

**Fifth ASEAN Competition Conference**  
**Advancing Competition Policy and Law Post-2015**  
**Progress, Opportunities and Challenges**

**June 4-5, Ho Chi Minh City, Vietnam**

**Remarks of Randolph Tritell**  
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**From Dialogue to Action – Considerations for Regional Enforcement**  
**Cooperation on Competition Policy and Law in the ASEAN Region**

Good morning and *xin chao*. I am pleased and honored to be part of this conference and to have the opportunity to share some experience and perspectives of the United States with international competition cooperation.

Many previous speakers have done a superb job identifying the challenges and opportunities involving international cooperation. I also can imagine that it is a real challenge, especially for young agencies in the region, to take on international cooperation even as you are building your domestic enforcement system, trying to create a competition culture, and dealing with all of the other issues that we have been discussing at this excellent conference.

I will base my remarks around five questions that I thought might arise regarding this subject. But let me first note that any views I express are my own and not necessarily those of the Federal Trade Commission or its Commissioners.

A first question might be what role can the United States play in this conversation? What is the U.S. interest here, and what do ASEAN (Association of Southeast Asian Nations) officials and stakeholders have to learn from a country at a very different stage of development of its competition regime and that is not part of a regional economic integration. I would answer this question in two ways.

First, this region is of great significance to the United States given its size, dynamism, economic growth and even greater growth potential, and many partnerships with the United States. The growth of competition law and policy in the region reflects a recognition of the benefits that sound competition policy can deliver to innovation, development, and consumer welfare.

Second, although the United States is not part of an integrated regional grouping, cooperation with other competition agencies is now a vital part of our antitrust enforcement. I would emphasize that the U.S. agencies cooperate with a wide range of competition agencies – in our region and across the globe, with administrative systems and prosecutorial systems, with common law and civil law legal systems, in countries with advanced and developing economies, and with mature and young competition agencies.<sup>1</sup> Although similarities on these dimensions can make cooperation work more smoothly, cooperation can and does take place among agencies of all types. So I don't see any inherent reason why there can't be robust cooperation among

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<sup>1</sup> See e.g., Submission by the United States, "Discussion on International Co-operation," DAF/COMP/WP3/WD(2012)24, June 8, 2012, available at [https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/062012International\\_coop\\_U%20S.pdf](https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/062012International_coop_U%20S.pdf); Randolph Tritell and Elizabeth Kraus, "The Federal Trade Commission's International Antitrust Program," May 2015, available at [The Federal Trade Commission's International Antitrust Program](#); Molly Askin and Randolph Tritell, International Antitrust Cooperation: Expanding the Circle, prepared for the Antitrust in Emerging and Developing Countries Conference organized by Concurrences Journal and NYU School of Law, New York, October 24, 2014, available at <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/141024expandcircle-askin-tritell.pdf> (to be published by the Institute of Competition Law in the forthcoming conference proceedings).

ASEAN competition agencies<sup>2</sup> despite the substantial differences in the various factors I have mentioned, of course, once they have a law and an agency in place.

A second question is what does cooperation mean? One important kind of cooperation is direct enforcement cooperation, particularly when two or more agencies are reviewing the same merger or conduct. But cooperation is a broad concept that also encompasses activities such as informal contacts between agency officials and staff regarding enforcement matters, policy coordination, technical assistance, working together in multilateral organizations, and staff exchanges.

A third question is why is international cooperation important? After all, agencies in the United States have the ability and resources to investigate and prosecute anticompetitive conduct that affects US consumers without depending on other agencies.

But in today's global markets, trying to enforce US antitrust law without cooperation would not only weaken the international competition enforcement system but it would make our enforcement in the United States less effective. Why is that?

First, when we cooperate on cases, we learn by interacting with our colleagues, which makes our investigation more effective and also more efficient, both for the agency and for the parties. Other authorities may have access to different market players, information that we haven't discovered, insights into how the market works or might be affected, or how a remedy might or might not be effective in curing a competitive problem.

Second, we all have a strong interest in consistency of outcomes. That begins with consistency of analyses, which is strengthened by cooperation. With some 130 competition regimes around the world, conflicting outcomes are a real risk, and cooperation helps avoid harmful conflicts and promote outcomes that comprehensively and soundly address anticompetitive practices. We simply cannot work effectively in domestic silos – to be effective at home, we have to cooperate across borders.

Here is a list I found of reasons that cooperation is important: regional integration, economic efficiency and growth, promoting competition culture, facilitating consistent implementation of competition policy in the region, helping new agencies establish their competition policy regimes, maintaining regular contact among enforcement staffs, building an effective legal framework against anticompetitive practices, and improving the efficiency and effectiveness of national competition authorities. That is of course from the ASEAN Regional Guidelines,<sup>3</sup> and a good list it is!

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<sup>2</sup> A list of current ASEAN Experts Group on Competition members is available at <http://www.aseancompetition.org/aegc/aegc-members>.

<sup>3</sup> ASEAN, "ASEAN Regional Guidelines on Competition Policy," 2010, available at <http://www.asean.org/images/2012/publications/ASEAN%20Regional%20Guidelines%20on%20Competition%20Policy.pdf>.

A fourth question is how enforcement cooperation works. I will touch on this only briefly this morning but my colleagues and I would be glad to discuss this with you at any time if you have questions.

First, it is helpful to develop mechanisms to ensure that the agency learns about investigations. This can be through, for example, notification provisions of a cooperation agreement, contacts with other agencies' staffs, asking the parties, or just following the press.

Most cooperation occurs in investigations of proposed mergers because the timelines of the various reviewing agencies are usually fairly well aligned and the parties share with the agencies an interest in efficient and consistent resolution. But it can be helpful in all types of cases, and agencies are cooperating increasingly frequently in cartel, dominance, and other types of investigations.

Once we have identified a matter as a candidate for cooperation, our staffs communicate by e-mail, telephone, or sometimes by videoconference.

One of the first topics is typically the likely timetables for our investigations, so we can try to align them as closely as possible. We then consider what kind of information can be shared. We think of potentially shareable information in three categories.

The first is public information. It is very often surprisingly valuable for agencies to share readily available and easily shareable information such as information about the companies involved in an investigation, publicly available industry data, and information from press reports.

The second is what we call agency-confidential information. This is information that we are not prohibited from disclosing but that we ordinarily do not share, such as the existence of our investigation, our staff's view of the relevant markets, and the likely competitive effects of the transaction or conduct.

The third category is confidential information, such as merger filings, evidence from third parties, and remedies proposals. It can be quite useful to be able to discuss such information but most agencies, including ours, are required to keep these types of information confidential. But there can be ways to share even confidential information of this sort.

First, domestic law can allow the agency to share otherwise confidential information if it furthers enforcement needs, as is the case in, for example, Canada and the United Kingdom. Second, some countries have entered into "second generation" agreements that allow the sharing of confidential information. The U.S. has such an agreement with Australia,<sup>4</sup> and Australia has just entered a second generation agreement with Japan.<sup>5</sup>

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<sup>4</sup> "Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance," April 1999, *available at* <https://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement>.

<sup>5</sup> "Cooperation arrangement between the Australian Competition & Consumer Commission and the Fair Trade Commission of Japan," April 2015, *available at* [https://www.accc.gov.au/system/files/Cooperation arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan.pdf](https://www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20and%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf).

For the FTC and most other agencies, though, the most common solution is for the parties to waive their confidentiality protections. Parties involved in most in-depth merger investigations and some non-merger investigations conducted by the U.S. antitrust agencies have come to believe that interagency cooperation is in their interest. They therefore allow us to share their information with other investigating agencies, as long as they can trust the other agency to maintain the confidentiality of the shared information. Waivers are an important tool that facilitates efficient investigations and consistent outcomes. While firms are welcome to decline to provide a waiver with no adverse consequences, we encourage them to grant a waiver.

The final question is what steps ASEAN nations and agencies can take to further international cooperation. At the risk of repeating some good suggestions that other speakers have already made, let me mention four such steps.

One might be to develop a multilateral legal framework. As the European Union has direct experience with this, I will leave it to my co-panelist, Michael Albers, to discuss whether this seems like a good path for ASEAN agencies at this point.

A second possibility is for agencies to enter into bilateral cooperation agreements among ASEAN members or with third countries. The United States has many cooperation agreements, MOUs, and best practice agreements, which provide a useful framework for cooperation.<sup>6</sup> Perhaps more important, they have been a catalyst to greater cooperation among our staffs – the entry into an agreement makes staffs feel more comfortable collaborating with each other on investigations and other matters.

However, at least in our case, formal agreements are not legally necessary to cooperate, and we cooperate with many partners without a specific agreement. While whether your agency can cooperate without an agreement depends on your domestic law, I want to highlight the possibility of cooperating without a formal agreement.

Third, it can be useful to take advantage of work on cooperation that has been done in multilateral competition bodies. For example, the ICN has, at the initiative of the JFTC, produced a merger cooperation framework,<sup>7</sup> and it just concluded a project with the OECD that has resulted in a practical guide to international cooperation in merger investigations.<sup>8</sup> The ICN also has various useful tools available online, such as a model confidentiality waiver form.<sup>9</sup> (The

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<sup>6</sup> See <http://www.ftc.gov/policy/international/international-cooperation-agreements> for a complete list of the FTC's agreements and arrangements.

<sup>7</sup> ICN, "International Competition Network's Framework for Merger Review Cooperation," 2012, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

<sup>8</sup> ICN, "Practical Guide on International Enforcement Cooperation in Mergers," 2015, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.

<sup>9</sup> ICN, "Waivers of Confidentiality in Merger Investigations," Appendix A, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

U.S. agencies have also developed a model waiver, available on the FTC and DOJ websites along with FAQs.<sup>10)</sup>

The OECD has a longstanding Council Recommendation regarding cooperation in antitrust matters, which was updated and revised last year.<sup>11</sup> It includes provisions on investigative assistance, exchange of information including confidential information, and coordination of investigations. Even for agencies whose countries are not OECD members, the Recommendation can be a useful model, and countries are welcome to formally associate themselves with the OECD instrument.

Other multilateral competition bodies, such as APEC and UNCTAD, have also done useful work in this area that could help inform cooperative efforts in ASEAN.

Fourth, and perhaps most important, building relationships between staffs is a key facilitator of cooperation. Taking, and making, opportunities to talk informally with colleagues goes a long way to creating the understanding and trust that make it easier to send an e-mail or pick up the phone the next time your agency is reviewing the same matter as another ASEAN agency or has a question on which the other agency's experience could be helpful.

It has been exciting to witness the birth and growth of competition regimes in the ASEAN region. It is natural that these laws are born and nurtured in each country's domestic context. But, spurred by the regional integration mandate of ASEAN, you have the opportunity to shape your legal and policy instruments to take advantage of the opportunities that cooperation presents to benefit your agencies and the competition landscape of the region. I urge you to take advantage of these opportunities. The US Federal Trade Commission stands ready to assist in those efforts and looks forward to continuing to work with your agencies and to seeing the further progress of competition policy in the ASEAN region.

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<sup>10</sup> "Model Waiver of Confidentiality For use in civil matters involving non-U.S. competition authorities," available at [https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model\\_waiver\\_of\\_confidentiality.pdf](https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf) and <http://www.justice.gov/atr/public/international/docs/300916.pdf>; "Model Waiver of Confidentiality For use in civil matters involving non-U.S. competition authorities: Frequently Asked Questions," available at [https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers\\_faq.pdf](https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf) and <http://www.justice.gov/atr/public/international/docs/300917.pdf>.

<sup>11</sup> OECD, "Recommendation concerning International Co-operation on Competition Investigations and Proceedings," 2014, available at <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.