International Cooperation and Harmonization in Competition Law

Experience from Legal Assistance in Asia in the Field of Competition Law

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I. INTRODUCTION

The main purpose of this paper is to demonstrate the importance of legal assistance for developing countries in Asia, including East Asia and Southeast Asia. In the last decade, the author has had the opportunity to visit countries in Central Asia (Uzbekistan), East Asia (Mongolia, China), and Southeast Asia (Vietnam, Cambodia) frequently as part of legal assistance projects organized by the Center for Asian Legal Exchange (CALE) at Nagoya University in cooperation with universities in the mentioned countries.[1]

In these countries, the status of economic development and the development of economic and social capital are still different from those in developed countries. People's understanding of market competition is more ambiguous than in developed countries. At the same time, the extent and form of the introduction of competition law as well as its enforcement vary significantly.

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1 The research division of the Graduate School of Law, Nagoya University, started the legal assistance projects in 1998 and later established the center for collaboration in international law and political research (CALE: Center for Asian Legal Exchange). CALE comprises Japanese staff who are residents at Tashkent State Law School (Tashkent, Uzbekistan), Mongolian National University (Ulaanbaatar, Mongolia), Hanoi National Law School (Hanoi, Vietnam) and Royal University of Law and Economics (Phnom Penh, Cambodia). CALE sets up activities such as gathering and providing legal information, holding international conferences, organizing lectures on Japan law, and providing student exchange programs.

Market competition is generally to be seen as a beneficial social mechanism for achieving efficiency in resource allocation in Asia's developing countries. However, there have been periods in which competition was restricted by public policy measures on grounds of fairness of distribution in these countries. The trade-off between efficiency and fairness often brings about economic systems with policy management that emphasizes distributional fairness over market competition, as symbolized by various policy measures to promote specific industry sectors and to protect domestic industries.

Moreover, such industrial policy measures often cause the existence of a collaborative network between interest groups and policy makers, involving tendencies toward favoritism and cronyism. In Japan, there are problems of bid rigging and collusive bidding at the initiative of government agencies. In developing countries, however, government corruption has caused serious social problems. Especially in Asia, where many countries started developing late and only at the initiative of the government, resistance to government intervention in markets is often weak, and the exclusive and discretionary nature of administrative powers persists.

In addition, social cushioning and control mechanisms against the exploitation of consumers by domestic enterprises are still weak. In particular, the judiciary, which is supposed to protect the rights of citizens, is often powerless or involved in corruption. However, the main purpose of this paper is not to discuss solutions for the problems of corruption and exploitation. Rather, these problems were mentioned because their existence is a fact that has to be taken into consideration when dealing with international cooperation and legal assistance in Asia, in particular in the field of competition law.

II. Current Situation and Need for Support of Competition Law Improvement in the Asian Region

In the rapidly developing Asian market, the introduction and improvement of competition law and competition policy are increasing rapidly. A good example is the enactment of China's anti-monopoly law in 2007. The development of competition law and policy in the East Asian region has been observed in the last two decades. In order to facilitate the development of the East Asian market and to enable competition law and policy to take its competitive environment into account, "legal assistance" from developed countries in Asia in the field of competition law is indispensable. In respect of this issue, Japan has the competition authority with the world's most experience in the administration of competition law, and is the top-ranked country in East Asia that provides technical support for developing coun-

tries. The problem lies in how to establish effective technical support systems based on the needs of the recipient country. Countries in the East Asian region are truly heterogeneous, with competition law structures that differ among countries and regions. Some countries and regions only have under-developed competition regulatory regimes, while others have sound competition laws and have accumulated much experience in competition law enforcement. The level of development and the need for legal assistance thus vary.[2]

First, for example, South Korea (which codified its competition law in 1980 in the "Monopoly Regulation and Fair Trade Act") and Taiwan (which codified its competition law in 1992 in its "Fair Trade Act") have sufficient experience in the administration of competition law, whilst Japan is experienced in competition law administration and has already become a provider of knowledge and experience on competition law issues. Cooperation is thus necessary among providing countries ("donors") as well as between providing countries and receiving countries ("recipients"), so as to avoid "competition for legal assistance", which would result in contradicting each other's national interests.

Second, competition regulations and guidelines have been undergoing development for more than fifteen years since the codification of the competition laws in Thailand (in 1999) and Indonesia (in 2000). Despite the fact that the number of cases is rather small, positive achievements have been made in law enforcement, but these have been mainly limited to the area of unfair trade practices. For these countries, in order to improve competition law enforcement on other types of anticompetitive conduct, such as cartels and abuse of a dominant position, practicable technical cooperation is required, such as a joint analysis of actual cases and of investigation methods.

Third, notable development of major regulations and guidelines has been observed in Vietnam (which codified competition law in 2005), Mongolia (codified in 2005), and Laos (codified in 2004) since the introduction and initial enforcement of the competition acts. However, it is still insufficient

2 The content of "legal assistance" could be quite different depending on the situation of the respective recipient country. According to *Hiroshi Matsuo* (H. MATSUO, Good Governance and the Rule of Law, in: Japan Reviewer 2009, 36), legal development support could be divided into three categories: (1) the enactment of adequate laws and regulations; (2) the establishment or improvement of governmental organs including legislative, administrative and judicial bodies; and (3) the training and education of lawyers and citizens. It includes a wide range of activities, ranging from general measures aiming at the development of society to the establishment and equipping of specific physical facilities to support the operation of the legal system and the conducting of surveys before and after the implementation of individual projects.

as a whole, and law enforcement performance is still poor compared to Japan. Therefore, technical cooperation aiming for full-fledged implementation of competition law (such as support for the drafting of regulations and guidelines, for improving investigation methods, and for enforcing the law) is necessary, as is support for the build-up of an organizational framework that facilitates effective law enforcement.

Fourth, in countries with inadequate competition laws such as the Philippines (where competition law was codified only recently in 2016), Malaysia (codified in 2010), and Cambodia (comprehensive competition law is not yet developed), overall technical cooperation, such as teaching legal theory and assisting in building the capacity of law enforcement institutions, is needed in order to support the drafting of adequate legislation.

As mentioned below, the Japan Fair Trade Commission (hereinafter "JFTC") has been undertaking technical cooperation with overseas competition authorities based on the development assistance programs proposed by the Japan International Cooperation Agency (JICA). Such technical cooperation includes group training courses, counterpart training courses, long-term training, and country-/area-focused training courses. However, the person in charge of the JFTC projects (the International Division of the Secretariat of the General Affairs Bureau in particular) maps out and implements the projects "ad hoc" for each separate training project, instead of implementing projects with a comprehensive perspective. The ad hoc approach, however, has its limits in implementing effective technical cooperation. In other words, for medium- to long-term technical cooperation, it is time for the JFTC to develop "strategies" of legal assistance to determine recipients' demand and the forms of cooperation that should be carried out. Based on developed strategies, it is also necessary to consider the optimal project designs for the various recipient countries. Some countries in East and Southeast Asia, such as China and Indonesia, have already gone through the first stage of the development of competition law. The level of experience and competence of the competition authorities' officials who have participated in training programs offered by Japan is constantly improving. The technical cooperation programs have to be raised to a higher level in order to meet the needs of recipient countries.

In view of these issues in regard to the planning and design of overseas technical cooperation in the future, it is necessary to comprehensively analyze the needs of the recipient countries, the forms of feasible technical support Japan can provide, and the legal assistance provided by Western foreign countries.[3] It is also necessary to develop an optimal program de-

3 For example, in the United States, the FTC and the DOJ have been making good use of the US Agency for International Development (USAID) and have provided

sign that aims for a diversity of technical cooperation.[4] In addition, it is urgent to shape the direction of medium- to long-term legal assistance concerning Japan's competition policy.

III. "Fairness" in Asian Competition Laws

Based on the author's experiences of being dispatched to various developing countries in Asia for legal assistance projects, it seems unpromising to introduce a US model of competition law and policy that mainly focuses on free competition. As Adam Smith said, efficiency could be achieved with individuals pursuing their own interests, as if led by the "invisible hand" of a god. However, Smith was not particularly concerned with the question of how social justice could be attained through the market. His point was to emphasize that market competition would contribute to the achievement of economic efficiency. When considering the future of competition law in

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assistance to more than 50 countries over the past fifteen years. Assistance projects have been implemented in Central Europe, Eastern Europe, the former Soviet Union, Latin America, the Caribbean, and South Africa. Asia has also been included as a target region in recent years. Four types of technical cooperation can be identified: (1) dispatch of local experts (resident advisor), (2) short-term missions (one to two weeks), (3) organizing local conferences, (4) providing internships (see FTC, US Federal Trade Commission's and Department of Justice's Experience with Technical Assistance for the Effective Application of Competition Laws (6 February 2008), at *http://www.ftc.gov/oia/wkshp/index.shtm*). Among the mentioned types, the long-term dispatch of experts usually draws the most attention. It is generally recognized as the most effective legal assistance. The FTC and DOJ sent experts to Eastern Europe from 1991 to 2001, to Argentina and South Africa in the late 1990s, and to Indonesia and the ASEAN Secretariat in 2001. The length of a local stay per expert is about half a year to one year. By dispatching multiple experts at different times, it seems possible for each authority to have experts stay for a total period of two years.

4 Regarding legal assistance in the United States, the acceptance of internships attracts attention as an approach that does not exist in Japan. In the past, regarding the acceptance of internships, the United States were inattentive due to confidentiality issues, but since the enactment of the US SAFE WEB Act in 2006, it seems that the FTC have been experimentally accepting trainees from the competition authorities of Brazil and Hungary, as well as from the consumer protection authorities of Canada. However, there is a problem that internships have to be limited to a small number of people due to the costs involved, the English proficiency of the trainees and other reasons. Japan has also accepted personnel from foreign competition authorities as trainees, but only exceptionally. Although there are many challenges to overcome due to the problems of confidentiality, training costs, Japanese language proficiency of trainees, etc., it is worth considering accepting more interns at the Fair Trade Commission of Japan.

Asia, however, this cannot be done without taking into account "the fairness of competition." After all, it took more than thirty years for the Anti-monopoly Act[5] to become rooted in Japan. Transplanting the current legal system as it is from a developed country usually does not have support from the citizens in the recipient country, and as a natural result it does not root itself in the country.

The author also believes that traditional competition law and policy can solve problems only in a very limited manner. As a matter of fact, severe social problems such as environmental pollution and labor exploitation lie ahead. The current challenging issue is how to respond to corporate social responsibility and establish connections with labor law in the context of economic law theory.

One of the features of competition law in Asia is the emphasis on regulating unfair trade practices.[6] Likewise, regulations regarding the abuse of a dominant market position are another distinctive feature.[7] In Asia, there is a general tendency to consider ensuring fair trade (protection of competitors) more important than ensuring free competition (protection of competition).[8]

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5 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu,* Act No. 54/1947.

6 In East Asia, laws regulating only unfair trade practice were generally enacted prior to the enactment of more comprehensive competition laws. In South Korea, for example, the Unfair Competition (unfair trade practice) Prevention and Trade Secret Protection Act was enacted in 1961, and the Monopoly Regulation and Fair Trade Act was enacted later in 1980. In China, the legislative preparations regarding competition law started in 1987, the (first) Law against Unfair Competition, which regulated only unfair trade practices, was enacted in 1993, and the Anti-Monopoly Act followed only in 2008.

7 For example, in Taiwan, the prohibitively high license fee demanded by the patent pool for CD-R technology, which was actually set by Sony and Philips, was ruled abusive and declared illegal by the Fair Trade Commission of Taiwan. As another example, the Fair Trade Commission of Taiwan also found the high price for Microsoft's software to be abusive and ordered remedies based on reconciliation proceedings.

8 Professor *Ohseung Kwon* (Seoul National University, Korea) has pointed out that it is easier to understand the meaning of fair trade than that of free competition (efficiency) in Eastern Asia, and there is a tension between the two (see O. KWON, Factors obstructing the Establishment of a Competitive Order, in: Kobe Law Journal 55 (1) (June 2005) 9–12). Regarding the tension between free and fair competition, the example of tie-in sales as an unfair trade practice is easy to understand. Tie-in sales, from the perspective of competitors of secondary products, is something that takes away opportunities to compete with cheap products of high quality, and harms competition that focuses on the low price and high quality of products. In contrast, from the viewpoint of free competition, the issue is whether the competitive order of the market for secondary products, which is outside the relationship of individual

There also should not be such a dichotomy between the "nation" and the "market". As was visible during the Asian currency crisis, the question lies in whether market mechanisms could protect the Asian regional "community" from the uncontrollable rampant effects of worldwide excessive capital liquidity. In this regard, maintaining free competition as a goal in East and Southeast Asia has to be seen in connection with the goal of maintaining fair trade.[9]

IV. Conclusion: Universalism and Particularism in Asian Competition Laws

Basically, competition law and social institutions originate from Europe and the United States. Competition laws in these countries should be evaluated with consideration of the whole social and political system, instead of simply separately. Although Asian legal systems are mostly inherited from Western laws, much of the "living law" has its origins in (the traditional culture of) pre-modern times. After all, there are differences between Asian countries and Western countries. With that being said, how should we weave these differences into the theory of competition law?

The author would like to adopt a compromise approach to explain this matter. Because there are differences in trade practices among countries, when applying the law, we must wisely take into account the importance of the principal values of Asian competition laws emphasizing the protection of fair trade. Meanwhile, the overall frameworks of the competition laws in the United State and in Europe, where a US-style competition law had been originally adopted, have developed independently and differently. Thus, they cannot be simply seen as one model. Furthermore, another significant point is to look at how the legal principle of competition law has developed on the one hand, and how the practice of competition law has evolved on

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counterparties of the trade and individual competitors, will be significantly affected. Taking away the individual competitor's opportunity to compete with cheap products of high quality is not so much the issue here. Even if some competitors lose their trade opportunities, as long as the competition in the secondary product market is active, there would be no problem. Although free and fair competition are two sides of the same coin, their relationship is tense at the same time.

9 At this point, the author is dissatisfied with some of the trends set out by law and economics theories in current American antitrust law. However, this does not contradict the fact that the tools of analysis (theory and demonstration) developed by law and economics theories are extremely fascinating. For reference, L. Kaplow/S. Shavell, Fairness versus Welfare (Harvard 2002); L. Kaplow/C. Shapiro, Antitrust, in: Polinsky/Shavell (eds.), Handbook of Law and Economics, vol. 2 (Amsterdam 2007) 1073.

the other hand. The two aspects are related when assessing what direction and structure the globalization of competition law should have.

With respect to cross-border competition law cases, a conflict is likely to occur when a competition authority of one country adopts a universal point of view and another in a different country looks at the case from a particularistic point of view. Then global harmonization might be the only means to integrate the two views into a general framework of a legal system. However, the author's concern is whether or not global harmonization alone would suffice. After all, the current antitrust theory in the United States, which seems to neglect fair trade, is particular to the United States and should not be seen as universal. There has even been a historical era in the United States in which the survival of farmers and small and medium-sized producers was considered important (i.e. the atomistic market structure was considered important) to protect social health ("Jeffersonian democracy"). From a historical point of view, thus, we can never say that the emphasis on fair competition in Asia is exceptional and should be interpreted and applied with restraint.

In conclusion, the general supremacy of efficiency over social welfare in competition law today should be made less absolute based on the findings of regional studies of competition laws in Asia. Fair competition and fair trade should be given more and more positive emphasis, instead of being excluded as indicative of the backwardness of Asian competition laws. Legal assistance in the area of competition law in Asia also has to take this into account. In this regard, Japan's experience of regulating "unfair trade practices" can be a good example for other Asian countries. Such aspects are essential to establishing a common culture of competition in Asia.

SUMMARY

Experience with various legal assistance projects for developing countries in Asia shows that the situation and level of development of competition law regimes differ greatly among the many Asian countries. What kind of legal assistance in the field of competition law each such country needs therefore depends on the specific local situation. To improve legal assistance in Asia, the Japan Fair Trade Commission (JFTC) should develop a more sophisticated strategy of legal assistance for future medium- and long-term assistance projects and should coordinate such projects better with other partners in Japan and with potential co-operation partners in other developed countries that also provide legal assistance to countries in Asia. Moreover, the specific needs, perceptions, and principal legal values of the receiving countries have to be taken into account more. In particular, legal assistance in Asia has to consider that there is

a general tendency in many Asian countries to put more emphasis on ensuring fair competition than on ensuring free competition. It is therefore not promising to only implement Western models of competition law frameworks, which at present often prioritize ensuring free competition and efficient markets. Japan can be a good example for many Asian countries, because the regulation of unfair trade practices is a very important aspect of Japanese competition law.

(The Editors)

ZUSAMMENFASSUNG

Die Erfahrung mit verschiedenen Projekten der Entwicklungshilfe beim Aufbau von Recht und Justiz in den Entwicklungsländern Asiens zeigt, dass sich die Situation und das Entwicklungsniveau des Wettbewerbsrechts in den einzelnen Ländern Asiens stark unterscheiden. Welche Art von Unterstützung im Bereich des Wettbewerbsrechts ein Land benötigt, hängt daher sehr von den lokalen Gegebenheiten ab. Um die Entwicklungshilfe in Asien zu verbessern, sollte die Japan Fair Trade Commission (JFTC) eine ausgeklügeltere Strategie der Unterstützung durch mittelfristige und langfristige Projekte entwickeln und die Projekte besser mit Partnern in Japan und möglichen Partnern in anderen Ländern koordinieren, die ebenfalls Unterstützung beim Aufbau von Recht und Justiz in asiatischen Ländern leisten. Außerdem sind die besonderen Bedürfnisse und rechtlichen Vorstellungen und Werte in den Entwicklungsländern stärker zu berücksichtigen. Bei derUnterstützung auf dem Gebiet des Rechts in Asien hat insbesondere zu beachten, dass in den asiatischen Ländern generell eine Tendenz besteht, der Gewährleistung des fairen Wettbewerbs mehr Beachtung zu schenken als der des freien Wettbewerbs. Es ist deshalb nicht erfolgversprechend, lediglich westliche Modelle der Wettbewerbskontrolle einzuführen, die gegenwärtig dem Schutz des freien Wettbewerbs und der Gewährleistung effizienter Märkte priorisieren. Japan kann als gutes Vorbild für die Länder in Asien dienen, da im japanischen Wettbewerbsrecht die Regelungen gegen unfaire Handelspraktiken einen sehr wichtigen Aspekt darstellen.

(Die Redaktion)