

Interaction of Competition Policy and Law with other Government Policies

Seminar on Malaysia's Competition Law

29 September 2010
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AGENDA

1. Introduction – A primer on competition policy and law (CPL)
2. CPL and innovation
3. CPL and procurement policy
4. CPL and international trade policy
5. Conclusion – Observations and lessons learnt



INTRODUCTION – A PRIMER ON COMPETITION POLICY AND LAW

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What is competition policy?

- ❖ Competition policy includes all government measures which promote effective competition process in the economy. These measures include those directly affecting the conduct and behaviour of enterprises and the structure of industry.
- ❖ Thus, competition policy has a broad scope encompassing these activities:
 - Innovation
 - Government procurement
 - Trade liberalization
 - Deregulation and privatization
 - Consumer protection
 - Industry development
- ❖ Competition law is only a subset of competition policy, providing the legal instrument to effect the policy.

Malaysia's competition policy was approved by the Cabinet in October 2005. Both the Competition Act 2010 (CA 2010) and Competition Commission Act 2010 (CCA 2010) were passed by the Parliament in May and gazetted in June 2010. They will come into force in 2012, after an 18-month moratorium.

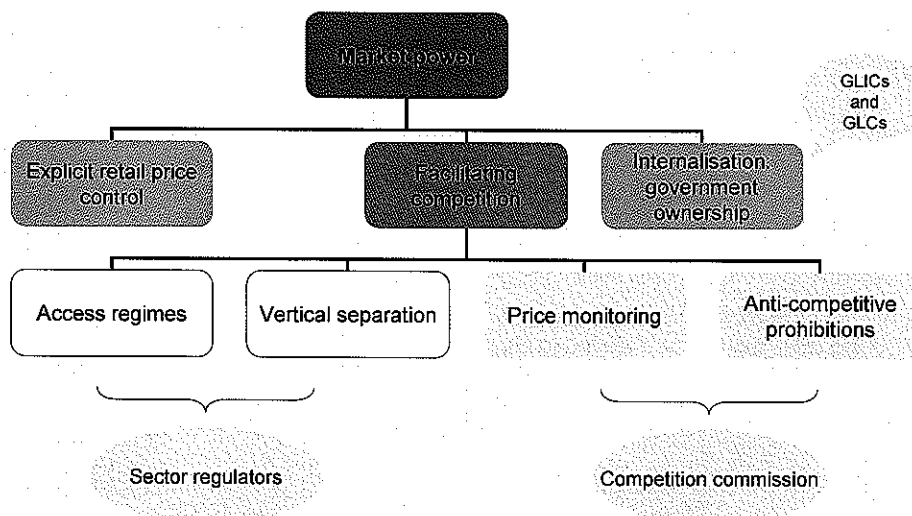
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What is competition law? A simplistic analogy

- ❖ Analogy of a sports-game:
 - Players: Businesses; Referees: Regulators; Spectators: Consumers; Field: Market.
 - Competition law provides rules of the game for players in the field.
 - Level playing field (fair game) for strong and weak players – players play by the same rules – domestic vs. foreign, large vs. small, public vs. private.
 - Deviation from rules has welfare reduction properties for all relevant stakeholders in the long-term: Upset consumers (having to pay higher prices) → Upset regulators (tighter rules) → Upset businesses (higher compliance and transaction costs).
- ❖ In the business context, competition law provides rules of the game for businesses' growth strategies:
 - Organic: Abuse of dominant position prohibitions.
 - Alliances: Anti-competitive agreement prohibitions.
 - M&As: Merger control provisions.

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Competition law is another legal instrument to deal with market power brought about by businesses' growth strategies



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Basic format of a competition law

Provisions	Details
Scope	<ul style="list-style-type: none"> • Where does the law apply? • Extraterritoriality provisions. • Exemptions and exclusions.
Anti-competitive agreements prohibition	<ul style="list-style-type: none"> • Core elements of law. • <i>Per se</i> prohibitions (outright ban) vs. rules of reason. • Examples: price fixing, market fixing, bid-rigging. • Merger control – additional element in the law (nice to have).
Abuse of dominant position prohibitions	
Merger control provisions	
Enforcement	<ul style="list-style-type: none"> • Investigation processes, leniency programme.
Appeals	<ul style="list-style-type: none"> • Types of offences. • Fines and criminalisation.
Penalties and remedies	

CA 2010 does not have merger control provisions.

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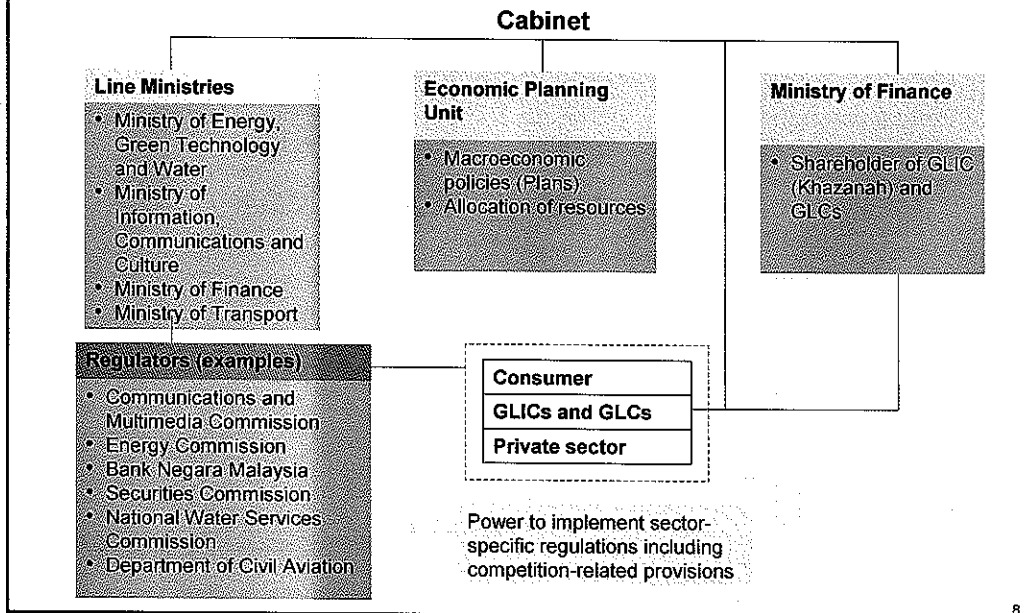
Interaction of CPL with other government policies

Government policies	Examples of competition-related issues
Innovation and intellectual property	Compulsory licensing and parallel importing
Government procurement	Bid-riggings in tenders
Trade liberalization	Cross-border cartels
Deregulation and privatization	Access to essential facilities
Consumer protection	Unfair trade practices – e.g. tied selling
Industry development	Abuse of dominance by 'national champions'

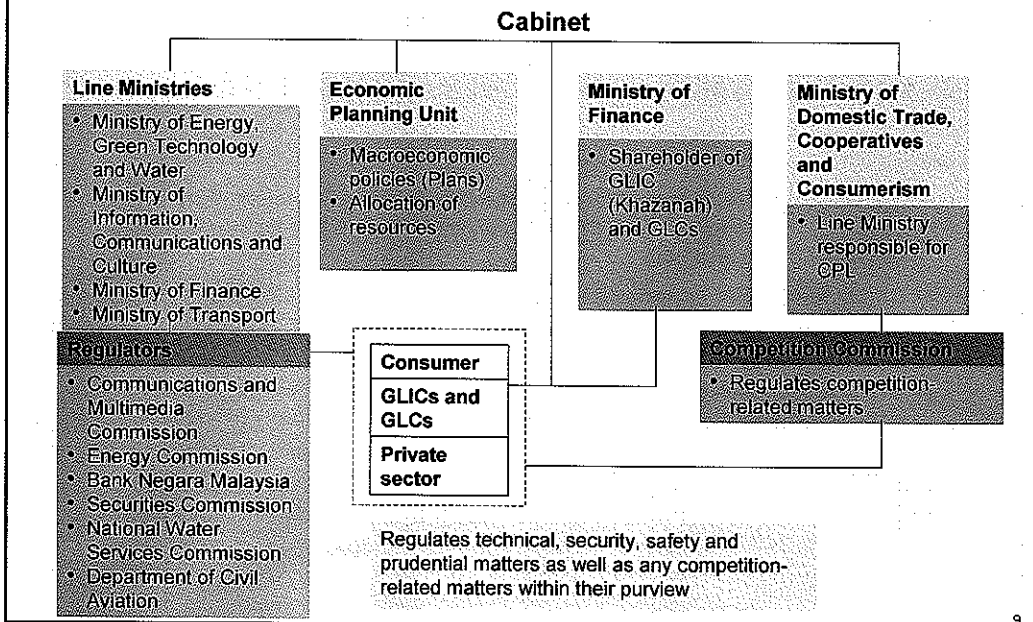
In other jurisdictions, the CPL has wider interactions – for example, in the European Union (EU), the CPL is enforced to attain the objective of single market integration and to regulate state aid (subsidies).

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Framework on current policy and regulatory arrangements in Malaysia



Framework on policy and regulatory arrangements in Malaysia post competition law implementation





CPL AND INNOVATION – A FOCUS ON IPR ISSUES

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What is innovation and innovation policy?

- ❖ Innovation consists of the discovery, development, and commercialization of new and improved products and processes. As mentioned in the 10MP, 'innovation is a vital ingredient to increasing productivity and ultimately raising the competitiveness of the economy'.
- ❖ Malaysia has its own national innovation policy which aims to:
 - **Shape a supportive ecosystem for innovation:** The government wants to develop human capital, invest in innovation infrastructure and nurture new ventures through incubators.
 - **Create innovation opportunities:** The government act to create incentives and opportunities for businesses to invest in innovation, through improvement in government procurement process and regulatory changes.
 - **Establishing innovation enablers:** The government to review the supporting institutional infrastructure and strengthen the intellectual property (IP) regime to provide a dynamic environment for innovation.
 - **Funding innovation:** The government will support R&D and commercialization across the innovation value chain and strengthen the risk capital industry for better access to funding for innovative start-ups.

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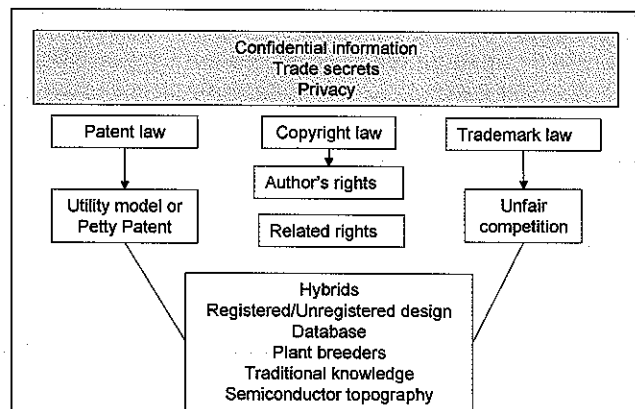
CA 2010 and innovation

- ❖ CA 2010 acknowledges that innovation is one of the key factors required to promote competitive pricing, improve quality in products and services and result in wider choices for consumers.
- ❖ As such, the Act prohibits anti-competitive conduct which limit or control technical or technological development:
 - Chapter 1: Anti-competitive agreement – Section 4(2)(c)(iii)
 - Chapter 2: Abuse of dominant position – Section 10(2)(b)(iii)
- ❖ Technological benefits are one of the four requirements that enterprises can use to seek relief from liability (safe harbour) for Chapter 1:
 - Chapter 1: Anti-competitive agreement – Section 5(a)

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Intellectual property (IP) and IP rights

- ❖ Currently there is no standard international definition for IP but WIPO provides an informal definition whereby, 'IP refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce'.
- ❖ IP rights (IPR) are basically rights to these creations of the mind and the IP or IPR laws basically regulate these creations, their use and exploitation. Of all the laws affecting innovation, the IPR laws have the most direct relation.



Source: Dutfield and Suthersanen (2008) p.13

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Malaysia's domestic IPR measures

- ❖ Malaysia's National Intellectual Property Policy (NIIP) was passed by the Cabinet in 2007. It recognizes the importance of IPR as a valuable economic asset as well as a critical business tool that provides competitiveness.
- ❖ The objectives of the policy include, among others, the implementation of the highest standard of IPR protection system, protection of national IPR interest and promotion of foreign investment and technical transfer.
- ❖ Malaysia's IPR-related laws include:
 - Trade Marks Act 1979
 - Patents Act 1983
 - Copyright Act 1987
 - Industrial Design Act 1996
 - Layout-Designs of Integrated Circuits Act 2000
 - Geographical Indications Act 2000

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Interaction between CA 2010 and IPR laws – regulating for market failure

- ❖ IP (and IPR) has these special features:
 - Being the product of the mind (intellect) which is not necessarily rivalrous.
 - An intangible asset, that is, the value is not limited by its physical form.
 - Treated in law as any other forms of property.
- ❖ In law, IP must be protected from theft and abuse, especially in view of the low marginal cost of copying IP. However, in economics, this low marginal cost of copying is considered public good and a form of market failure as the private sector may not have the incentive to provide such goods since they cannot be sure of making economic profits.
- ❖ While inventors need to be rewarded for their contribution to knowledge and innovation as well as protected against 'free riders' initially, regulators need to ensure they will not abuse their monopoly powers, which left unchecked could result in the stifling of future innovation and the reduction of consumer welfare.

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Compulsory licensing

- ❖ Compulsory licensing is a procedure for authorities to license companies or individuals other than the patent owner to use the rights of the patent – to make, use, sell or import a product under patent (that is, a patented product or a product made by a patented process) – without the permission of the patent owner.
- ❖ While compulsory licensing provisions are common in domestic patent laws of most countries, reasons for imposing such licenses vary including to address issues of:
 - Refusal to deal
 - Non-working or inadequate supply of the market
 - Public interest
 - Abusive and/or anti-competitive practices
 - Government use
 - Dependent or 'blocking' patents (on improvements to prior inventions)
 - Special product regimes (for pharmaceuticals and food)
 - Licenses of right
- ❖ Section 84 of Malaysia's Patents Act allows for compulsory licensing to be undertaken in certain situations such as national emergency, public interest or '...where a judicial or relevant authority has determined that the manner of exploitation by the owner of the patent or his licensee is anti-competitive...'

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International experiences in compulsory licensing and government use

Country	Reason for licence	Product	Cost reduction	Remuneration to patent owner
Malaysia 2003	Authorized local distributing agent for an Indian manufacturer to import from India, for the purpose of supplying public hospital for two years	Antiretrovirals	From US\$315 to US\$58 per month	4% value of stocks actually delivered
Indonesia 2004	Authorized Minister to appoint a pharmaceutical factory as the patent exploiter for and on behalf of the government	Nevirapine and lamivudine	Fixed dose combination produced for US\$38 per month	0.5% net sales
Thailand 2006	Government use	Efavirenz	From US\$41 to US\$22 per month	0.5% sales value
Brazil 2007	Public interest	Efavirenz (600mg)	From US\$1.59 to US\$0.45 per dose (savings of US\$30mn in 2007)	n/a

Source: Correa (2010) p. 22-23

Note: Antiretrovirals – medication for treatment of infection by retroviruses, mainly HIV. Nevirapine – another antiretroviral drug used to treat HIV-1 infection and AIDS. Lamivudine – drug used for treatment of chronic hepatitis B at a lower dose than for treatment of HIV. Efavirenz – yet another antiretroviral drug used to treat HIV-1 infection.

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CPL AND PROCUREMENT POLICY

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Procurement and government procurement

- ❖ 'Procurement' is the purchase of goods and services by public or private enterprises. Procurement is usually undertaken through competitive bidding or tendering.
- ❖ Government procurement is the purchase of goods and services by the public sector. In Malaysia, this include procurement by the federal government, state government, local authorities and statutory bodies.
- ❖ As compared to private sector purchase, government has limited options as it is subject to transparency requirements and is generally constrained by legislation and detailed administrative regulations and procedures.

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Government procurement policy

- ❖ The main objective of the Malaysian government procurement is to support government programmes by obtaining value for money through acquisition of works, supplies and services.
- ❖ Close attention is given to price factors and non-price factors such as whole life cost, quality, quantity, timeliness and warranty.
- ❖ Government procurement is based on these policies:
 - Stimulate growth of local industries through maximum utilization of local materials and resources.
 - Encourage and support the evolvement of Bumiputera entrepreneurs consistent with the nation's aspirations to create Bumiputera Commercial and Industrial Community.
 - Increase and enhance capabilities of local institutions and industries via transfer of technology and expertise.
 - Stimulate and promote service-oriented local industries such as freight and insurance.
 - Accelerate economic growth whereby government procurement is used as a tool to achieve socioeconomic and development objectives.

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Government procurement principles

- ❖ Government procurement is based on these principles:
 - **Public accountability:** Should reflect public accountability entrusted with the government.
 - **Transparency:** All regulations, conditions, procedures and processes need to be clear and transparent to facilitate better understanding among suppliers and contractors.
 - **Value for money:** Should yield the best returns for every RM spent in terms of quality, quantity, timeliness, price and source.
 - **Open and fair competition:** Process should offer fair and equitable opportunities to all those participating or competing in any procurement.
 - **Fair dealing:** All acceptable bids will be processed fairly based on current rules, policies and procedures.

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Effects of procurement on competition

- ❖ **Level of investment in the market:** Overly strong focus on price may discourage new investments to improve non-price characteristics of products or services including quality and choice.
- ❖ **Pace and quality of innovation:** In markets where innovation is important, coordination (for bid-rigging) may be more difficult as this reduces product or service homogeneity.
- ❖ **Structure of industry:** Procurement preference for bundled or unbundled products or services could result in enterprises organizing themselves accordingly – either vertically integrating or otherwise.

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Bid-rigging: Anti-competitive practice in bidding

- ❖ Bid-rigging refers to a situation in which bidders for a particular contract or tender collude to pre-arrange the outcome of the bid or to pre-determine the winning bidder.
- ❖ Most common forms of bid-rigging include:
 - **Sub-contract bid rigging:** Some of the bidders opt out of bidding process as the pre-determined winner agrees to sub-contract parts of the bid to them.
 - **Complementary bidding:** Some of the bidders submit bids which are either too high or contain unacceptable conditions, defrauding buyers by creating the appearance of genuine competitive bidding.
 - **Bid rotation:** Bidders take turns winning the bid.
 - **Bid suppression:** Some of the bidders opt out of the bid so that the designated or pre-determined winning bid will be accepted.
 - **Market division:** Competing firms allocate specific customers or types of customers, products or territories among themselves and the winning bid is decided in accordance with such allocation.
 - **Common bidding:** Firms agree to submit common bids, thus eliminating price competition.

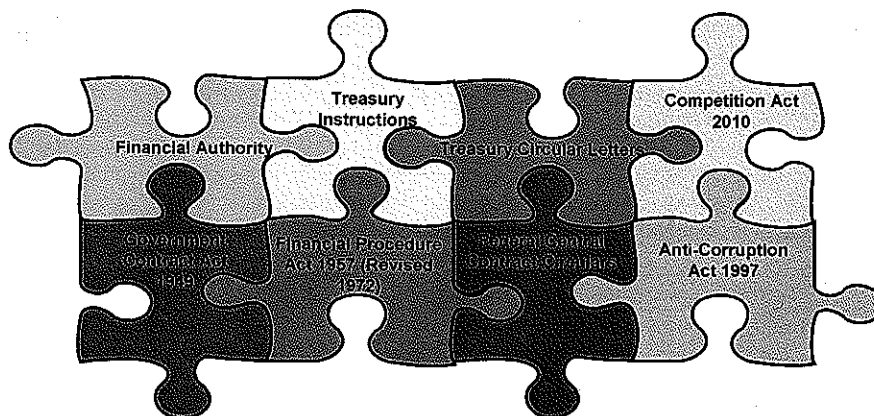
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Bid-rigging is (unsurprisingly) a common anti-competitive conduct

- ❖ The perception that bid-rigging occurs in developing countries is misleading as it is a common anti-competitive conduct in many countries around the world:
 - **Indonesia:** In 2007, the Business Competition Supervisory Commission (KPPU) fined three LCD monitor suppliers a total of US\$39,000 and banned them from participating in government tenders for two years for fixing tender offers to supply almost 270 LCD monitors to the Jakarta regional government in 2006.
 - **Japan:** In March 2010, the Japan Fair Trade Commission (JFTC) fined six Air Force office furniture suppliers US\$4.4mn for bid-rigging in cooperation with the Air Force staff. The JFTC also ordered these companies to adopt a resolution to end the conduct and informed each other when they have done so.
 - **Singapore:** In June 2010, the Competition Commission of Singapore (CCS) fined a cartel of 14 electrical and building works companies a total of US\$190,000 for rigging bids. The companies were found to have colluded on tender bids for ten projects from July 2007 to April 2009. CCS began investigating the cartel after receiving a tip-off from one of the companies concerned, Arisco, which revealed that its previous management had entered into bid-rigging arrangements with other companies to co-ordinate the price of quotations.

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CA 2010 complements procurement laws and regulations in Malaysia



Bid-rigging is expressly prohibited in CA 2010 – Section 4(2)(d) of Chapter 1: Anti-competitive agreement in Part II: Anti-competitive Practices

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CPL AND INTERNATIONAL TRADE

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Cross-border anti-competitive conduct

- ❖ Greater globalization and international trade activities have resulted in increasing number of cross-border anti-competitive conduct cases.
- ❖ Of all the anti-competitive conduct, competition authorities view cartels as most serious of offences – indeed, international cartels are worse as they significantly affect global consumer welfare – see below for the estimated affected sales from international cartels between 2005 and 2008. Victims would include consumers in the developing countries and LDCs, which may not enforce competition laws in their jurisdictions, thus leaving the cartel effects unchecked.

Cartel – sector (location)	Sales between 2005 and 2008 (US\$b)
Airlines, passenger, fuel surcharge (Global)	1,164.0
Diamonds, rough gem quality (Global)	303.2
Bank cards' fees (the US)	285.0
Airlines, cargo, fuel surcharge (Global)	264.9
Insurance brokerage fees (the US and the UK)	145.0
LCDs (Liquid Crystal Displays), TFP type (Global)	131.0
Telecom, mobile services (Korea)	96.0
Cleaning products, home and personal (the EU)	74.1
Tobacco products (the UK)	43.5

Source: Connor (2009)

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Addressing cross-border anti-competitive conduct through extraterritoriality provisions in competition laws...

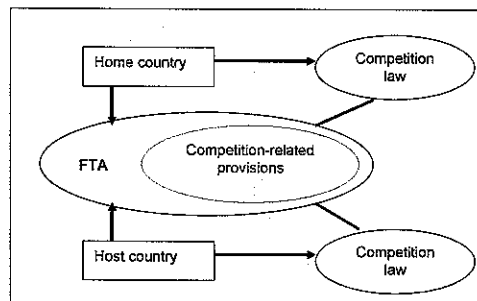
- ❖ Extraterritoriality in competition law is based on the economic 'effects' doctrine:
 - First developed in the US and has since found acceptance in other jurisdictions despite concerns over the difficulties in managing the tension between adhering to the concept of sovereignty in international public law and extraterritoriality (seen to be encroaching on the domestic policy and regulatory space). The UK, for instance, has criticized the approach and claimed that the US antitrust law is being used as a trade policy tool to open markets perceived as closed to the US firms.
 - There must be presence of direct, substantial and foreseeable anti-competitive effects, otherwise a minimum standard of reasonableness applies to assert jurisdiction over conduct committed abroad but adversely affecting domestic situation.

CA 2010 also has extraterritoriality provision – Section 3(2) – to catch those cross-border anti-competitive conduct which has effect on competition in any market in Malaysia

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...and through competition-related provisions in trade agreements

- ❖ Linking domestic laws of trading countries
 - Competition policy provides 'rules of the game' for entities in domestic market.
 - Trade policy provides 'rules of the game' for foreign-based entities in partner's market.
- ❖ Rule-making provisions complementing market access/liberalisation provisions in other parts of the FTAs.
- ❖ Increasing cases of cross-border anti-competitive practices:
 - International cartels (price fixing, market segmentation).
 - International M&As (abuse of dominant position).
- ❖ Harmonizing competition laws of trading countries – reduce transaction costs and business uncertainty.



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Enforcing multilateral competition law – the interaction between trade and competition laws

- ❖ Historically, multilateral competition rules have been approached from the context of the effects of competition on international trade – unfortunately with less positive outcomes:
 - Competition-related provisions were incorporated into Articles 46 to 56 of the International Trade Organisation Charter (widely known as the Havana Charter) in 1948.
 - After ITO was aborted, the contracting Parties to the GATT (General Agreement in Tariffs and Trade) adopted only a simple procedure for consultation on problematic restrictive business practices (RBPs) in 1960.
 - In 1989, a group of developing countries initially proposed for RBPs to be an agenda for the Uruguay Round negotiations but this proposal was not pursued.
 - In the 1996 Singapore Ministerial Conference decided to establish a working group on competition policy, notably its interaction with trade. However, developing countries rejected the work agenda, along with three other 'Singapore issues'.
- ❖ Competition-related provisions are incorporated in the various WTO agreements, albeit, in a piecemeal fashion.

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Competition-related provisions in WTO agreements (1)

WTO agreements	Details
Agreement on Trade-Related Investment Measures (TRIMs)	Article 9 (Review by the Council of Trade in Goods) – mandating the Council of Trade in Goods to consider whether the agreement should be complemented with provisions on investment and competition policies.
General Agreement on Trade in Services (GATS)	<ul style="list-style-type: none"> • Article VIII (Monopolies and Exclusive Service Suppliers) – WTO Members to ensure their monopolies and exclusive service suppliers do not abuse their monopoly positions in domestic markets and do not substantially prevent competition among suppliers in domestic markets. • Article IX (Business Practices) – recognition that certain business practices can restrain competition and so restrict trade in services and so allow, upon request, for consultations between or among Members to eliminate those restrictive business practices. • Annex on Telecommunications – Members to ensure open access and use of public telecommunications transport networks and services for service suppliers of other Members. • Reference Paper on Basic Telecommunications – Members commit to principles for the establishment and maintenance of a competitive market in the basic telecommunications sector.

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Competition-related provisions in WTO agreements (2)

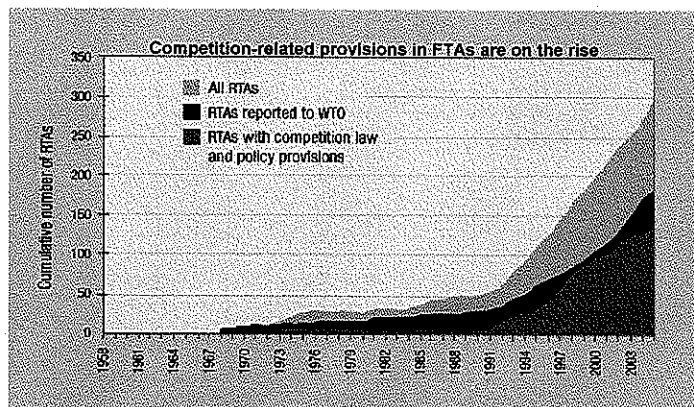
WTO agreements	Details
Agreement on Safeguards	Article 11 (Prohibition and Elimination of Certain Measures) – Members not to seek, take or maintain anti-competitive measures such as compulsory import cartels and market share fixing.
Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)	<ul style="list-style-type: none"> • Part 2, Section 4 (Industrial Designs), Article 31 – Compulsory licensing are allowed to remedy anti-competitive practices. • Part 2, Section 8 (Control of Anti-competitive Practices in Contractual Licences), Article 40 – Allows for Members to specify in their legislation licensing practices or conditions that may constitute abuse of IPRs having adverse effect on relevant market.
General Agreement on Tariffs and Trade (GATT)	Article XVII (State Trading Enterprises) – recognition that while Members could establish state trading enterprises; these entities should not abuse their exclusive or special privileges position and so creating obstacles or significantly affecting trade.

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Incorporating competition-related provisions in FTAs

- ❖ It has been estimated that over 140 of about 380 FTAs formed include competition-related provisions, consistent with the current trend of negotiating and enforcing deeper and comprehensive FTAs.
- ❖ FTAs with developed countries, notably with the US, EU and Japan, notably incorporated specific competition chapters – thus, resulting in WTO-plus FTAs.

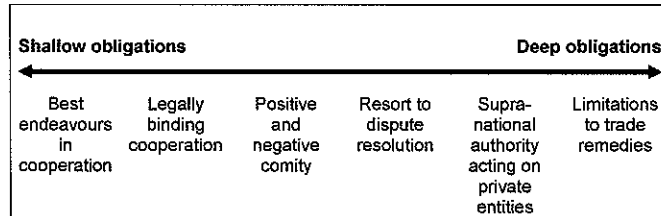


Source: UNCTAD

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Incorporating competition-related provisions in FTAs

- ❖ Competition-related provisions are viewed as rule-making provisions which enhance and complement the market access provisions in such FTAs.
- ❖ Japanese FTAs usually incorporate shallow obligations (best endeavours in cooperation) while the EU FTAs incorporate deeper obligations (supranational authority acting on private entities). Meanwhile, the US FTAs usually exclude their competition chapters from the dispute settlement mechanism.



Note: Actual positioning would depend upon specific wording in the agreement.
Source: UNCTAD

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CONCLUSION

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Observations and lessons learnt

- ❖ All ministries and agencies need to appreciate and understand the interlinkages between CPL and the respective measures under their purview:
 - Consistency in objectives – consumer welfare and increase competitiveness.
 - Need to understand underlying economic concept in CPL.
 - Issue: What is the priority? How to work together? How to minimize gaps or overlaps?
- ❖ Work on CPL already intensive at regional (ASEAN) level:
 - CPL identified as part of work track to achieve the ASEAN Economic Community by 2015 – single ASEAN market and production base.
 - Establishment of ASEAN Experts Group on Competition (AEGC).
 - Incorporated into ASEAN FTAs.
 - Issue: Would there be supra-national institutions to support CPL work as in EU? How to ensure consistency between domestic legislation and international commitments?

