

Voluntary Peer Review of Competition Law and Policy in Mongolia

Presentation by:

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Views expressed are these of the author and do not reflect the official position of any national or international institution, including FAS-Russia, AFCCP-Mongolia and UNCTAD

Outline of the Presentation

- ✚ The Mongolian context of competition law and policy development
- ✚ Competition legislation, incl. state aid control, public procurement and other provisions
- ✚ Courts and private bar
- ✚ Government and non-government stakeholders: competition advocacy issues
- ✚ Sector legislation and policies viewed from competition policy perspective
- ✚ The Mongolian competition authority: agency profile and capacity building
- ✚ Observations and recommendations.

The Mongolian context of competition law and policy development

- Fast economic growth mainly based on development of natural resources and influx of FDI:
 - GDP growth of 7% per year since 2003
 - About 20% in the end of 2011
 - EIU forecast for 2012 is about 15%
- Human development and inclusiveness of growth problem
 - Although per capita GDP tripled from \$ 638 in 2004 to \$ 2200 in 2010 the country is on 100 (out of 169) place according to UNDP Global Human Development Report based on per capital GDP, life expectancy and education level
- Structure of economy: «national projects » vs the universe of SMEs
 - 98% of companies have less than 199 employees
- ◆ What can be a role of competition law enforcement and policies in the Mongolian realities?

Competition law development in Mongolia: historical benchmarks

- 1993 – adoption of the Law on Prohibiting Unfair Competition.
- Starting from 1994 – dismantling and privatization of state owned enterprises: open access to essential supplies, facilities, networks.
- 1995 – amendment stipulating for powers of state inspector.
- 2000 – comprehensive amendment of the Law.
- 2005 – conversion of UCRA into AFCCP. Actual enforcement started.
- 2010 – new Law on Competition adopted.

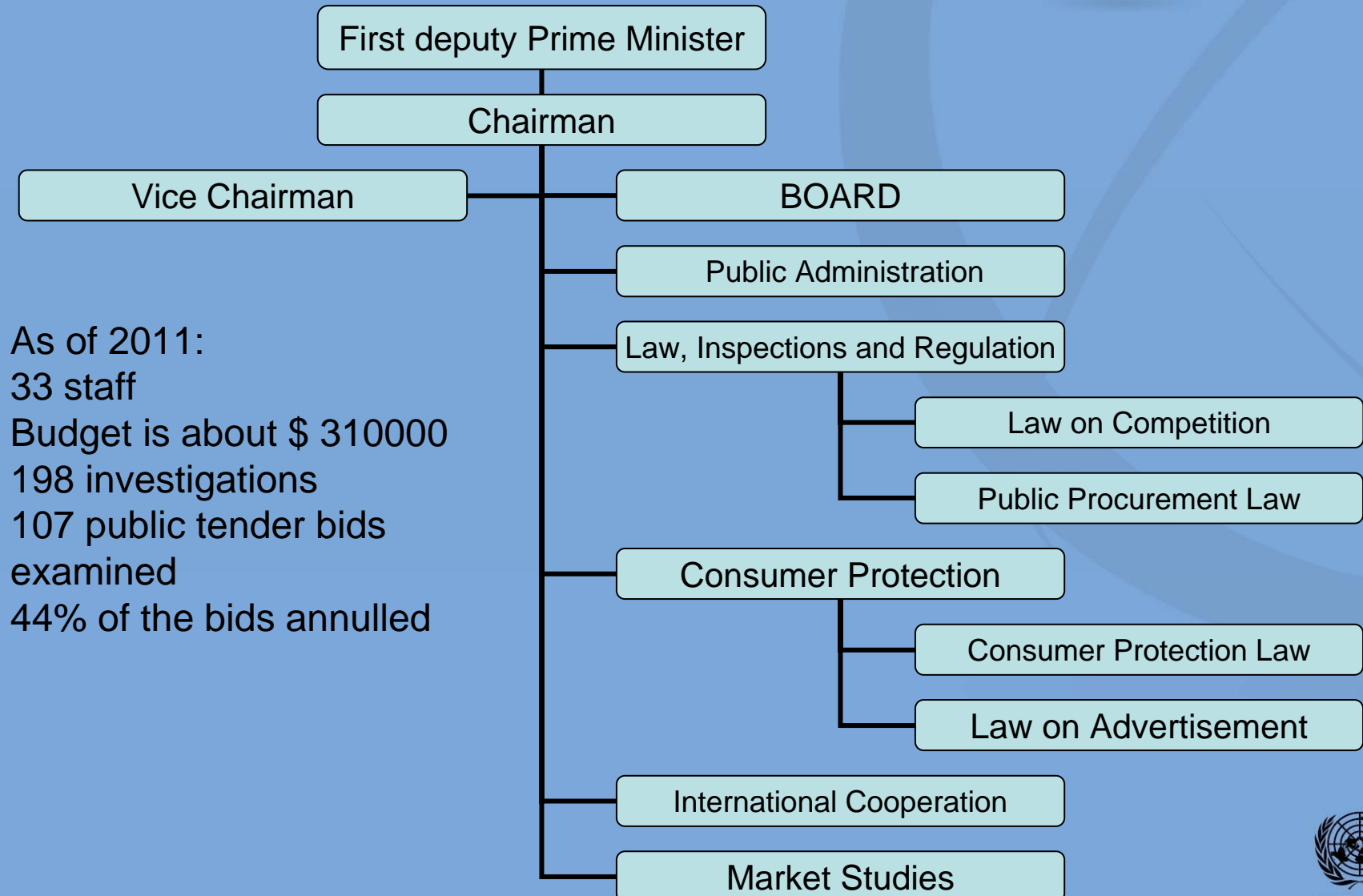
The Scope of Competition Law and Policy

- ❖ Market definition and dominance assessment
- ❖ Legal safeguards against the major types of violations
 - ❑ Cartels and leniency provisions
 - ❑ Unilateral abuses
 - ❑ Merger review
- ❖ State aid control
- ❖ Public procurement
- ❖ Competition law and sector regulations
- ❖ AFCCP powers and agency profile – to be considered further

Nationwide exemptions from antitrust law

- ✓ Constitutional limitations of foreign entry into development of natural resources
- ✓ IPR
- ✓ Purchases of “strategic products”
- ✓ Price increases by natural monopolies authorized by sector regulators and approved by AFCCP

Institutional Framework: AFCCP



As of 2011:
33 staff
Budget is about \$ 310000
198 investigations
107 public tender bids
examined
44% of the bids annulled

The role of the judiciary

■ Courts

- Prevalence of formal and procedural approach over substantive analysis
- Insufficient communication between AFCCP and the courts

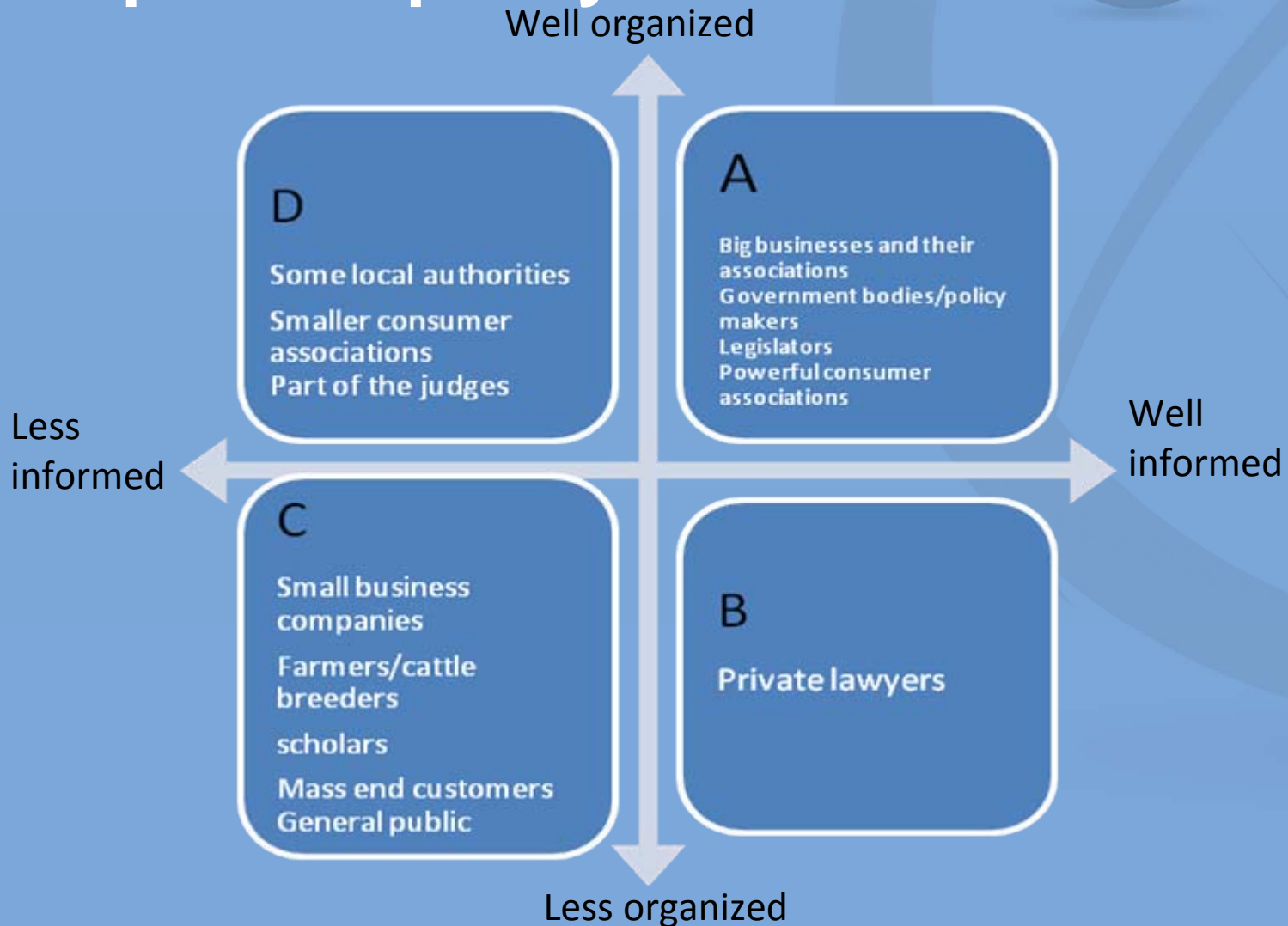
■ Private practitioners

- Practical absence of lawyers specializing in antitrust cases
- Lack of legal skills in antitrust matters

Competition Advocacy

- The National Parliament and Government:
 - Sector Regulators
 - NDIC
 - State Property Commission
- Implementation of national development projects and competition
- Business community
- Consumer associations
- Legal profession
- General public

Competition policy stakeholders



Observations and possibilities for improvement of the Mongolian competition regime

- ✚ Make AFCCP Regulatory Board fully operational
- ✚ Upgrade the staff skills and agency capacity, including priority setting and planning, keep institutional memory
- ✚ Improve competition legislation and complement it with Guidelines
- ✚ Increase the agency influence in order to promote competition policy in particular sectors; improve coordination with sector regulators
- ✚ Dialogue with the judges corps
- ✚ Seek “grass roots” support to competition enforcement and policy, e.g. facilitate private damage recoupment and private bar development
- ✚ Improve the agency visibility and image with stakeholders and general public, upgrade advocacy and communication skills; facilitate growth of competition culture
- ✚ Improve public procurement rules and procedures, achieve its better transparency, e.g. by introduction of e-bidding
- ✚ Make more clear delineation between authority of AFCCP and sector regulators; improve coordination between them.

Major Recommendations: Improving the Competition Law

- Dominance assessment: consider introduction of qualitative criteria additionally to existing quantitative threshold.
- Cartels: make clear delineation between horizontal and vertical anticompetitive agreements; emphasize the *per se* illegality of cartels in the Law.
- Unilateral violations: consider broader use of effect based treatment.
- Merger review: provide for possibilities of use of remedies.
- Substantive and procedural ***Guidelines*** are needed.

Major Recommendations: Strengthening Enforcement

- *Case handling*: consider a legal possibility for extension of the terms of consideration of antitrust cases, if needed.
- *Investigation procedures*: develop more clear procedures acceptable for courts.
- *Sanctions*: consider introduction of more substantial penalties for impediments to inspections and more effective means for collecting fines.
- *Damage recoupment*: improve legal and procedural possibilities for private damage recoupment; advertise such possibilities among potential claimants.

Major Recommendations:

Complementary Policies

- *State aid control*: broaden legal possibilities and transparency of state aid provisions to insure its better use for development.
- *Public procurement*: improve transparency of public procurement, including introduction of electronic auctions.
- *Sector regulation*: provide for more clear separation of responsibilities of competition authority and sector regulators and better coordination among them.
- *State-controlled enterprises*:
 - ▶ Avoid replacement of government monopolies with private ones, consider their unbundling to ensure competition;
 - ▶ Ensure equal access to essential supplies and facilities;
 - ▶ Make an appropriate choice between the implementation of competition law and price control, where necessary.

Major Recommendations: Ensuring Policy Coherence

- Strike the right balance between the interests of national and regional development and safeguarding competition.
- Ensure AFCCP's participation in the development of licensing rules, granting concessions, and other matters related to development programs.
- Provide AFCCP with equal possibilities of participation in government development programs.
- Ensure equal access to supplies and essential facilities in the course of implementation of these programs.
- Develop competitive distribution networks and short-cut dominant market intermediaries (especially in meat,