singaporean authorities concerned were altered in the protocol to revise the Implementing Agreement that was agreed upon in 2007.

**(3) JAPAN-MEXICO EPA (SIGNED IN SEPTEMBER 2004, EFFECTIVE IN APRIL 2005)**

***(a) Objectives Section***

The Japan-Mexico EPA provides in item (d) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) that one of the objectives of the EPA is to “promote cooperation and coordination for the effective enforcement of competition laws in each Party.” As a competition authority already existed in Mexico at the time of the execution of the EPA, it is noteworthy that in comparison with other economic partnership agreements “coordination” is specified as one of the objectives, in addition to “cooperation”.

***(b) Substantive Section***

Like the Japan-Singapore EPA, the Japan-Mexico EPA contains a chapter dealing specifically with competition policy issues. The chapter’s Substantive Section sets forth that “[e]ach 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 market.” The Japan-Mexico EPA, also like the Japan-Singapore EPA, has adopted a framework under which the competition authorities of contracting party countries enforce their respective competition laws [within their own jurisdictions]. It has no provision requiring the “review, improvement or adoption of laws and regulations” for controlling anti-competitive practices. Such a provision was not included in part because an enforcement authority already existed in Mexico at the time of the execution of the agreement.

***(c) Procedural Section***

In its Procedural Section, the Japan-Mexico EPA sets forth several provisions similar to those of the Japan-Singapore EPA. Paragraph 1 of Article 132 provides that “[t]he Parties shall, in accordance with their respective laws and regulations, cooperate in the field of controlling anti-competitive activities”. Paragraph 2 of the same Article provides that “[t]he details and procedures of cooperation under this Article shall be specified in an implementing agreement.” This structure is similar to that of the Japan-Singapore EPA. In addition, like other EPAs, it stipulates that the dispute settlement procedures of the Japan-Mexico EPA shall not apply to the competition chapter (Article 135). Unlike the Japan-Singapore EPA, the Japan-Mexico EPA specifically provides, in addition to the above-mentioned provisions, “Non-Discrimination” (Article 133) and “Procedural Fairness” (Article 134).

The Implementing Agreement contains provisions on: 1) “Notification” (Article 2); 2) “Cooperation in Enforcement Activities” (Article 3); 3) “Coordination of Enforcement Activities” (Article 4); 4) “Cooperation Regarding Anti-competitive Activities in the Territory of the Country of One Party that Adversely Affect the Interests of the Other Party” (Article 5); 5) “Avoidance of Conflicts over Enforcement Activities” (Article 6); 6) “Technical Cooperation” (Article 7); 7) “Transparency” (Article 8); 8) “Consultations” (Article 9); 9) “Confidentiality of Information” (Article 10); and 10) “Communications” (Article 11). Reflecting the fact that both Japan and

Mexico enforced competition laws at the time of the execution of the EPA, the Implementing Agreement has provisions for “negative comity” and “positive comity” by enforcement authorities similar to those of bilateral cooperation/mutual assistance agreements between the competition organizations of developed countries.

#### **(4) JAPAN-MALAYSIA EPA (SIGNED IN DECEMBER 2005, EFFECTIVE IN JULY 2006)**

##### ***(a) Objectives Section***

Like the two above-mentioned EPAs, the Japan-Malaysia EPA also includes an Objectives Section, Substantive Section and Procedural Section. First, with respect to the Objectives Section, item (e) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) provides that one of the objectives of the EPA is “to encourage effective control of and promote co-operation in the field of anti-competitive activities”. This is the same wording as that of the Japan-Singapore EPA.

##### ***(b) Substantive Section***

As for the Substantive Section, Article 131 of Chapter 10 (“Controlling Anti-competitive Activities”) provides that “[e]ach Country shall, in accordance with its applicable laws and regulations, take measures which it considers appropriate against anti-competitive activities for the efficient functioning of its market” (paragraph 1); and “[e]ach Country shall, when necessary, endeavour to review and improve or adopt laws and regulations to effectively control anti-competitive activities” (paragraph 2). This is the same provision as that of the Japan-Singapore EPA.

##### ***(c) Procedural Section***

The Japan-Malaysia EPA has the same provisions in the Procedural Section as those of the Japan-Singapore EPA, stipulating that “[t]he Countries shall, in accordance with their respective laws and regulations, co-operate in the field of controlling anti-competitive activities subject to their respective available resources” (paragraph 1 of Article 132), and “[t]he details and procedures of co-operation under this Article shall be specified in the Implementing Agreement” (paragraph 2 of Article 132). The non-application of the dispute settlement procedures provided for in the EPA to the competition chapter (Article 133) is the same as that of the Japan-Singapore EPA and the Japan-Mexico EPA.

In addition, the Implementing Agreement, which provides the “details and procedures of co-operation,” sets forth provisions on: 1) “Transparency” (Article 12); 2) “Technical Co-operation” (Article 13); and 3) “Discussion” (Article 14). Since Malaysia had no domestic competition law at the time of the execution of the EPA, as in the case of Singapore, the Implementing Agreement lacks provisions such as “exchange of information,” “notification” and “comity”, which are found in bilateral cooperation/mutual assistance agreements between developed countries and under the Implementing Agreement of the Japan-Mexico EPA. It provides that the governments shall “review” their cooperation pursuant to the competition chapter when either country adopts new laws and regulations that control anti-competitive activities (Article 15). In Malaysia, the “Competition Law 2010” was enacted in 2010 and put into effect in January 2012.

**(5) JAPAN-PHILIPPINES EPA (SIGNED IN SEPTEMBER 2006, EFFECTIVE IN DECEMBER 2008)**

***(a) Objectives Section***

As in the previously discussed EPAs, the provisions of the Japan-Philippines EPA related to competition policy include an Objectives Section, Substantive Section and Procedural Section. With respect to the Objectives Section, item (f) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) provides that one of the objectives of the Japan-Philippines EPA shall be to “promote competition by addressing anti-competitive activities and cooperate in the field of competition”. In comparison with the Japan-Singapore EPA and the Japan-Malaysia EPA, the Japan-Philippines EPA has a provision to “promote competition by addressing anti-competitive activities” in place of the wording “to encourage effective control of anti-competitive activities.” In addition, like the Japan-Singapore EPA and Japan-Malaysia EPA, the Japan-Philippines EPA does not refer to the “coordination for the effective enforcement of competition laws...,” which is contained in the Japan-Mexico EPA.

***(b) Substantive Section***

With respect to the Substantive Section, the first sentence of paragraph 1 of Article 135 of Chapter 12 provides that “[e]ach Party shall, in accordance with its applicable laws and regulations, take measures which it considers appropriate to promote competition by addressing anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its market.” The substance of this provision is virtually the same as that of the Japan-Singapore EPA and Japan-Malaysia EPA. In addition, the provision to “review and improve or adopt laws and regulations to effectively promote competition” (paragraph 2 of Article 135) is the same as that of the two above-mentioned EPAs, because, like them, no competition authority existed in the Philippines due to the absence of domestic competition laws at the time of the execution of the EPA.

***(c) Procedural Section***

The Procedural Section is substantially similar to those of the Japan-Singapore EPA and Japan-Malaysia EPA. Paragraph 1 of Article 136 provides for cooperation “in accordance with their respective laws and regulations...subject to their respective available resources [.]” thus establishing a framework under which the competition authorities of the contracting parties enforce their respective laws within their respective jurisdictions. The EPA also leaves the details of the cooperation to the “Implementing Agreement” (paragraph 2 of Article 136) and excludes the provisions of the competition chapter from the scope of the dispute settlement procedures provided for in the EPA (Article 137), which is the approach taken in the Japan-Singapore EPA and Japan-Malaysia EPA.

Unlike the two above-mentioned EPAs, the last sentence of paragraph 1 of Article 135 provides that “[a]ny measures shall be taken in conformity with the principles of transparency, non-discrimination and procedural fairness.” The “Implementing Agreement”, like the Japan-Malaysia EPA, has only limited content. It only contains provisions on 1) “Technical Cooperation” (Article 13), 2) “Transparency” (Article 14) and 3) “Discussion” (Article 15), and only provides that the parties shall “review” their cooperation pursuant to the competition chapter when either country adopts new laws and regulations relating to the implementation of its competition policy (Article 16).

**(6) JAPAN-CHILE EPA (SIGNED IN MARCH 2007, EFFECTIVE IN SEPTEMBER OF THE SAME YEAR)**

***(a) Objectives Section***

The provisions related to competition policy in the Japan-Chile EPA are in line with those in Japan-Mexico EPA in terms of the objectives, substantive and procedural sections. In the Objectives Section, item (f) of Article 2 (“Objectives”) of Chapter 1 in the Japan-Chile EPA (“General Provisions”) provides like other EPAs, that one of the objectives of the EPA is to “promote cooperation and coordination for the effective enforcement of competition laws in each Party.” Since a competition authority already existed in Chile at the time of the conclusion of the EPA, “coordination” is specified as one of the objectives in addition to “cooperation.”

***(b) Substantive Section***

In the Japan-Chile EPA, Chapter 14 covers “Competition”. In the Substantive Section, Article 166 provides: “Each Party shall, in accordance with its laws and regulations and in a manner consistent with this Chapter, take measures which it considers appropriate against anti-competitive activities so as to prevent the benefits of the liberalization of trade and investment from being diminished or nullified by such activities.” The content of the provision is similar to Substantive Sections of other EPAs. Like the one with Mexico, the EPA with Chile, where a competition authority already existed at the time of the conclusion of the EPA, has no provision requiring the “review, improvement or adoption of laws and regulations.”

***(c) Procedural Section***

In its Procedural Section, as in the Japan-Mexico EPA, the Japan-Chile EPA provides “Cooperation on Controlling Anti-competitive Activities” (Article 167), “Non-Discrimination” (Article 168), “Procedural Fairness” (Article 169), “Transparency” (Article 170) and “Non-Application of Dispute Settlement” (Article 171). As mentioned above, although “Comity (Coordination)” is provided for in the General Provisions, there is no explicit provision in the Procedural Section. Unlike other EPAs, the Japan-Chile EPA does not provide an “Implementing Agreement” on “Competition.”

**(7) JAPAN-THAILAND EPA (SIGNED IN APRIL 2007, EFFECTIVE IN NOVEMBER OF THE SAME YEAR)**

***(a) Objectives Section***

With respect to the Objectives Section, item (h) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) of the Japan-Thailand EPA provides that one of the objectives of the EPA is to “promote fair and free competition by proscribing anti-competitive activities and cooperate in the field thereof.” Although the expression is different from the objectives sections in other EPAs, the content itself is almost the same.

***(b) Substantive Section***

In the Japan-Thailand EPA, Chapter 12 covers “Competition.” Specifically, in the Substantive Section, the following is provided for in Article 147: “Each Party shall, in accordance with its respective laws and regulations, promote fair and free competition by proscribing anti-competitive activities in the Party, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its market.” As in the Japan-Mexico EPA and the Japan-Chile EPA, a

competition law and a competition authority already existed in Thailand at the time of the conclusion of the EPA, and so the Japan-Thailand EPA has no provision requiring the “review, improvement or adoption of laws and regulations.”

**(c) Procedural Section**

In its Procedural Section as well as that in Japan-Mexico EPA and Japan Chile EPA, since enforcement authorities already existed, the Japan-Thailand EPA provides “Cooperation on Promoting Fair and Free Competition by Proscribing Anti-competitive Activities” (Article 148) “Non-Discrimination” (Article 149), “Procedural Fairness” (Article 150) and “Non-Application of Dispute Settlement” (Article 151). Regarding “Cooperation,” similar to the other EPAs (except Japan-Chile EPA), details are provided in Chapter 4 of the Implementing Agreement, which contains provisions on: 1) “Notification” (Article 12); 2) “Exchange of Information and Coordination” (Article 13); 3) “Transparency” (Article 14); 4) “Technical Cooperation” (Article 15); 5) “Consultation” (Article 16); 6) “Review” (Article 17); 7) “Treatment of Confidential Information” (Article 18); 8) “Use of Information in Criminal Proceedings” (Article 19); and 9) “Communications” (Article 20).

Regarding “Comity,” unlike the Japan-Mexico EPA, which explicitly provides both “negative comity” and “positive comity,” the Japan-Thailand EPA only provides that “(t)he competition authorities of the Parties shall, as appropriate, consider coordination of their enforcement activities with regard to matters that are related to each other” (Article 13).

**(8) JAPAN-BRUNEI EPA (SIGNED IN JUNE 2007, EFFECTIVE IN JULY 2008)**

The Japan-Brunei EPA does not have a chapter or provision related to competition.

**(9) JAPAN-INDONESIA EPA (SIGNED IN AUGUST 2007, EFFECTIVE IN JULY 2008)**

**(a) Objectives Section**

One of the objectives of the Japan-Indonesia EPA - provided for in item (e) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) - is to “promote competition by addressing anti-competitive activities, and cooperate on the promotion of competition.” With the exception of the fact that the EPA does not mention “Coordination” as in the Japan-Mexico and Japan-Chile EPAs, the content is similar to the Objectives Sections in other EPAs.

**(b) Substantive Section**

In the Japan-Indonesia EPA, Chapter 11 covers “Competition”. As for the Substantive Section, Article 126 provides similar to Substantive Sections in other EPAs: “(e)ach Party shall, in accordance with its laws and regulations, promote competition by addressing anti-competitive activities, in order to facilitate the efficient functioning of its market”. Because a competition law and a competition authority already existed in Indonesia, the EPA has no provision requiring the “review, improvement or adoption of laws and regulations.”

**(c) Procedural Section**

Regarding its Procedural Section as in the EPAs with countries where enforcement authorities already existed, the Japan-Indonesia EPA provides for: “Cooperation on the Promotion of Competition” (Article 127); “Non-Discrimination” (Article 128); and “Procedural Fairness” (Article 129).<sup>\*</sup> Regarding “Cooperation,” as in some other EPAs, details are provided in the Implementing Agreement, which contains in chapter 5 provisions on: 1) “Notification”



(Article 12); 2) “Exchange of Information” (Article 13); 3) “Coordination of Enforcement Activities” (Article 14); 4) “Technical Cooperation” (Article 15); 5) “Transparency” (Article 16); 6) “Consultations” (Article 17); 7) “Review” (Article 18); 8) “Confidentiality of Information” (Article 19); and 9) “Communications” (Article 20).

Like the Japan-Thailand EPA, “Comity” in the EPA is expressed as a general provision (Article 14), and neither “negative comity” nor “positive comity” are explicitly provided for.

\*Chapter 14 (Dispute Settlement) excludes Chapter 11 (Competition) from the application of the dispute settlement procedures (Article 138).

## **(10) JAPAN-VIET NAM EPA (SIGNED IN DECEMBER 2008, EFFECTIVE IN OCTOBER 2009)**

### ***(a) Objectives Section***

One of the objectives of the Japan-Viet Nam EPA – provided for in item (c) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) – is to “promote cooperation and coordination for the effective enforcement of competition laws in each Party.” The content is similar to the Objectives Sections in other EPAs such as the Japan-Chile EPA.

### ***(b) Substantive Section***

In the Japan-Viet Nam EPA, Chapter 10 covers “Competition.” As for the Substantive Section, Article 99 provides similarly to Substantive Sections in other EPAs: “(e)ach Party shall, in accordance with its laws and regulations, promote competition by addressing anti-competitive activities, in order to facilitate the efficient functioning of its market”.

### ***(c) Procedural Section***

As for the Procedural Section, although competition authorities already existed in Viet Nam at the time of the conclusion of the EPA, its provisions are simple compared with those in other EPAs. Specifically, it has only two articles: “Cooperation” (Article 101) and “Technology Cooperation” (Article 102). With respect to the principles of transparency and non-discrimination, Article 99, which sets rules for the Substantive Section, simply provides that “[a]ny measures shall be taken in conformity with the principles of transparency, non-discrimination and procedural fairness.” Unlike other EPAs, the Japan-Viet Nam EPA does not have any implementing agreement concerning “competition”. Instead, “Miscellaneous provisions” (Article 104) provides that “[a]ny detailed arrangements to implement the provisions of the Chapter may be made by the competition authorities of the contracting parties.

## **(11) JAPAN-SWITZERLAND EPA (SIGNED IN FEBRUARY 2009, EFFECTIVE IN SEPTEMBER 2009)**

### ***(a) Objectives Section***

With respect to the Objectives Section, item (c) of Article 1 (“Objectives”) of Chapter 1 (“General Provisions”) of the Japan-Switzerland EPA provides that one of the objectives of the EPA is “to promote cooperation and coordination for the effective enforcement of competition laws in each Party.” The content is similar to the Objectives Sections in other EPAs.

### ***(b) Substantive Section***

In the Japan-Switzerland EPA, Chapter 10 covers “Competition”. In the Substantive Section,

Article 103 provides: “Each Party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anti-competitive activities when it recognizes that such activities prevent the benefits of the liberalization of trade and investment from being nullified or impaired by such activities, or prevent the efficient functioning of its market.” The content of the provision is similar to Substantive Sections of other EPAs.

***(c) Procedural Section***

With respect to the Procedural Section, since competition authorities existed in Switzerland at the time of the conclusion of the Japan-Switzerland EPA, the EPA, like other EPAs, provides for “Cooperation” (Article 104) and “Dispute Settlement” (Article 106). Regarding “Transparency,” “Non-Discrimination,” and “Procedural Fairness,” they are provided in Article 103. Regarding “Cooperation,” the EPA, like other EPAs, provides details in the Implementing Agreement, which contains provisions on: 1) “Notification” (Article 10), 2) “Cooperation Regarding Anti-competitive Activities” (Article 11), 3) “Exchange of Information” (Article 12), 4) “Coordination of Enforcement Activities” (Article 13), 5) “Cooperation Regarding Anti-competitive Activities in the Territory of the Country of One Party that Adversely Affect the Interests of the Other Party” (Article 14), 6) “Avoidance of Conflicts over Enforcement Activities” (Article 15), 7) “Transparency” (Article 16), 8) “Consultations” (Article 17), 9) “Confidentiality of Information” (Article 18), 10) “Use of Information for Criminal Procedures” (Article 19), 11) “Communications between Competition Authorities of the Two Contracting Party Countries” (Article 20). It is noteworthy that in the Japan-Switzerland EPA, like the Japan-Mexico EPA, the Implementing Agreement has provisions for “negative comity” and “positive comity” by competition authorities, similar to those of bilateral cooperation/mutual assistance agreements between the enforcement organizations of developed countries.

**(12) JAPAN-INDIA EPA (SIGNED IN FEBRUARY 2011, EFFECTIVE IN AUGUST OF THE SAME YEAR)**

***(a) Objectives Section***

Chapter 1, Article 1 “Objectives” of the Japan-India EPA stipulates “promote cooperation for the effective enforcement of competition laws in each Party.”

***(b) Substantive Section***

The Japan-India EPA includes a chapter “Competition” (Chapter 11), that states “Each Party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anticompetitive activities”, “The Parties shall, in accordance with their respective laws and regulations, endeavour to cooperate in the field of controlling anticompetitive activities subject to their respective available resources,” and “Each Party shall apply its competition laws and regulations in a manner which does not discriminate between persons in like circumstances on the basis of their nationality.”

***(c) Procedural Section***

The EPA establishes Article 120 “Procedural Fairness” and Article 121 “Transparency” related to the procedural regulations. Moreover, Article 122 stipulates “Non-Application of Chapter 14” stating that “The dispute settlement procedures provided for in Chapter 14 shall not apply to this Chapter.”

**(13) JAPAN-PERU EPA (SIGNED IN JUNE 2011, EFFECTIVE IN MARCH 2012)*****(a) Objectives Section***

The Japan-Peru EPA does not have a provision related to the objective.

***(b) Substantive Section***

In the Japan-Peru EPA, Chapter 12 covers “Competition.” Article 189 provides: “Each Party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties through the efficient functioning of its markets.” Because competition law and a competition authority already existed in Peru, the EPA has no provision requiring the “review, improvement or adoption of laws and regulations.”

***(c) Procedural Section***

The EPA includes Article 190 “Cooperation on Controlling Anticompetitive Activities”, Article 191 “Non-Discrimination”, Article 192 “Procedural Fairness”, and Article 193 “Transparency” related to the procedural regulations. Moreover, Article 194 stipulates “Non-Application of Paragraph 1 of Article 7”, stating that the dispute settlement procedures shall not be applied to the Competition Chapter.

**(14) JAPAN-AUSTRALIA EPA (SIGNED IN JULY 2014, EFFECTIVE IN JANUARY 2015)*****(a) Objectives Section***

The Japan-Australia EPA includes Chapter 15 “Competition and Consumer Protection”, and Article 15.1 “Objectives” provides that one of the objectives of the EPA is “promoting economic efficiency and consumer welfare through the promotion of competition and cooperation on consumer protection”.

***(b) Substantive Section***

The Substantive Section is contained in paragraph 1 of Article 15.3, providing that: “Each Party shall, subject to its laws and regulations, take measures which it considers appropriate to promote competition, especially by addressing anticompetitive activities”. As a competition law and a competition authority already existed in Australia, the EPA has no provision requiring the “review, improvement or adoption of laws and regulations”.

In addition, the following effort-based provision concerning the government not to provide state-owned companies with competitive benefits in Article 15.4: “In addition to Article 15.3, bearing in mind the relationship between the promotion of competition and other policy objectives, the Parties recognize that seeking to ensure that governments do not provide competitive advantages to state-owned enterprises simply because they are state owned can contribute to the promotion of competition”.

***(c) Procedural Section***

As part of the Procedural Section, paragraph 2 of Article 15.3 provides that measures considered appropriate to promote competition “shall be consistent with the principles of transparency, non-discrimination and procedural fairness”. In addition, Article 15.5 provides for “Cooperation on Addressing Anticompetitive Activities”, Article 15.6 for “Cooperation on Consumer Protection”, Article 15.7 for “Consultations”, Article 15.8 for “Confidentiality of Information”, and Article 15.9

for “Non-Application of Chapter 19 (Dispute Settlement)”.

## **(15) JAPAN-MONGOLIA EPA (SIGNED IN FEBRUARY 2015, EFFECTIVE IN JUNE 2016)**

### ***(a) Objectives Section***

The Japan-Mongolia EPA provides in item (e) of Article 1.1 “Objective” of Chapter 1 “General Provisions” that one of the objectives of the EPA is “promoting cooperation and coordination for the effective enforcement of competition laws in each Party”. The content is similar to the Objectives Sections in other EPAs.

### ***(b) Substantive Section***

The Substantive Section is contained in paragraph 1 of Article 11.1, providing that: “Each Party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anticompetitive activities, in order to facilitate trade and investment flows between the Parties through the efficient functioning of its markets”. As a competition law and a competition authority already existed in Mongolia, the EPA has no provision requiring the “review, improvement or adoption of laws and regulations”.

### ***(c) Procedural Section***

The Substantive Section is contained in Article 11.2 pro-competition authority .3 “Non-Discrimination”, Article 11.4 “Procedural Fairness”, and Article 11.5 “Transparency”. In addition, Article 11.6 provides for “Non-Application of Paragraph 2 of Article 1.8 and Chapter 16”, providing that dispute settlement procedures shall not be applicable to the provision of this chapter.

Regarding “Cooperation,” similar to other Japanese EPAs, details are provided in the Implementing Agreement, which contains provisions on: 1) “Notification” (Article 3.3); 2) “Cooperation in Enforcement Activities” (Article 3.4); 3) “Exchange of Information” (Article 3.5); 4) “Coordination of Enforcement Activities” (Article 3.6); 5) “Cooperation regarding Anticompetitive Activities in the Country of a Party that Adversely Affect the Interests of the Other Party” (Article 3.7); 6) “Avoidance of Conflicts over Enforcement Activities” (Article 3.8); 7) “Technical Cooperation” (Article 3.9); 8) “Transparency” (Article 3.10); 9) “Consultations” (Article 3.11); 10) “Confidentiality of Information” (Article 3.12); 11) “Use of Information for Criminal Proceedings” (Article 3.13); and 12) “Communications” (Article 3.14).

## **(16) JAPAN - EU EPA (SIGNED JULY 2018, ENTERED INTO FORCE FEBRUARY 2019)**

### ***(a) Parts related to the provisions of objectives***

Chapter 11 of the Japan-EU EPA is “Competition Policies”. Article 11.1 states that the Parties recognize “the Importance of fair and free competition in their trade and investment relations” and “that anticompetitive practices have the potential to distort the proper functioning of markets and undermine the benefits of liberalisation of trade and investment”.

### ***(b) Parts related to substantive provisions***

As for substantive provisions regarding “Competition policies”, Article 11.2 stipulates, “Each Party shall, in accordance with its laws and regulations, take measures which it considers appropriate against anticompetitive practices, in order to achieve the objectives of this Agreement”. Moreover, Article 11.3 provides that “Each Party shall maintain its competition law that applies to

all enterprises in all sectors of the economy and which addresses, in an effective manner, the following anticompetitive practices”, in which the specific anticompetitive practices for the EU are “(i) agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition; (ii) abuse by one or more enterprises of a dominant position; and (iii) mergers or concentrations between enterprises which would significantly impede effective competition”, and for Japan , "Private monopolisation, unreasonable restraint of trade, unfair trade practices, and mergers or acquisitions which would substantially restrain competition in a particular field of trade”.

In addition, "Operational independence" (Article 11.4) maintains the authority independent in operations with responsibility and authority for effective execution of domestic competition laws, and "Non-discrimination" (Article 11.5) stipulates regarding competition laws.

***(c) Parts related to procedural provisions***

As for “competition policy,” Chapter 11 provides for procedural fairness in competition law enforcement, transparency, non-application of dispute settlement procedures, etc.

Moreover, regarding “enforcement cooperation,” in Article 11.8 notes that “the Parties acknowledge that it is in their common interest to promote cooperation and coordination between the competition authorities with regard to developments in competition policy and enforcement activities”, within the framework of the “Agreement between the European Community and the Government of Japan concerning cooperation on anticompetitive activities,” created in 2003. In order to facilitate the cooperation and coordination, Article 11.8(2) stipulates that the authorities may exchange or communicate information within the framework of the Agreement concerning cooperation on anticompetitive activities.

Chapter 11 of the Japan-EU EPA is “Competition Policies”. Article 11.1 states that the Parties recognize “the Importance of fair and free competition in their trade and investment relations” and “that anticompetitive practices have the potential to distort the proper functioning of markets and undermine the benefits of liberalisation of trade and investment”.

**(17) CPTPP AGREEMENT (SIGNED IN MARCH 2018, EFFECTIVE IN DECEMBER 2018)**

***(a) Parts related to the provisions of objectives***

Chapter 16 of the CPTPP is titled “Competition Policy” and Article 16.1 provides for the “objective of promoting economic efficiency and consumer welfare”. Article 16.6 provides for “consumer protection.”

***(b) Parts related to substantive provisions***

As for substantive provisions on “competition policy,” Article 16.2 sets out that “Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct, and shall take appropriate action with respect to that conduct.”

***(c) Parts related to procedural provisions***

As for “competition policy,” Chapter 16 provides for procedural fairness in competition law enforcement, private rights of action, non-application of dispute settlement procedures, etc. In Article 16.2(5) gives introduction of a system which voluntarily resolves alleged violations by consent of the competition authority and the party.

As for “cooperation,” provisions are set out regarding exchange of information on formulation of competition policies and issues related to enforcement of competition laws. There are also provisions on “technical cooperation.”

### **3. CONCLUSION**

Some provisions on competition in regional trade agreements include common substantive provisions like in the customs union countries such as EU or South Africa, or provisions like in NAFTA such as “Each contracting party shall take appropriate measures to prohibit anti-competitive conduct.”

The recent global situation surrounding competition laws includes “expansion” and “deepening” of competition laws. Since the 1990’s, there has been progress in terms of increase (expansion) of countries introducing the competition law, as well as strengthening (deepening) of cooperation, particularly between competition authorities of developed countries regarding tangible enforcement of the laws. “Expansion” of competition laws means an increase in the number of competition authorities that possibly apply competition laws in their own country in response to international cases because of impacts on domestic market. Whereas “deepening” means establishment of cooperation systems as laid down in bilateral antimonopoly cooperation agreements or chapters on competition in EPAs.

However, there are concerns that such expansion of competition laws will lead to domestic competition laws being applied to international cases by the competition authorities of each country such as enterprise merger in third countries or an international cartel, which may develop into an imposition of sanctions or become an obstacle to the merger and acquisition. Moreover, it has previously been pointed out that in cases where an internationally active Japanese company does not sufficiently research the competition laws of that country, it would be a problem. In order to handle such situations, it is thought necessary for each country to have its competition laws framed on a common foundation. In other words, harmonization is thought essential between countries regarding cartel regulations, unilateral act regulations, and corporate combination regulations. Efforts in international competition network (ICN), etc. have progressed in recent years.

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## **GOVERNMENT PROCUREMENT**

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### **1. BACKGROUND OF THE RULES**

With respect to government procurement, which is said to represent 10% to 15% of a country’s GDP, the imposition of certain regulations has a great significance from the perspective of the free trade of goods and services. The WTO agreements acknowledge this fact by including the WTO Agreement on Government Procurement (hereafter the WTO Agreement on Government Procurement is referred to as “the GPA” unless the former agreement is specifically mentioned) as a plurilateral agreement (for details, see Chapter 14 of Part II).

However, since only 46 countries and autonomous customs areas (mainly, developed countries) are parties of the GPA, the establishment of disciplines for government procurement in EPAs/FTAs is particularly significant if the other country is not a party of the GPA. Even if the other country is a party of the GPA, it is still meaningful because the disciplines of the GPA can be strengthened through the reduction of the relevant threshold and extension of covered entities.

Unlike the GATT and the GATS, the GPA has no provisions specifically concerning regional

trade agreements. The non-discriminatory treatment clause of the GPA (Article IV: 1(b)) provides that, with respect to any measure regarding covered procurement, each party shall provide to the products, services and suppliers of other parties, “treatment no less favourable than the treatment accorded to products, services and suppliers of any other Party.” Therefore, if a regional trade agreement between the parties of the GPA promises any treatment which is more favourable than the GPA with respect to the measures regarding the government procurement covered by the GPA, such favourable treatment will be bestowed to all parties of the GPA by virtue of the aforesaid non-discrimination treatment clause. In contrast, if provisions on government procurement are contained in a regional trade agreement between the party of the GPA and non-party of the GPA, the substance of such provisions will not be applied to the relationship with other parties of the GPA. This essentially liberalizes the government procurement market which has not yet been subject to the regulation of the GPA. It means that Japan can get the market access to the government procurement in its EPA/FTA partner countries by only making a commitment to give the market access which Japan has already plurilaterally opened under the GPA.

## **2. OVERVIEW OF LEGAL DISCIPLINES**

Generally, when provisions on government procurement are included in a regional trade agreement, they mostly say that the provisions of the GPA apply *mutatis mutandis*. The main issues of negotiation are national treatment, non-discrimination, fair and equitable procurement procedures, complaint filing systems, delisting of privatized entities, offsets, etc. The EPAs which have been executed by Japan provide as follows:

### **(1) JAPAN-SINGAPORE EPA**

Chapter 11 covers government procurement. It provides that the provisions of the GPA, except for some clauses, shall apply *mutatis mutandis* to the procurement of goods and services specified in Annex VII A by the entities of the contracting party countries specified in Annex VII B if the procurement amount is not less than SDR 100,000. (SDR means the special drawing rights of the International Monetary Fund.)

Unlike the GPA, the Japan-Singapore EPA has no provisions on most-favoured-nation and stipulates that it shall not apply to any procurement of construction works.

The Japan-Singapore EPA stipulates that the relevant threshold shall be reduced from SDR 130,000, which was the threshold stipulated in the former Agreement on Government Procurement agreed in 1994, to SDR 100,000, and thus imposes obligations greater than those of the said GPA. In addition, the Japan-Singapore EPA provides: (i) that when an entity listed in Annex VII B is privatized, this Chapter shall no longer apply to that entity; and (ii) that government officials shall exchange information in respect of government procurement.

### **(2) JAPAN-MEXICO EPA**

Chapter 11 has virtually the same provisions as those of the former Agreement on Government Procurement agreed in 1994 but does not provide for MFN treatment. Procurement by regional government entities and privatized entities are excluded from the scope of application.

Mexico is not a party of the GPA. Under the government procurement system of Mexico, companies of countries that have executed an FTA with Mexico (“Mexico FTA Country Companies”) are treated differentially (*i.e.*, more favourably), than companies of countries that have not executed an FTA with Mexico (“Non-Mexico FTA Country Companies”). In the evaluation of bid prices, the bid prices of Mexican companies are discounted by 10% in

comparison with those of Non-Mexico FTA Country Companies. Large bids are designated “international public bids to be called for in accordance with the provisions of the Free Trade Agreement,” and Non-Mexico FTA Country Companies cannot participate. Therefore, Japanese companies were in a disadvantageous situation prior to the Japan-Mexico EPA.

Because of the Japan-Mexico EPA, Japanese companies became able to enjoy treatment equal to that of Mexico FTA Country Companies (such as companies from the U.S. or Canada) and Mexican companies in the government procurement of Mexico.

### **(3) JAPAN-MALAYSIA EPA**

Malaysia is not a party of the GPA. Although Japan insisted on establishing provisions on government procurement in the Japan-Malaysia EPA, negotiations have failed to establish such provisions. In July, 2012, Malaysia became an observer country to the Committee on Government Procurement.

### **(4) JAPAN-PHILIPPINES EPA**

Because the Philippines is not a party of the GPA, Chapter 11 of the Japan-Philippines EPA addresses government procurement with a view to application of legal disciplines and ensuring market access to government procurement in the Philippines.

The Chapter provides that (i) the party countries recognize the importance to a party country of according national treatment and non-discrimination treatment with respect to the measures regarding government procurement, (ii) in the event that a party country offers a non-party country any advantageous treatment concerning the measures regarding government procurement, the former party country shall consent to enter into negotiations with the other party country with a view to extending these advantages or advantageous treatment to the other party country, (iii) for purposes of the effective implementation and operation of this Chapter, a Sub-Committee shall be established, and (iv) the party countries shall enter into negotiations at the earliest possible time, not later than five (5) years after the date of the entry into force of this Agreement, with a view to liberalizing their respective government procurement markets.

### **(5) JAPAN-CHILE EPA**

Chapter 12 covers government procurement. Because Chile is an observer country of the Committee on Government Procurement, this chapter was included, on the expectation that Chile would apply the legal disciplines to its government procurement, and ensure access to the government procurement market.

Each Party agrees to grant the goods, services and suppliers of the other Party national treatment and non-discriminatory treatment; challenge procedures; and conduct further negotiations with the other Party in the event that a Party gives third country an additional benefit concerning access to its government procurement market. This chapter assures that Japanese companies can bid with national treatment and non-discrimination treatment for any procurement of not less than the thresholds at a national, regional and municipal level in Chile, and use the challenge procedures if any problems arise in government procurement.

### **(6) JAPAN-THAILAND EPA**

Chapter 11 covers government procurement. Because Thailand is not a party of the GPA, this chapter was established on the expectation that it would promote better understanding by Japan of the government procurement practices of Thailand. It is also intended to bring them in line with



global standards, resulting in the creation of a beneficial environment for Japanese companies.

Specifically, Chapter 11 stipulates information exchange on laws and regulations, policies and practices concerning the government procurement of both Parties and any reforms to the existing government procurement regimes, as well as establishing a sub-committee for the purposes of the effective implementation and operation of the chapter.

## **(7) JAPAN-BRUNEI EPA**

Because Brunei is not a party of the GPA, Japan considered including a separate chapter that referred to government procurement in the EPA with Brunei, on the expectation that Brunei would apply legal disciplines to its government procurement. However, Brunei expressed strong reservations about the creation of an independent chapter. After negotiating with Brunei, the Chapter on Improvement of Business Environment (Chapter 8) includes the declaration that both Parties should strive to grant the goods, services and suppliers of the other Party MFN treatment, to enhance transparency in government procurement measures and to implement the measures in a fair and effective manner.

## **(8) JAPAN-INDONESIA EPA**

Chapter 10 covers government procurement. Because Indonesia is not a party of the GPA, this chapter was included, on the expectation that it would promote better understanding by Japan of the government procurement practices of Indonesia. It is also intended to bring them in line with global standards, resulting in the creation of a beneficial environment for Japanese companies.

Specifically, similar to the Japan-Thailand EPA, Chapter 10 stipulates information exchange on laws and regulations, policies and practices concerning the government procurement of both Parties and any reform to the existing government procurement regimes, as well as establishing a sub-committee for the purposes of the effective implementation and operation of this chapter. In October, 2012, Malaysia became an observer country to the Committee on Government Procurement.

## **(9) JAPAN-ASEAN EPA**

As a result of negotiations, provisions concerning government procurement were not set forth.

## **(10) JAPAN-VIET NAM EPA**

Various principles concerning government procurement are set forth in the chapter on “Improvement of Business Environment” (Chapter 11). Since Viet Nam is a non-GPA party, both Parties are required to make efforts to enhance transparency in government procurement measures and to implement the measures in a fair and effective manner. In December, 2012, Viet Nam became an observer country to the Committee on Government Procurement.

## **(11) JAPAN-SWITZERLAND EPA**

Both Japan and Switzerland are party countries of the GPA, and the chapter on “Government Procurement” (Chapter 10) of the EPA stipulates that the rights and obligations of the two countries shall follow the GPA. It also provides that the two countries shall designate a government office as a contact office to promote communications concerning government procurements between the two countries, conduct studies to promote mutual understanding at the joint meetings of the EPA, and hold negotiations to offer benefits to the other party on a reciprocal basis, in the event that one of the parties provides a third party with access to the government procurement market in better terms

than those offered to the other party, and the other party calls for negotiations.

## **(12) JAPAN-INDIA EPA**

Chapter 10 of the Japan-India EPA covers government procurement. It stipulates that “each Party shall ensure transparency of the measures and shall exchange information regarding government procurement in accordance with its national laws and regulations.” Additionally, “each Party shall provide to the goods, services and suppliers of the other Party treatment no less favourable than that it accords to non-Party’s goods, services and suppliers in accordance with its laws and regulations.” India is an observer country of the Committee on Government Procurement but not a party country of the GPA. Therefore, “The Parties shall enter into negotiations to review this Chapter with a view to achieving a comprehensive Chapter on Government Procurement, when India expresses its intention to become a party of the Agreement on Government Procurement.”

## **(13) JAPAN-PERU EPA**

Chapter 10 of the Japan-Peru EPA covers government procurement. Although Peru is not a party of the GPA, this chapter was established on the expectation that Peru would apply the legal disciplines to its government procurement, and ensure access to its government procurement market. As a result of efforts to create a meaningful government procurement chapter, by considering the scale of the government procurement market in both countries and their relevant domestic laws/regulations, provisions of this chapter contain similar provisions as the high-level EPAs/FTAs concluded by both countries. This EPA stipulates national treatment, non-discrimination, prohibition of offsets and ensuring transparency and so on.

## **(14) JAPAN-AUSTRALIA EPA**

Chapter 17 of the Japan-Australia EPA covers government procurement. Australia is not a party of the GPA, but is an observer country of the Committee on Government Procurement (its accession was adopted at the WTO Committee on Government Procurement in October 2018). Because of the scale of government procurement in Australia, which accounts for an important part in the Australian economy at approximately 11% of GDP, however, it was considered beneficial to include the provisions stipulated in the EPAs/FTAs concluded with third countries by both countries. This chapter was therefore established in the Japan-Australia EPA. In order to facilitate participation in the government procurement market, this EPA stipulates national treatment, non-discrimination, procurement procedures for bidding, prohibition of offsets, ensuring transparency, challenge procedures. It also includes an arrangement whereby, in the event that a Party offers a non-Party better access to its government procurement market than has been provided to the other Party, the former Party shall, on request of the other Party, enter into negotiations with a view to extending that advantages to the other Party on a reciprocal basis.

## **(15) JAPAN-MONGOLIA EPA**

Chapter 13 of the Japan-Mongolia EPA covers government procurement. Mongolia is not a party of the GPA and is an observer country of the Committee on Government Procurement. Because Mongolian domestic laws/regulations on government procurement do not correspond with the GPA, provisions on ensuring transparency in government procurement procedures, information exchange, and non-discrimination principle were included in this EPA. In addition, this EPA stipulates that negotiations shall be initiated to review the chapter with a view to achieving a comprehensive chapter on government procurement when Mongolia expresses its intention to become a party of the GPA.

## **(16) CPTPP AGREEMENT**

Following the United States' withdrawal from TPP Agreement (signed in Feb. 2016) in January 2017, the eleven other member countries had continued consultations toward the early enforcement of the agreement. As a result, they reached a basic agreement under the title of a new agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), at the TPP Ministerial Meeting held among the remaining eleven parties in Da Nang, Viet Nam, in November 2017. The CPTPP was signed in March 2018 and effected on December 30, 2018.

Chapter 15 of the CPTPP covers government procurement. Disciplines equivalent to those of the GPA are provided, such as general principles of open tendering, national treatment and non-discrimination, and fair and impartial tendering procedures. Among countries participating in the CPTPP, Malaysia, Viet Nam and Brunei have not acceded to the GPA, and bilateral EPAs between Japan and these three countries do not include the same level of provisions as in the GPA. Thus, the above rules were set out as international agreements between Japan and the three countries for the first time. In these countries, almost all central government entities are subject to the government procurement chapter, and a commitment was pledged to make other public bodies subject to that chapter. In addition, as for Australia, Canada and Singapore, more entities and services have been covered than in existing international agreements (GPA, EPA/FTA), and as for Australia, Peru and Chile, the thresholds of covered procurement have been lowered from those in existing international agreements (GPA, EPA/FTA).

## **(17) JAPAN-EU EPA**

Chapter 10 of Japan-EU EPA covers government procurement. As both Japan and the EU are GPA member countries/regions, based on the procuring entities, goods, services, etc. promised by each member in the GPA, market access improvements have been achieved on both sides, for the purpose of promoting suppliers in Japan and the EU to participate in the government procurement market. For example, Japan applies special rules which is different from current international agreements such as the WTO GPA, including expanding the scope to regional independent administrative agencies established by prefectures and cities designated by ordinance and allowing the EU suppliers to participate in open tendering procurements by core cities whose value is at or above a certain threshold (excluding construction services), while, as in the past, allowing core cities to stipulate qualification requirements regarding address of suppliers' office. The EU side newly added thirteen procurement entities of central government, including France, as the scope.

Furthermore, regarding procurements by railway companies, of which both Japan and the EU are major players, Japan withdrew notes in its Appendix of the GPA regarding procurements related to operational safety of transportation for EU suppliers one year after the date of the entry into force of the agreement. The EU partially opened its procurement market of railway products including passenger coaches which the EU can exclude Japanese suppliers under the GPA.

Regarding regulations related to government procurement, more stringent rules are agreed in addition to the GPA rules. For example, it stipulates obligation to establish a single point of access on the Internet where notices of intended or planned procurement are accessible free of charge.

## **3. EVALUATIONS**

As mentioned above, provisions on government procurement are included in all the EPAs that Japan has concluded, with the exception of the Japan-Malaysia EPA and the Japan-ASEAN EPA. Because Japan's EPA partner countries (except Singapore, Switzerland, EU) are non-GPA parties, it is the first time that Japan has succeeded in imposing legal disciplines with EPAs to liberalize the

government procurement market in these countries. The level of disciplines in each EPA differs, because Japan took a flexible position depending on the degree of maturity of the government procurement market in each party country.

In EPA future negotiations, it is desirable to request non-GPA parties to comply in particular with the disciplines concerning government procurement and to further liberalize their government procurement market, while taking into consideration the degree of maturity of that market in each party country.

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## TRADE FACILITATION

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### ***1. BACKGROUND TO RULES***

On February 22, 2017, the WTO Trade Facilitation Agreement came into force, which is the first agreement in which all the Members are participating since the formation of the WTO in 1995. The Agreement provides comprehensive rules to reduce time and costs spent on trade transactions, such as the improvement of transparency of trade rules, and the acceleration and simplification of customs procedures. Meanwhile, the EPAs entered into by Japan usually have provisions for enhancing the predictability and transparency of customs procedures and simplification of customs procedures from the perspective that, when advancing economic partnership, it is important to settle individual or specific problems between party countries through bilateral cooperation and, thus, facilitate trade. The chapter concerning customs administration and trade facilitation of the TPP, which was signed in February 2016, includes provisions that have not been seen in the WTO Trade Facilitation Agreement or past bilateral EPAs, such as the provision that sets the deadline for release of cargoes and includes customs valuation in the scope of the advanced ruling system. These provisions are expected to contribute to the reduction of logistics costs through accelerated import clearance, and the improvement of foreseeability through enhanced transparency.

### ***2. OVERVIEW OF LEGAL DISCIPLINES***

Basically, these provisions involve enhancing the transparency of customs procedures through public announcements of customs-related laws and regulations, harmonizing customs procedures with relevant international standards, and simplifying customs procedures through the use of information and communications technology. In addition, these provisions provide for cooperation and the exchange of information between customs authorities and establishment of sub-committees between customs authorities to promote trade facilitation. Provisions also provide for the promotion of cooperation and the exchange of information between customs authorities for the purposes of preventing violations of customs laws and regulations and preventing the smuggling of illicit drugs, guns, and goods suspected of infringing intellectual property rights on the borders (*See* Chapter 4 of the Japan-Singapore EPA, Section 3 of Chapter 5 of the Japan-Mexico EPA, Chapter 4 of the Japan-Malaysia EPA, Chapter 4 of the Japan-Philippines EPA, Chapter 4 of Japan-Thailand EPA, Chapter 5 of Japan-Chile EPA, Chapter 4 of Japan-Brunei EPA and Chapter 4 of Japan-Indonesia EPA, Chapter 4 of Japan-Viet Nam EPA, Chapter 3 of Japan-Switzerland EPA, Chapter 4 of Japan-India EPA, Chapter 4 of Japan-Peru EPA, Chapter 4 of Japan--Australia EPA, Chapter 4 of Japan-Mongolia EPA, and Chapter 5 of the TPP).

In addition to the above, the Japan-Singapore EPA, Japan-Philippines EPA and Japan-Thailand EPA in the chapter on paperless trading provides that the party countries shall cooperate through the exchange of views and information on realizing and promoting paperless trading, encourage

cooperation between their relevant private entities engaging in activities related to paperless trading, and review how to realize paperless trading. (*See* Chapter 5 of the Japan-Singapore EPA, Chapter 5 of the Japan-Philippines EPA, and Chapter 5 of Japan-Thailand EPA.) In the Japan-Switzerland EPA's chapter on electronic commerce systems (Chapter 9), it is provided that efforts will be made for all trade-related documents to be disclosed in an electronic format, that trade-related documents in electronic format are to be regarded as the equivalent of their paper counterparts, and that international cooperation will be sought in the promoting the acceptance of trade-related documents in electronic format.

The typical custom procedures of Japan's concluded bilateral EPAs determine the application scope, definitions, transparency, customs clearance, temporary import and transit goods, cooperation and exchange of information, subcommittees, etc., while the cooperation contents are provided separately in the implementation arrangement. The special characteristics are as follows.

- Adherence to the purpose of the World Customs Organization (WCO) revised Kyoto Convention;
- Does not go beyond abstract regulations, without including numerical targets;
- No regulations concerning prior instructions, express goods, or maintaining confidentiality;
- There are provisions on establishment of subcommittees that review the implementation and application of regulations.

CHAPTER 5 CUSTOMS ADMINISTRATION AND TRADE FACILITATION of the TPP sets out that customs procedures shall be applied in a predictable, consistent and transparent manner, and provides for facilitation of cooperation between contracting parties, harmonization with international standards, expedited customs clearance and other procedures, reliable implementation of administrative and judicial reviews, etc. Rules under the chapter provide the following benefits:

- Release of goods – adopt or maintain the procedures that provide for the release of goods within a period no longer than that required to ensure compliance with its customs laws and, to the extent possible, within 48 hours of the arrival of the goods, etc.;
- Express Shipments -- under normal circumstances, release of goods is allowed within six hours after submission of the necessary customs documents;
- An advance ruling system at the request of an importer, exporter or producer (tariff classification, origin, etc.) (issued in no case later than 150 days; written advance rulings remain in effect at least for three years);
- Automation --party countries endeavour to provide a facility that allows importers and exporters to electronically complete import and export requirements at a single entry point.

The provision regarding express shipments in TPP11 provided that “no customs duties will be assessed on express shipments valued at or below a fixed amount set under the Party’s law” and that “each Party shall review the amount periodically taking into account factors that it may consider relevant.” However, this provision concerning review has been suspended (the second sentence of Article 5.7, 1(f)).

**Figure III-6-1 Comparison of Provisions related to Customs Procedures in Bilateral EPAs signed by Japan**

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Singapore EPA	For prompt customs clearance of goods traded between the Parties, each Party shall make use of information and communications technology, simplify its customs procedures, and make its customs procedures conform to relevant international standards (Art. 36).	The Parties shall exchange information between customs authorities with respect to the implementation of this Chapter (Art. 38).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 37).		Art. 39
Japan-Mexico EPA	For prompt customs clearance of goods traded between the Parties, each Party shall make cooperative efforts to make use of information and communications technology, simplify its customs procedures, and make its customs procedures conform to relevant international standards (Art. 50).				

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Malaysia EPA	For prompt customs clearance of goods traded between the Countries, each Country shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards, and promote co-operation between its customs authority and other national authorities, and its customs authority and the trading communities of the Country (Art. 54).	The Countries shall co-operate and exchange information with each other on customs matters (Art. 56).  The area of co-operation shall include capacity building, such as training, technical assistance and exchange of experts (Art. 57).	Each Country shall continue to facilitate procedures for the temporary admission of goods traded between the Countries (Art. 55).	Each Country shall ensure that all relevant information of general application pertaining to its customs laws is publicly available in the Country, and at the request of an interested person of the Countries, shall endeavour to provide information (Art. 53).	Art. 58
Japan-Philippines EPA	Each party shall make use of information and communications technology, reduce and simplify import and export documentation requirements, and harmonize its customs procedures with relevant international standards, in order to make cooperative efforts for simplification and harmonization of their customs procedures (Art. 53).	The Parties shall cooperate and exchange information with each other in the fields of customs procedures, including their enforcement against trafficking of prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 55).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 54).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person, and at the request of an interested person, provide information (Art. 52).	Art. 56

Part III: FTA/EPA and IIA

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Thailand EPA	Each Party shall make use of information and communications technology, reduce and simplify import and export documentation requirements, and harmonize its customs procedures with relevant international standards, in order to make cooperative efforts for simplification and harmonization of their customs procedures (Art. 53).	The Parties shall cooperate and exchange information with each other in the field of customs procedures, including their enforcement against trafficking of prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 55).	Each Party shall continue to facilitate procedures for the temporary admission of goods traded between the Parties (Art. 54).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person, and, at the request of an interested person, provide information (Art. 52).	Art. 56
Japan-Chile EPA	Each Party shall endeavour to make use of information and communications technology, adopt or maintain simplified customs procedures, harmonize its customs procedures with relevant international standards, and promote cooperation between its customs authority and other national authorities of the Party as well as the trading communities of the Party, in order to expedite customs clearance (Art. 57).	Each Party shall endeavour to assist each other to ensure proper application of customs laws (Art. 58 the Agreement and Art. 2 of the Implementing Agreement).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 54).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person, and, at the request of an interested person, endeavour to provide information (Art. 52).	Art. 60



	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Brunei EPA	Each Party shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards, and promote cooperation between its customs authority and other national authorities of the Party as well as the trading communities of the Party, in order for prompt customs clearance (Art. 51).	The Parties shall cooperate and exchange information with each other in the field of customs procedures, including their enforcement against trafficking of prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 53).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 52).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person, and, at the request of an interested person, provide information (Art. 50).	Art. 54
Japan-Indonesia EPA	Each Party shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards, and promote cooperation between its customs authority and other national authorities of the Party as well as the trading communities of the Party, in order for prompt customs clearance (Art. 54).	The Parties shall cooperate and exchange information with each other in the field of customs procedures, including their enforcement against trafficking of restricted and prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 55).		Each Party shall ensure that all relevant information of general application pertaining to its customs laws is publicly available, and at the request of an interested person, provide information (Art. 53).	Art. 56

Part III: FTA/EPA and IIA

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Viet Nam EPA	Each Party shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards, and promote cooperation between its customs authority and other national authorities of the Party as well as the trading communities of the Party, in order to promote prompt customs clearance (Art. 41).	The Parties shall cooperate and exchange information with each other in the field of customs procedures, including their enforcement against trafficking of restricted and prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 43).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 42).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is publicly available, and at the request of an interested person, provide information (Art. 40).	Art. 44
Japan-Switzerland EPA	Each Party shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards, and promote cooperation between its customs authority and other national authorities of the Party as well as the trading communities of the Party, in order to promote prompt customs clearance (Art. 29).	The Parties shall cooperate and exchange information with each other in the field of customs procedures, including their enforcement against trafficking of restricted and prohibited goods and importation and exportation of goods suspected of infringing intellectual property rights (Art. 31).	Each Party shall continue to facilitate customs clearance of goods in transit (Art. 30).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is publicly available, and at the request of an interested person, provide information (Art. 28).	Art. 32

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-India EPA	Each Party shall make use of information and communications technology, simplify its customs procedures, harmonize its customs procedures with relevant international standards and recommended practices, and promote cooperation between its customs authority, other national authorities of the Party, and the trading communities of the Party (Article 45).	The Parties shall cooperate and exchange information with each other on customs matters, including specific cases, such as: customs procedures; customs valuation within the meaning of the Agreement on Customs Valuation; enforcement against the trafficking of prohibited goods and the importation of goods suspected of infringing intellectual property rights; prevention, investigation and repression of violation or attempted violation of customs laws; and trade statistics data relating to customs clearance of goods and conveyances related to goods, exported from a Party to the other Party. (Article 48).	Each Party shall continue to facilitate the procedures for the temporary admission of goods traded between the Parties (Article 46).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person. (Article 44)	Art. 49
Japan-Peru EPA	For prompt customs clearance of goods traded between the Parties each Party shall simplify its customs procedures, harmonize its customs procedures with relevant international standards and recommended practices, promote cooperation between its customs authority, other national authorities of the Party, and the trading communities (Article 79).	The Parties shall cooperate and exchange information with each other in the field of customs procedures within the available resources of their respective customs authorities. Such cooperation and exchange of information include mutual administrative assistance and technical assistance (Article 83).		Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available. At the request of any interested person of the Parties, each Party shall provide, as quickly and accurately as possible, information relating to the specific customs matters (Article 76).	Art. 85

Part III: FTA/EPA and IIA

	<b>Acceleration of customs procedures</b>	<b>Cooperation and exchange of information between the customs authorities</b>	<b>Simplification of the procedures for the temporary admission of goods</b>	<b>Transparency of customs procedures</b>	<b>Establishment of sub-committees on customs procedures</b>
Japan-Australia EPA	For prompt customs clearance of goods traded between the Parties, each Party shall make use of information and communications technology; simplify its customs procedures; harmonize its customs procedures with relevant international standards and recommended practices; and promote cooperation between its customs administration and other national authorities of the Party as well as the trading communities of the Party (Article 4.4).	The Parties shall cooperate and exchange information in the field of customs procedures (Article 4.7).	Each Party shall continue to facilitate procedures for the temporary admission of goods traded between the Parties (Article 4.6).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person either in print or through the Internet (Article 4.3).	Art. 4.9
Japan-Mongolia EPA	For prompt customs clearance of goods traded between the Parties, each Party shall make use of information and communications technology; simplify its customs procedures; harmonize its customs procedures with relevant international standards and recommended practices; and promote cooperation between its customs administration and other national authorities of the Party as well as the trading communities of the Party (Article 4.4).	The Parties shall cooperate and exchange information in the field of customs procedures (Article 4.7).	Each Party shall continue to facilitate procedures for the temporary admission of goods traded between the Parties (Article 4.5).	Each Party shall ensure that all relevant information of general application pertaining to its customs laws is readily available to any interested person either in print or through the Internet (Article 4.3).	Art 4.8

**Figure III-6-2 Summary of the CHAPTER 5 CUSTOMS ADMINISTRATION AND TRADE FACILITATION of the TPP**

Acceleration of customs procedures	Cooperation and exchange of information between the customs authorities	Simplification of the procedures for the temporary admission of goods	Transparency of customs procedures	Establishment of sub-committees
<ul style="list-style-type: none"> <li>●Automation (Article 5.6) Each Party shall endeavour to use international standards with respect to procedures for the release of goods, take into account the standards and recommendations of the World Customs Organization (WCO), and endeavour to provide a facility that allows importers and exporters to electronically complete standardized import and export requirements at a single entry point</li> <li>●Express Shipments (Article 5.7) Express shipments shall be released within six hours after submission of the necessary customs documents, provided the shipment has arrived;</li> <li>●Release of Goods (Article 5.10)               <ul style="list-style-type: none"> <li>• Each Party shall adopt or maintain simplified customs procedures for the efficient release of goods.</li> <li>• Goods shall be released within a period no longer than that required to ensure compliance with its customs laws and, to the extent possible, within 48 hours of the arrival of the goods.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>●Customs Cooperation (Article 5.2) Each Party shall cooperate with the other Parties to achieve compliance with their respective laws and regulations that pertain to the implementation and operation of the provisions of this Agreement, including claims for preferential tariff treatment, restrictions or prohibitions on imports or exports, and investigation and prevention of customs offenses. In addition, each Party shall endeavour to provide technical advice and assistance for the purpose of simplifying procedures for clearing goods through customs, and developing the technical skill of customs personnel.</li> </ul>	N/A	<ul style="list-style-type: none"> <li>●Advanced Rulings (Article 5.3)               <ul style="list-style-type: none"> <li>• Each Party shall issue a written advance ruling with regard to tariff classification, the application of customs valuation criteria, and whether a good is originating, as expeditiously as possible and in no case later than 150 days after it receives a request.</li> <li>• Advanced rulings remain in effect for at least three years.</li> </ul> </li> <li>●Response to Requests for Advice or Information (Article 5.4) On request from an importer in its territory, or an exporter or producer in the territory of another Party, a Party shall expeditiously provide advice or information regarding the requirements for qualifying for quotas, such as tariff rate quotas, the application of duty drawback, country of origin marking, etc.</li> <li>●Publication (Article 5.11) Each Party shall make publicly available its customs laws, regulations, and general administrative procedures and guidelines, to the extent possible in the English language. Each Party shall designate or maintain one or more enquiry point to address enquiries from interested persons.</li> </ul>	N/A