REPERTORIUM Jurnal Ilmiah Hukum Kenotariatan, diterbitkan oleh **Program Studi Magister Kenotariatan Fakultas Hukum Universitas Sriwijaya** bekerjasama dengan **Pengurus Wilayah Ikatan Notaris Indonesia Sumatera Selatan**, 2 (dua) kali dalam 1 (satu) tahun, pada bulan Mei dan Oktober, sebagai media komunikasi dan pengembangan ilmu hukum kenotariatan. Redaksi menerima naskah artikel laporan penelitian dan artikel konseptual yang harus relevan dengan visi dan misi redaksi serta mengacu kepada Pedoman Sistematika dan Teknis Penulisan yang telah ditentukan. Redaksi berhak mengubah naskah sepanjang tidak mengubah substansi atau isinya.

DAFTAR ISI

IMPLICATION OF FOREIGN DIRECT INVESTMENT TO COMPETITION LAW AND POLICY: Comparative Analysis Indonesia, Australia

Oleh:

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Abstrak: *Penanaman modal asing (FDI) dianggap sebagai salah satu komponen kunci dalam strategi pembangunan untuk meningkatkan perekonomian suatu negara. FDI diyakini dapat memberikan akses lapangan kerja, mengurangi biaya produksi, membantu pengembangan bisnis dan berkontribusi terhadap pertumbuhan dan peningkatan standar hidup. Berkaitan dengan itu, hukum persaingan memiliki tujuan untuk menjaga tercapainya pertumbuhan ekonomi dan kesejahteraan masyarakat. Tapi dalam konteks ini, konsumen dapat dirugikan karena adanya perlakuan tertentu dalam FDI, misalnya pemberian perlakuan khusus dalam kuota atau tarif. Agak berbeda kemudian kalau dibandingkan dengan negara knowledge-based economy, misalnya, Australia. FDI akan memiliki dampak yang lebih besar dalam bidang jasa daripada bidang manufaktur (resource-based industries). Namun, berbeda dengan negara maju, FDI di negara berkembang malah lebih restriktif, khususnya dalam bidang jasa daripada manufaktur. Esai ini menyimpulkan, disamping keuntungan dari FDI yang didapat, secara langsung maupun tidak langsung berpotensi untuk terjadinya pelanggaran prinsip persaingan usaha, misalnya, efisiensi, produktifitas dan kapasitas penawaran. Tentunya keuntungan ekonomi yang didapat dari FDI juga harus mempertimbangkan resiko dan cost-nya.*

Kata Kunci: *FDI, Persaingan Usaha, Konsumen, Kesejahteran.*

A. Introduction

The economic globalisation has resulted in increases in a number of businesses operating across national borders. One of the contributors to this increasing is foreign direct investment (FDI). Attracting FDI has become a key component of national development strategies for many countries as a contributor to the growth of the economy as a whole and it is seen by many as essential for jump-starting economic growth through its supporting of domestic capital, productivity and employment.

In parallel, competition law and policy has a purpose to maintain and enhance competition in order to achieve economic growth and consumer welfare. Broadly speaking, competition policy can be defined as the body of laws and regulations through which countries protect and preserve the role of open and competitive markets as a primary means for allocating economic resources. It is aimed at preventing the exercise of market power and promoting economic efficiency. Increased efficiency will be reflected in greater consumer choice, lower product prices and higher product quality.

However, the existence of multinational corporations (MNCs) may not always increase competition. The Organisation for Economic Cooperation and Development (OECD) states that economies of scale are important determinants of industrial structure and in practical the entry of MNCs may lead to increased concentration, when a foreign MNCs enters a

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relatively small national industry and increases average firm size this may initially improve resource allocation.[2]

In contrast, concerns have arisen that strong foreign MNCs out-compete all local firms, or at least force local firms to merge, and the increased industrial concentration can result in market power, which the abuse of market power by the MNCs and/or local firms would then result in a decrease in efficiency.[3]

In addition, even where competition laws do exist, they differ considerably in terms of their content, sectoral scope and in terms of the entities they cover and nations that have a competition law may not enforce it, or may be constrained in their ability to do so by differences in their legal system.[4]

This essay will examine correlation, and implication both negative and positive impact of FDI to competition law and policy. To determine correlation and implication of FDI to competition law and policy, Australia and Indonesia will be examined, while some other countries will be discussed to explain such situation. The reason why Australia and Indonesia are focused because Australia is developed country and the competition law and policy has been existed for long time. Meanwhile, Indonesia is developing country where competition law and policy is relative a new law, introduced in 1999.

B. Foreign Direct Investment

Generally, FDI is an important instrument to build up a country's economy. FDI is believed can provide job opportunities, reduce consumer costs, assist business development and contribute to growth and higher living standards. Through its supporting of domestic capital, productivity and employment, FDI considers as important in economic development including its impact on a country's trade policy and imports and exports, also affecting its trade and balance.[5] According to James Petras, orthodox economist propounds the benefits of FDI are:

1. Creating new enterprises, gains or expands markets and stimulates new research and development of local technological 'know-how'.
2. Increasing the export competitiveness of an industry, and stimulates the local economy via secondary and tertiary purchases and sales.
3. Providing tax revenue to bolster the local treasury and hard currency earnings to finance imports.
4. Maintaining debt payments and the integrity of the financial system, which are essential to securing financial good standing in international markets.
5. Providing needed capital for development since local sources are not available or inadequate, especially in the third world.
6. Serves as an anchor for attracting further investment and serves as a 'pole of development'.[6]

FDI is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one

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[2] See Organisation for Economic Cooperation and Development (OECD). 2001. *New Horizons and Policy Challenges for FDI in the 21st Century*. OECD.
[3] *Ibid.*
[4] Julian L. Clarke. 2003. *Competition policy and FDI* World Trade Institute.
[5] See World Bank. *Impact of Foreign Direct Investment* 2005.
[6] James Petras. 2005. "Six Myths About the Benefits of FDI". *Global Policy Forum.*

economy, foreign direct investor or parent enterprise, in an enterprise resident in an economy other than that of the foreign direct investor, FDI enterprise or affiliate enterprise or foreign affiliate.[7] There are three components in FDI, which are:

1. Equity capital. The foreign direct investor's purchase of shares of an enterprise in a country other than its own.
2. Reinvested earnings comprise the direct investor's share, in proportion to direct equity participation, of earnings not distributed as dividends by affiliates, or earnings not remitted to the direct investor. Such retained profits by affiliates are reinvested.
3. Intra-company loans or intra-company debt transactions refer to short- or long-term borrowing and lending of funds between direct investors or parent enterprises and affiliate enterprises.[8]

The FDI implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy. Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among foreign affiliates, both incorporated and unincorporated. FDI may be undertaken by individuals as well as business entities. Flows of FDI comprise capital provided, either directly or through other related enterprises by a foreign direct investor to an FDI enterprise, or capital received from an FDI enterprise by a foreign direct investor.

Although, many arguments support the idea that FDI can increase labour standards and skill upon entry, while others have criticized it for exploiting labour standards and seeking out cheap labour. FDI can also be an important transporter of new technologies and innovative ideas. These new technologies are especially effective when they spillover into the domestic economy through linkages between domestic firms and the foreign investor. When local firms possess sufficient absorptive capacity to capture these spillovers, the positive impact of FDI is maximized, and when FDI contributes to improving infrastructure, skills and the general business climate, it often leads to new FDI inflows and increased positive impacts.[9]

In spite of the potential benefits of FDI, the competition authorities should recognise that harm to consumers can arise from the favourable treatment of FDI, for instances a promise to provide discriminatory treatment via, for example quotas or tariffs from competing imports.[10] Moreover, the Asia pacific Economic Cooperation (APEC) reports that the award to foreign investors of special tax and financial incentives has competition consequences if such concessions are not available to all new market entrants and existing firms and this discrimination in favour of FDI appears to be the situation recently encountered in Argentina, Brazil, the Philippines and Indonesia.[11]

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[7] United Nations Conference on Trade and Development, *World Investment Report 2004.*

[8] *Ibid.*

[9] World Bank, above n. 5.

[10] Asia Pacific Economic Cooperation (APEC) Reports (NDP).

[11] *Ibid.*

C. Implication of FDI to Competition

The purpose of competition law is to maintain and enhance competition in order to achieve economic growth and enhance consumer welfare. Competition is important for economic development because it imposes competitive pressures that improve technical efficiency and active innovations. A characteristic competition law addresses issues such as the abuse of a dominant position, restrictive agreements, mergers and acquisitions, and unfair competition. The abuse of a dominant position refers to a situation where a firm's market share exceeds a certain level.[12] In addition, the existence of competition law prevents a firm from abusing its dominant position to increase prices to limit competition through practices like predatory pricing, tying, and exclusive dealing.

However, in Australian Competition Law for instance, the objective of s 46 of the Trade Practice Act (TPA) 1974 is not ensuring the equal opportunity for small and medium sized competitors to compete against their larger competition but to achieve economic efficiency for the benefit of consumer.[13]

Although market efficiency, which is assumed to result in lower prices and more choices for the consumer, better products and services and increasing opportunities for existing and new businesses, is often the key goal of competition policies. Shelton states that in practice, most governments take into account non-efficiency goals such as fairness, opportunities for small businesses, pluralism, technological development and employment, in the conduct of their domestic competition policies.[14]

Thus, there are several reasons why this correlation between competition law and policy and FDI is important. According to Clarke, FDI has important implications for the sustainability of national policies, for example high levels of FDI can challenge the government's ability to protect domestic industries.[15] Also, the tradeoff between higher FDI, which is considered to be beneficial for the recipient nation, against the ability of the government to maintain its control over certain sectors of the domestic economy, and the benefit of doing so, remains a largely unanswered policy question.

In relation with FDI, competition law and policy is important variable for country to attract FDI. The Asia Pacific Economic Council (APEC) states that FDI will be motivated and directed at particular economies not only the market size, openness and growth prospects of an economy but also relate to the extent of competition within an economy.[16] Furthermore, it states that the strength of anti-trust policies, as perceived by potential investors, has a significant influence upon FDI flows compared across countries.[17]

However, government policies that protect certain segments of the economy may be more attractive to certain investors than a fully competitive market because of the potential for abnormal profit resulting from imperfect competition in that sector.

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[12] More detail see Shujiro Urata, *Competition Policy and Economic Development in East Asia* (NDP) <http://law.wustl.edu/Publications/WUGSLR/IssueArchive/Volume_1/Document_Files/p%2015%20Urata.pdf> (27 April 2009).
[13] P H Clarke and S G Corones. 2005. *Competition Law and Policy; Cases and Materials*. 2nd ed, 2005. Oxford. P. 376.
[14] J. Shelton. 1998. *Competition Policy: What Chance for International Rules?*. OECD.
[15] Julian L. Clarke, above n. 4.
[16] Asia Pacific Economic Cooperation, above n. 10.
[17] *Ibid.*

The externalities of FDI on a host economy include positive as well as negative effects. The positive effects, for example, vertical linkages and knowledge spillovers for domestic enterprises.

FDI may generate demand for intermediate goods and may crowd-in domestic investment to deliver it and also help to diffuse new skills and knowledge brought in the host economy. Thus, FDI lowers the cost of technology adoption and may expand the set of technologies available to local firms. The competition channel emphasises that the entrance of foreign firms intensifies competition in the domestic market, encouraging domestic firms to become more efficient by upgrading their technology base.[18]

The positive effects of FDI to growth national economic are different among countries. Through FDI each country tries to achieve their economic welfare. As the previous explanation, competitiveness environment is one variable to attract FDI. For example, Australia where politic, economy, social and law relative stable, retained its position as one of the top four countries in the Asia Pacific region by attracting FDI $ 8 billion in 2003.[19] Moreover, the International Monetary Fund released a glowing assessment of the country's economy commending its "strong performance, with six years of budget surpluses, falling public debt, low inflation, high and rising productivity, and a long period of uninterrupted growth that has underpinned a dynamic job market".[20]

In contrary, after the Asian Crisis in 1997, FDI in Indonesia remains weak. According to Malcolm Gray, before the crisis, FDI had assumed an important role and Indonesia had been reasonably successful in attracting it.[21] The World Economic Forum states that one of the obstacles to attract FDI in Indonesia is competitiveness environment.[22] Indonesian position drops in the rate 3 points from 69 in 2002 to 72 in 2003, out of 104 countries for its international competitiveness.[23] It is far behind regional countries competitors such as Malaysia, Thailand and China. According to the World Competitiveness Scoreboard 2005, Indonesian position is 59, better than previous year.[24] While the position of competitiveness, for instances Australia and Canada are 9 and 5, respectively.[25] Beside that, indecisive fiscal incentives, political stability, a stable macroeconomic environment, an adequate physical infrastructure, supply of human capital and the application of national treatment to foreign investors are others factor for the current lack of inward FDI in Indonesia.[26]

In March 1999, the current Indonesian competition law was adopted by the Indonesian Parliament. The law provides rules and guidance both with respect to substantive and procedural matters. Law number 5 covers monopolistic practices, price fixing, price dis-

18 Robert Lensink and Oliver Morrissey, *Foreign Direct Investment: Flows, Volatility And Growth*. 2001. < http://www.nottingham.ac.uk/economics/credit/research/papers/cp.01.06.pdf> (27 April 2009).
19 Financial Times Business Magazine January 05, "Australia", *FDI* (2005).
20 *Ibid.*
21 Malcolm Gray, "FDI and recovery in Indonesia: Recent events and their impacts". 2002. *Backgrounder August Vol. 14/2*
22 World Economic Forums. 2005. *Asia Competitiveness Rankings.*
23 *Ibid.*
24 The World Competitiveness Scoreboard. 2005.
25 *Ibid.*
26 Indonesian Institute, *Columbia University - CSIS Workshop on a Comprehensive Competition Framework for Indonesia -* Jakarta, May 24-25, 2000.

crimination, cartels, trusts, and vertical integration, among other features and prohibited agreements and activities. The objectives of the Indonesian competition law are:

a. To safeguard the interests of the public and to improve economic efficiency as one of the efforts to improve the people's welfare;
b. To create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large, middle and small-scale undertakings in Indonesia;
c. To prevent monopolistic practices and/or unfair/unhealthy business competition that may be committed by undertakings, and
d. The creation of effectiveness and efficiency in business activities.[27]

In Indonesian Competition Law, the notion that competition law is a means to preserve and maintain a competitive economy that will encourage efficiency and increase consumer welfare has adopted. However, what Sirait points out is interesting, which is the Indonesian business culture considers normal business activity to mean working or doing business cooperatively, not competitively.[28] One meaning of the competition term is individualistic conduct oriented to one side's needs using any means necessary to achieve maximum benefit. [29]

Both direct and indirect benefits associated with services FDI can boost national and export competitiveness. However, benefits may not be realized if conditions in the host economy are not conducive. According to United Nations Conference on Trade and Development, FDI can involve three kinds of risk: (i) systemic risk, when the absence of efficient regulation exposes a host economy to significant economic instability; (ii) structural risk, when the institutions and instruments needed to manage, for instance, privatization of utilities, are weak and there is the risk of turning State-owned monopolies into private ones; and (iii) contingent risk, when FDI in socially or culturally sensitive areas causes unintended harm.[30]

Increased FDI may deliver benefits even when it is not accompanied by an increase in competition. For example, foreign entry may introduce new technology or know-how, and it may help to recapitalise troubled financial institutions, but if foreign investors enter a market where competition is limited then the net effect may be a welfare loss for the host country and the hosts will continue to bear the economic costs of limited competition and in addition foreigners may capture rents that would otherwise accrue to domestic producers. [31]

The effects of increased competition are usually seen as beneficial. Increased competition encourages both productive efficiency and a more efficient allocation of resources. This may be especially the case when MNCs enter industries where high entry barriers reduced the degree of domestic competition, for example utilities.[32]

Thus, competitive production has become essential for development. In order to achieve and sustain growth, structural change, desired

[27] Art. 3 the Indonesian Prohibition of Monopolistic Practices and Unfair Business Competition Law Number 5 Year 1999.
[28] Ningrum N. Sirait, *Indonesia's Experience with its Competition Law and Challenges Ahead* (NDP) <http://www.law.chula.ac.th/asli/paper/f4.pdf> (25 April 2009).
[29] *Ibid.*
[30] United Nations Conference on Trade and Development, above n. 8.
[31] See Asia Pacific Economic Cooperation, *International Investments and Their Legal Interpretations* (NDP). APEC.
[32] See Organisation for Economic Cooperation and Development (OECD). above n. 3.

patterns of income distribution, education, health, environmental protection and, ultimately, development, countries need firms that are efficient and productive enough to compete in open markets. On the other hand, a competitive position can be maintained only if it can rely on development that benefits the majority of the population.[33] In ensuring a competitive production sector, services play a vital role, for three main reasons:

1. Services are the largest productive sector in most economies, and their competitive (that is, efficient) production is critical to the welfare of a society as a whole. The growth and efficiency of services promote competitiveness in the broad sense of the term.
2. Many services are crucial inputs into products that compete in domestic and international markets. Cheap, reliable and modern infrastructures, as well as financial, technical and other services are consequently the backbone of a competitive economy. With the rising importance of the information- and knowledge-based economy, the share of services in most activities is growing, which accentuates the need for the efficient provision of key services.
3. Advances in information and communication technologies (ICTs) facilitate trade in services as they make it unnecessary for providers and users to be close to one another. New technology is making it easier to digitize information and send it across the world at negligible cost; and it allows services to be split into components, each of which can be located in countries that can provide them most efficiently and cost effectively.[34]

Improving the competitiveness of a firm or industry is an important factor in achieving economic development. Economic development progresses as competitive firms displace non-competitive firms, thereby enabling an economy to utilize resources efficiently.

However, these possible benefits are accompanied by possible costs. A highly efficient MNCs affiliate may lead to a fall in the number of local firms if the less efficient local firms are forced out of business. Though this may increase overall resource allocation in the long term, the short-term consequences for local employment and market concentration may be severe. For example, if MNCs affiliates are very strong, in the absence of an appropriate competition policy framework they may abuse their monopoly power, with consequentially harmful effects and resulting other costs include the repatriation of profits with consequences for balance of payments and exchange rates, and the avoidance of taxation through transfer pricing.[35] Also, on the negative side, the Antidumping Agreement of the WTO, could serve to protect domestic firms from unfair pricing and were often taken as a justification for economically inefficient measures.[36]

Moreover, FDI could be used intentionally in an anticompetitive manner: antidumping measures could be used as a means of realizing cooperative price setting by domestic and foreign firms, or in order to monopolize the domestic market, for examples, the extraterri-

[33] United Nations Conference on Trade and Development. above n. 30.
[34] *Ibid.*
[35] Organisation for Economic Cooperation and Development (OECD), above n. 32.
[36] United Nations Conference on Trade and Development. 1997. *Report of the Expert Meeting on Competition Law and Policy* 1997.

torial application of domestic competition laws to protect a domestic firm may not only infringe the sovereignty of a foreign country, but also distort competition between the two countries and the exemption clauses of competition laws could have the effect of protecting inefficient domestic industry and distorting trade.[37]

Other positive impacts of FDI, MNCs in services can help improve the competitiveness of host economies. FDI can provide capital, technology and managerial knowledge, enhance skills and restructure inefficient enterprises and also can introduce new service products that previously were not supplied by domestic firms. In addition, when an MNCs starts using a specific technology that has not yet been used in the host economy, its competitors may start imitating the technology or may trigger a wider adoption.[38]

Positive spillovers of FDI for developing countries, such as Indonesia, thereby stimulating improvements in competing service firms as well as for customers and suppliers. Where MNCs enter by acquiring State-owned utilities, they can improve the provision of basic services such as telecommunications, power and transportation, enhance the welfare of consumers and lower costs to industries using these services as inputs and can open up new export opportunities by providing access to markets and skills not otherwise available.[39]

In a knowledge-based economy, such as Australia, MNCs may have a larger impact in services than in manufacturing or resource-based industries. The role of services is closely linked to the knowledge content of the final product, and MNCs tend to have a competitive advantage in knowledge-intensive activities.[40] Moreover, while in goods industries countries have a choice between imports and FDI as modes of international delivery, in many service industries, they may have to rely on FDI to get access to state-of-the-art knowledge and products. For instance, FDI may crowd out local enterprises. In services that are natural monopolies, there is the risk of a possible abuse of monopoly power. Although developing countries need FDI for their economic growth, according to United Nations Conference on Trade and Development, different with developed country, some developing country more restrictive on FDI especially in services rather than manufacturing. There are several reasons for this. First, countries restrict FDI to avoid the risk of foreign investors killing off fledgling domestic enterprises, for example the infant industry; second, entry by large service MNCs involves competition policy considerations, and many host countries may not feel ready to deal with the technical and legal issues involved that industries that are characterized by a lack of competition are also likely to be subject to more regulations, thirdly, services FDI that involves the sale of public utilities to foreign firms raises complex issues related to privatization and the regulation of natural monopolies; next, some services may not appear to offer significant technical skill creation, linkages or other benefits and governments may wonder why they should promote entry by MNCs; and finally, since a number of services are closed to foreign investors, are monopolies and, in any event, need to be regulated, it is frequently difficult to predict as well as to

[37] *Ibid.*
[38] Organization for Economic Cooperation and Development, above n. 35.
[39] United Nations Conference on Trade and Development, above n. 8.
[40] *Ibid.*

assess the effects of an opening up to FDI, for example prices and getting the right regulation in place is a challenge.[41]

In product markets, restrictive business practices can impede FDI associated with the distribution, serving, development and production of goods. In service markets barriers to entry can discourage investment which is essential to service local markets. Firms interacting horizontally can behave in such ways to affect potential entrants' investment decisions, which the horizontal agreements that could affect FDI include price fixing, cartels or market allocation schemes, bid rigging, and refusals to deal and other abuses of incumbent position.[42] Vertical restraints on trade involving buyers and sellers of intermediate input markets and the organization of distribution of final products can also affect FDI. Vertical restraints include such practices as refusals to deal and boycotts, retail price maintenance, and exclusive-dealing arrangements. Furthermore, factor markets may also provide a channel through which firms may deter entry. Capital market imperfections provide a second channel through which private arrangements in host countries can affect FDI.[43] The firms can exploit capital market imperfections and impede the development of a market for corporate control, which can frustrate merger and acquisition activity.

On this basis, it may be inferred that beside FDI has the potential to enhance, directly and indirectly, the efficiency, productivity and supply capacity of host-country industries, thereby benefiting the economy as a whole, it can also entail risks and costs.

D. Conclusion

In conclusion, to benefit from an increasingly globalise and interdependent world economy, countries need to strengthen their capabilities for the supply of competitive services. Attracting FDI has become a key component of national development strategies for many countries as a contributor to the growth of the economy as a whole and it is essential for jump-starting economic growth through its supporting of domestic capital, productivity and employment. In parallel, competition law and policy has a purpose to maintain and enhance competition in order to achieve economic growth and consumer welfare. Competition is important for economic development because it imposes competitive pressures that improve technical efficiency and active innovations. This essay finds out that both competition law and policy and competitive environment have significant role to attract FDI. Competition environment is not only important for developed countries, such as Australia, but also developing countries such as Indonesia, to achieve their national welfare.

The effects of increased competition are usually seen as beneficial. Increased competition encourages both productive efficiency and a more efficient allocation of resources. Thus, competitive production has become essential for development. In order to achieve and sustain growth, structural change, desired patterns of income distribution, education, health, environmental protection and, ultimately, development, countries need firms that are efficient and productive enough to compete in open markets.

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[41] *Ibid.*

[42] See Marcus Noland, "Competition Policy and FDI: A Solution in Search of a Problem". 2006. *Institute for International Economics*

[43] *Ibid.*

For FDI, its most important contribution is in bringing the capital, skills and technology. However, FDI could be used intentionally in an anticompetitive manner: antidumping measures could be used as a means of realizing cooperative price setting by domestic and foreign firms, or in order to monopolize the domestic market, for examples, the extraterritorial application of domestic competition laws to protect a domestic firm may not only infringe the sovereignty of a foreign country, but also distort competition between the two countries and the exemption clauses of competition laws could have the effect of protecting inefficient domestic industry and distorting economy.

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