Introductory Chapter

Promoting Competition Around the World: A Diversity of Rationales and Approaches

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Introduction

Over the last twenty-five years, more and more countries have given a greater priority to promote competition. Even though these countries differ markedly in their levels of development, growth experiences, and the ideologies of their political and business elites, fostering inter-firm rivalry has become an important, albeit intermediate, objective of government policy. This is not to say that each government has pursued this objective with the same vigour. Still, it is worth exploring why more officials understand that letting competitive forces shape economic and social outcomes is desirable. Moreover, what measures have governments taken to foster competition? In particular, to what extent have governments taken steps to devise legislative and associated enforcement initiatives that specifically target the manner in which competitors compete?

The latter legislation, often referred to as competition or antitrust law, has spread around the globe and now some 100 jurisdictions are said to have enacted one form of competition statute or another (see annexure 1 for a list). Drawing on the country experiences reported in this book and on the findings of researchers and from government reports, this introductory chapter sketches out some answers to these questions. As competition law and enforcement is an evolving field, it would be unwise to regard these answers as definitive. We hope, however, to have identified a number of important features and themes that are worth following in the years to come.

The remainder of this chapter is divided into eight sections. In the first, we examine what is meant by the term 'competition'. The second through fourth sections examine the effects of competition on competitiveness, pro-poor development, and the efficient functioning of markets, respectively. The fifth section outlines policies that governments have to promote competition and the sixth section focuses on the rationales for enacting and implementing one of them, namely, competition or anti-trust law. The seventh section summarises some of the principal similarities and differences in competition law regimes around the world, while the last section includes some concluding remarks.

I. What is Competition?

1.1 A firm is said to compete with other firms in the same market if the decisions that the former takes to maximise its profits depend on either the steps taken by the latter firms or on the price that prevails in the market. Thus, a firm's choices are said to be constrained by 'competition' when its actions are influenced by its rivals' choices or by the prevailing market price. This characterisation of competition applies to all types of firms — be they multinational or national, domestic or foreign, wholesaler or retailer, or large or small. Moreover, this notion of competition is independent of the identity of the customer. That is, competition takes place in markets where the customers are private consumers as well as in markets where the government or firms make purchases. As we will see, many factors influence both the constraints that competition places on a firm's choices and the outcomes of competition.

1.2 When making decisions about how to compete with rivals, firms are said to compete in two ways: fairly or unfairly. Each is described below:

- Fair competition is said to relate to competition whereby firms produce better quality goods, become more cost efficient, adopt the best available technology, undertake more research and development and the like. Here, firms strive in terms of innovation, choice, quality and service, all of which are thought in principle to lead to greater customer satisfaction.
- Unfair competition is said to happen when a firm resorts to restrictive business practices, which can include predatory pricing, exclusive dealing, tied selling, resale price maintenance, collusion, cartelisation, refusal to deal, abuse of dominant position, etc.

1.3 An important question is whether competition is self-sustaining or not. Will, as some fear, firm rivalry lead to

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concentrated markets, as the number of firms operating in them is reduced while the size of those still active increases considerably, resulting in greater market power? Here 'competition kills competition'. Or, can entry by new firms, based at home or abroad, discipline the exercise of market power by incumbent firms? Will innovation undermine any long-term attempt to exploit market power and, if so, what factors influence the incentive to innovate? These are important microeconomic questions that economists have devoted plenty of effort analysing over the last one hundred years.

1.4 By and large, however, and with a few identifiable exceptions, the promotion of competition is thought to have important positive economic and social consequences for societies, both industrialised and developing. The next three sections of this chapter identify some of the most important benefits.

II. Promoting Competitiveness through Competition

2.1 One of the most important benefits of inter-firm rivalry is said to be improving national competitiveness. This claim, however, must be properly understood. 'Competitiveness' has no direct empirical counterpart and is often taken to include many features of a nation's corporate performance compared to firms located abroad, such as share of world markets, the rate of innovation, and limited import penetration. Another important point to bear in mind that firms, not nations, compete and so properly understood competitiveness is not a characteristic of government or state, but of the firms within a jurisdiction. This is not to say that governments have no bearing on how well their firms perform relative to foreign rivals and indeed, by fostering competition between domestic firms, governments are thought by some to foster national competitiveness.

2.2 One of the ways that governments can foster competition between domestic firms is to ease entry and exit from national industries. This is particularly important in developing countries as a study of 145 countries conducted by the World Bank[3] revealed that the typical entrepreneur goes through many more steps to launch and run a business, many of which are costly in terms of money and time, than in the industrialised countries.

2.3 Although Michael Porter had long argued that domestic inter-firm rivalry is a positive determinant of corporate performance in world markets, the connections between competition and competitiveness were drawn more frequently in policy circles in the 1990s, especially in Europe. The decline in the relative economic performance of the UK and Continental Europe, first compared to Japan and then to the US, prompted much debate about the appropriate policy response. The UK Government's White Papers on competitiveness identified ten policy areas that influence competitiveness, one of which is related to fair and open markets. Similarly, the European Union (EU) White Papers highlighted the following four areas for priority action, two of which have direct implications for inter-firm rivalry:

- the promotion of investment in intangible assets;
- the development of co-operation between firms;
- *ensuring fair competition; and*
- the modernisation of public authorities.

2.4 Thus, we see that these White Papers on competitiveness highlight 'fair' competition in markets as an essential ingredient for the enhancement and maintenance of competitiveness in economies. These prescriptions apply to developing countries as well. For instance, both heterodox and orthodox economists argue that fierce competition between the members of the Korean *chaebol* played an instrumental role in bolstering that nation's export competitiveness in the 1970s and 1980s. Moreover, many national reports on the Millennium Development Goals (MDGs) identify greater competition as important in accelerating the transfer of information and communications technologies to developing countries. Such technologies are playing an important role in determining the capacity and speed of firms to react to international commercial opportunities, so linking competition to competitiveness again.[4]

III. Competition and Pro-poor Development

3.1 Given the challenges faced by poorer countries, it is not surprising that the effect of promoting competition on the various indicators of development has become an important matter. The biggest challenge in the developing world today is to get rid of the abject poverty that deprives a large section of the population of a dignified life. A prominent approach to poverty reduction is to 'empower' the poor which, amongst others, is said to include providing them with productive employment and increasing their access to land, capital, and other productive resources. But this approach may not be successful unless these people are linked to the markets and these markets are made to work for their benefit.

3.2 As the World Development Report (WDR) 2000-01 rightly noted:

> *"Markets work for the poor because poor people rely on formal and informal markets to sell their labour and products, to finance investment, and to insure against risks. Well-functioning markets are important in generating growth and expanding opportunities for poor people".*

3.3 'Well-functioning' implies markets that work efficiently and without distortions. Nevertheless, competition is often distorted by incumbent firms, and it is essential that governments should take steps directly or indirectly for the elimination of these distortions. What is very often ignored is the fact that the prevalence of anticompetitive

3 *Doing Business in 2004: Understanding Regulation*, The World Bank.
4 Simon J. Evenett, "Competition and the Millennium Development Goals: New Evidence for Official Sources." 20 February 2006.

practices in markets hurts the poor disproportionately hard. A rich person may not mind much paying a dollar more for buying something but for people living with less than a dollar a day, getting value for money from every cent they spend is more vital. This is the 'consumption' side consequence of competition, or its absence.

3.4 If we turn to the 'ability to pay' or 'income' side of the equation, a sector that immediately comes to mind is agriculture. Of the 1.2 billion people on the globe who live in extreme poverty, approximately 75 percent live and work in rural areas and about two-thirds of them draw their livelihood directly from agriculture.[5] The market for agricultural products is very often considered to be an example of a perfect competitive market. In these markets, there is a considerable gap between the prices that consumers pay and the prices farmers actually receive. This is because of the chain of intermediaries between consumers and farmers, a chain, which in fact does not always work in a competitive manner. These intermediaries can abuse their pricing power in the market for final products; while in the markets for primary products they sometimes exert buyer or monopsony power. In the view of some developing countries, where majority of the population earn their livelihood directly from agriculture, the linkage between market imperfections in agriculture goods and poverty is manifest. This report carries several examples of this phenomenon.

3.5 It needs to be understood that promoting competition is not a luxury of the rich industrialised world, but one of the necessary tools for developing countries, in their fight against poverty. Developing countries should not be dogmatic about withdrawing from markets as distortions and failures in markets are quite ubiquitous and the state needs to play an important role in promoting open and fair trading conditions.

3.6 More generally, promoting competition can make an important contribution to the growth process. A research report released by the McKinsey Global Institute (MGI), based on research on the economies of 13 nations, argues that the key to reducing economic inequalities between rich and poor countries is productivity and its links to competition and consumption. MGI studied national economies from the ground up, and pointed out that many experts, including those in the international development banks, underestimate the significance of a level playing field. Competition is more important than education, or greater access to capital markets, in lifting a country's gross domestic product (GDP). To reduce barriers to competition, policy-makers must stand up to special business interests and focus more on the welfare of consumers. Competition, in this view, is an important determinant of convergence over time in living standards between nations.

IV. Promoting Markets through Competition

4.1 Competition can play an important role in changing the incentives of market participants and in nudging prices and outputs towards their efficient levels. However, not all markets attain efficient outcomes. Moreover, not all regulated markets generate efficient outcomes. Regulation can bring efficient outcomes if it is designed to work as a substitute for competition. Many policymakers now recognise this and so design reforms in such a way as to stimulate competition between firms, particularly in regulated markets. Seeing reforms through a competition lens is an important step that should be taken up in developing and industrialised countries alike.

4.2 Empirical evidence, though focused mainly on the experience of industrialised countries, has confirmed that barriers to competition within an economy, whether due to governmental or private restraints, lead to losses in income and welfare.

4.3 A study carried out on the Australian economy estimated the expected benefits from a package of competition-promoting and deregulatory reforms (including improvements in the competition rules) would create annual gains in real GDP of about 5.5 percent, or A$23bn, of which consumers would gain by almost A$9bn (in addition to increases in real wages, employment and government revenue)[6].

4.4 A report prepared for the UK Government illustrates the benefits of introducing competition into markets in which, previously, it had been absent. The markets analysed were: retail opticians, international telephone calls, net book agreements, passenger flights in Europe, new cars, and replica football kits. It was found that promoting competition led to large price reductions, more innovation, and better product development.[7]

4.5 The sad record of privatisation in many developing countries indicates the pitfalls of designing reforms without taking competition into account. Replacing state-owned monopolies with an unregulated private monopoly may well lead to sharper incentives to bring costs under control, but that is not all. Prices may also rise as a private firm seeks to maximise profits. This can have significant developmental implications as water, telecom and electricity companies, which have been privatised in large numbers by governments in poor countries, supply services that are essential for the well-being of their populations, in particular the vulnerable elements of those populations. Even in sectors which are not natural monopolies, very often the privatisation process ignored the competition implications by transferring the ownership to existing rivals and reducing competition in the process.

5 International Fund for Agricultural Development (IFAD), *Rural Poverty Report 2001: The Challenge of Ending Rural Poverty*, New York, Oxford University Press, 2001.

6 http://www.unctad.org/en/docs//c2em_d10.en.pdf

7 The Benefits from Competition: Some Illustrative UK Cases, Centre for Competition Policy, University of East Anglia, May 2004

4.6 To summarise, promoting competition has important consequences for competitiveness, development, and the effectiveness of markets and government reforms in general. These are some of the benefits of promoting competition. Taken together, however, they help to explain why promoting competition has attained a higher profile in recent years in developing and industrialised countries. We turn now to the steps taken by governments to stimulate rivalry between firms.

V. Competition Policy: The State Measures to Promote Inter-Firm Rivalry

5.1 Competition policy is an integral part of economic policy. The main objective of the competition policy is to preserve and promote inter-firm rivalry as a means of attaining an efficient allocation of resources in the economy. As a result, competition policy helps maximise consumer welfare, by ensuring that goods and services of the best possible quality are offered at lowest prices, and are available in adequate quantities. In addition, competition policy also improves business performance, by ensuring, for instance, that intermediate goods and services available at a lower cost and are of higher quality.

5.2. Many policies affect the degree of rivalry in national markets. Bearing in mind that foreign as well as domestic firms can try to supply a nation's markets, the list of policies that are elements of competition policy include:

- Trade policy;
- Industrial and investment policies;
- Certain reforms of public enterprises, including privatisation or disinvestment policy;
- Regulatory reform policy;
- Intellectual property rights (IPRs) policy;
- Consumer protection policy;
- Environment protection policy;
- Government procurement policy;
- Labour market policy; and
- Competition law (which directly targets the corporate strategies of incumbent firms).

5.3 Compared to competition law, then, competition policy is broader and more comprehensive in its scope, and includes all of the government policies that affect the competitive process in markets. For example, sector-specific policies in various areas, such as health, electricity, transport, telecommunications, financial services etc, can also affect actual or potential inter-firm rivalry.

5.4 There are a number of relationships between competition policy and other public policies. This factor has a direct bearing on the extent to which competition policy objectives can be pursued without being constrained by, or conflicting with, other public policy objectives. Although there may be instances where regulations or other state measures are, in principle, superior to promoting competition, in general the complementarities between competition policy and other state policies has received more attention over time.

5.5 Australia is a classic case in point. It has crafted a National Competition Policy (NCP), which is a set of policy reforms adopted by provincial governments throughout Australia. The objective was to encourage a better use of the country's resources through increasing competition, and thus to provide for a higher standard of living. The Australian policy consists of a number of separate reforms, which, in aggregate, seek to deliver a widespread competitive revitalisation of the national economy. The policy aims at providing a consistent approach to the dismantling of barriers to competition across state borders, as well as legislation to ensure that the same competition rules apply to as many sectors of the economy as possible, regardless of ownership.

5.6 In developing countries, there are fewer quantitative analyses regarding the benefits of adopting and implementing a competition law. However, a study of the Peruvian competition agency, INDECOPI, found that the first seven years of its operation yielded economic benefits amounting to US$120mn, which is significantly higher than the associated operating costs of US$20mn.[8] A study by the Korean Fair Trade Commission (KFTC) in 2003 found that the benefit (consumer welfare increases and income transfers) outweighed the costs (KFTC's budget) of competition law enforcement in 2000 and 2001 by 34 times[9].

5.7 Competition policy is not a trivial matter. Unfortunately, until recently, there has not been much research on competition matters in the developing world. Some studies done by CUTS under a string of 7Up[10] research and advocacy projects in Africa and Asia revealed a need for state measures to be taken against anticompetitive practices and for further analysis.

VI. Why have so Many Competition Laws been Enacted or Strengthened?

6.1 In the beginning of the 1990s, there were about 30 countries with a competition law on their statute books. At present, that number is over 100 and more nations are in the enactment queue. Why has this dramatic change come about?

6.2 In some quarters it is still contended that, taken together, low barriers to establishing a business and to foreign commerce are one of the most effective means of ensuring competition in the domestic market place and to curb abuses of market power. As a matter of theory, this argument has some appeal. However, the limits to this argument have been revealed in practice. For example,

8 See Caceres, A (2000), "Indecopi's first seven years" in Beatriz Boza, ed., *The Role of the State in Competition and IP Policy in Latin America: towards an academic audit of Indecopi*, Lima.

9 See chapter XX on Korea by Joseph Seon Hur

10 www.cuts-international.org/7Up.htm

imported goods rarely reach customers directly and well-entrenched domestic firms may have a grip over the distribution channels. This grip may also nullify the gains from liberalising trade. Competition policy/law do not generally deal with this problem!! In fact even competition law can be misused by false allegation of cross-border predatory pricing!!

6.3 There are also goods which are tradable but only within a limited geographical market, cement being a well-known example of this. Due to its bulky nature it is not economical to transport it to distant markets. As a result, even segments of a national market can be successfully monopolised or cartelised. In principle, a foreign investor could enter the market to supply cement. However, most foreign investment in this sector has been to buy incumbent firms, and not to add to the number of suppliers by establishing new greenfield facilities. This report carries a brief description of cement cartels, both punished and unpunished, in nearly every jurisdiction of the world.

6.4 There has been a marked tendency for governments to complement measures to liberalise trade and domestic commerce with stronger competition laws. Some countries have enacted these laws for the first time, while others have strengthened existing provisions, and some have also enacted new laws after scrapping old ones. There has been a growing concern in official circles and in the business communities in many countries that the benefits of economic reforms have not been fully realised. Competitiveness has not improved as much as expected and more generally private sector development has been seen as unsatisfactory. Policy-makers and others have sought explanations for this underperformance and many have concluded that having no watchdog to promote competition was a contributing factor.

6.5 The need for competition law is, therefore, driven by the desire to tackle anticompetitive practices and by the desire to make the most of reforms. Given the greater recognition of the role of the market and of the private sector in the efficient functioning of economies, competition law is likely to remain in the years to come as an important element of the package of microeconomic policies adopted by governments.

VII. Competition Laws Around the World: Some Similarities in the Midst of Considerable Diversity

7.1 Looking across the contributions to this volume it is striking how certain elements of national competition legislation and practice recur, even though there are substantial differences in prior economic development, legal systems, and other important societal characteristics. The purpose of this section is to identify some of the key areas of similarity and diversity in competition laws and enforcement practice. Over time it will be interesting to see if there is any convergence in laws and practice, perhaps to a smaller number of approaches. Alternatively, national experimentation may continue at a pace that no patterns of convergence emerge.

7.2 One striking commonality is that, by and large, the world has been moving from relatively closed and inward-looking regimes to ones which embrace, if sometimes hesitantly, globalisation and liberalisation with national economies integrating into an interdependent world economy. As a result, many countries in the world have moved from a centrally planned economy towards a market economy. In this process, they have adopted numerous macroeconomic and microeconomic reforms. Competition law is one such microeconomic reform, although as we will see the elements of competition law adopted by countries varies considerably.

Initial Conditions and Historical Antecedents

7.3 The importance of initial conditions – or history – comes through in the country chapters that follow. For example, in many countries price regulation or control was the initial precept on which to regulate markets. Nearly all countries, rich and poor, that followed, what might be called the welfarist model, started with price regulation as their competition regime. For example, Norway's first competition law was called a Price Regulation Act, 1920. The names of some more recent competition laws also contained both price and competition-related terms. In Kenya, the first competition law was named the Restrictive Trade Practices, Monopolies and Price Control Act, 1988. The first Thai law was called the Price Control and Antimonopoly Act, 1979.

7.4 For a time price controls were the principal means of market regulation in many countries. These controls were thought necessary to address problems created by those rapacious business people engaged in profiteering. This approach lost favour as countries started adopting reforms from 1985 on, slowly dropping or diluting price control laws and undertaking trade and investment liberalisation, and implementing market-supporting regulatory laws to promote competition.

7.5 This transition was particularly striking in one group of countries in the world – specifically those former members of the Soviet Bloc, where both price controls and the supply of commodities had been under the strict management of the State. After the collapse of the Iron Curtain in 1989/90, all of these countries began to embrace the market economy with varying degrees of enthusiasm. The associated reforms included introducing competition laws, which appear to have been adopted with some vengeance. Given the inherited dominance of the state in supply of goods and services, it is no wonder that these countries referred to their competition laws as anti-monopoly laws.

7.6 The competition law framework adopted in these so-called transition countries is somewhat different from other jurisdictions and sought to:

- regulate the large incumbent firms including their pricing and returns on capital;
- regulate natural monopolies, both in services and goods;

- regulate misleading advertising and deceptive marketing; and
- to promote consumer protection.

7.7 Another important influence on the former socialist East European countries is their proximity to the EU. Many such countries modelled their laws on the EC competition regime. This was for several reasons. First, many of these countries were candidate countries to join the EU, and a number of them have joined on May 01, 2004. Secondly, many of the others are still candidates for accession. Or, thirdly, due to proximity and the necessity of frequent contact with EU member states countries such as Albania, Armenia, and Macedonia, which conduct their relations with the EU under a partnership arrangement. Fourthly, influence may follow from technical and financial assistance received from the EU.

7.8 Some of what might be referred to as the partly-socialist economies, such as India (1969) or Peru (1985), adopted competition laws early, but these laws were initially used to stifle competition rather than promote it. Subsequently, the challenge for such countries has been to reform these laws and alter the underlying mindset that generated the poor outcomes of the past. That mindset viewed big-as-bad, thus their first laws were restrictive of enterprises and sought to control monopolies, often under the dubious notion that such measures would promote industrial democracy. The result, alas, was stifled innovation and competition in the market place. Moreover, these laws were misused by governments to create rigid licensing regimes, which also thwarted growth. Worse still, no one addressed the monopolistic practices of the public sector or the para-statals, which were the flavour of the day. (Typically government enterprises which functioned as corporations or departments engaged in commercial activities were exempt from the scope of the law.)

7.9 The history of competition laws goes back further than the post-World War II quasi-socialist economies mentioned above. While many believe that the US was the first country in the world to adopt a competition law in 1890, it was actually Canada who took that step in 1889. Since then, and counts do vary, between 80 and 100 other countries have enacted competition laws. *Refer Annexure-1 to see the progress of adoption of competition laws in the world by various countries over time.*

7.10 The second country in the world to adopt a competition law was the US in 1890, although in that jurisdiction it is referred to as an antitrust law. In both Canada and the US the demands of agrarian interests to address the alleged collusive behaviour of merchants, who were engaged in trading and distribution of farm goods, played an important part in the decision to enact these laws. These merchants were said to be monopsonies or were said to act as a buyers' cartel. (In the terminology of the time such collusive alliances were named as 'trusts'. Hence, the terms anti-trust or trust-busting.) The collusion would cover not only prices of commodities brought to the market but other anti-free market tactics, such as specifying what and how much each farmer will produce; who he can sell to; and what will be the terms of payment etc. The victims, namely farmers and related small businesses, were a powerful lobby, and politicians eventually reacted to their demands.

7.11 The courts have provided even earlier instances of the enforcement of judgements that, from today's perspective, have a competition law component to them. Finland's first encounter with competition enforcement began with a court judgement in 1837 and also concerned a monopsony. Timber processing mill owners were found to have colluded in dictating prices and quantities to suppliers of wood. The associated agreement among mill owners was struck down by a court after the aggrieved parties brought a suit. However, this action did not lead to the immediate formulation of a competition law. A policy debate on industrial combinations began in 1928 when the polity asked for investigations and for the control of 'rings and trusts'. Then debate went quiet until 1948, when it was raised with renewed vigour. This led to the formation of a committee, which submitted a report in 1952, which, in turn, resulted in the adoption of the first competition law in Finland, in 1958.

7.12 In France, the initial foundations of a competition law can be found in the Chapelier Law of 1791, which contained a provision that barred members of the same trade from assembling for the purpose of promoting their common interests. This could relate to either purchasing from basic producers or selling to customers. The 1810 Penal Code prohibited any concerted act to manipulate prices that could distort free competition.

Objectives of Competition Statutes

7.13 National competition laws differ in their stated objectives. Even so, it is important to appreciate that in practice the differences across jurisdictions may in fact be narrower than what appear in original statutes. Having said that, competition statutes contain four broad objectives:

- Economic efficiency (as traditionally conceived of by economists to include producer and consumer welfare)
- Consumer welfare (conceived of to include price and non-price determinants of customer satisfaction)
- Fair trading (a broad term that could be construed as not engaging in anti-competitive or restrictive business practices), and
- Preventing excessive concentrations (which may result from mergers or acquisitions).

7.14 Much can be made about the similarities and differences between these objectives. For example, the metrics associated with the first two objectives are outcome-oriented, as might be the case for the fourth objective. The third objective is act-oriented, that is, the goal to prevent certain specified corporate actions. A competition agency may, in some circumstances, reach different conclusions by using different objectives. For example, a cartel could well fall foul of a fair trading

objective. However, if the cartel was ineffective (with low overcharges and lasting a short period of time) then it may not have done much harm to consumers or distorted resource allocation much, in which case it may not be an enforcement priority under the first two objectives listed above. (The latter certainly should not be taken to imply that all cartels are ineffective and generate little harm.)

7.15 These objectives can be seen as applying at a moment in time or over a period of time. When the objectives apply to a point in time they are said to be static, e.g. static efficiency. However, a longer-term perspective of an objective is typically referred to as dynamic, e.g. dynamic efficiency. Clearly, when the effect of an actual or proposed corporate act is over a number of years, then a longer-term perspective may be warranted. Much depends here on the circumstances of the case.

7.16 Some of the sharpest disagreements in recent years in competition circles have concerned instances when a competition authority is thought to have protected competitors, rather than the process of competition (which is said to deliver economically efficient market outcomes). Such disagreements tend to occur when a longer term analysis of an actual or potential act are undertaken, where analysts may well differ as to the manner in which markets work, in particular the propensity for new products to enter a market (whether supplied by current suppliers or by new firms) in response to the exercise of market power by an incumbent firm or firms.

Reasons Given for Adopting a Competition Law

7.17 The reasons for adopting competition laws tend to vary from country to country. However, there are some similarities. For example, checking concentration of economic power, and ensuring the right to trade freely are frequently mentioned as among the reasons for enacting a competition statute.

7.18 The country chapters in this book point to the following set of reasons as to why countries adopt competition laws:

a) Concerns about high levels of concentration in significant markets, whereby production or commerce are controlled by a handful of businesses, were cited in the respective legislative histories on competition law enactment in the US, Canada, India, and Pakistan.

b) In the case of former (Soviet bloc) and current (China and Vietnam) communist countries, one prominent goal is to curb state monopolies and government policies hindering competition.

c) Many competition laws give competition authorities the right and responsibility to improve the design and implementation of other government policies. The concern here is to avoid implementation of policies that directly or indirectly generate anticompetitive outcomes. Privatisations and deregulations are prime examples of market-oriented policies that need to be designed with care.[11] In some jurisdictions, there are explicit provisions granting powers of intervention to the competition authority, while in some others, so-called advocacy provisions enable the authority to submit opinions to other government bodies.

d) Sometimes peer effects are important. For example, Pakistan passed its competition law in 1970 after it realised that high levels of concentration in its economy (where 22 families controlled 66 percent of the industrial assets and 87 percent of the banking and insurance assets). Pakistan's step followed that of India, whose legislature in 1969 enacted a competition law after a heavy concentration of domestic assets and wealth was reported by a government committee. Namibia, formerly a part of South Africa, followed the latter's competition law. Likewise, Papua New Guinea followed the Australian model. Albania has tended to follow the EC model even though it is not a EU member.

e) Conditionality from the major development institutions is said to be an important reason why some African countries adopted competition laws. Adoption of such laws was part of the structural adjustment package that the International Monetary Fund (IMF) and the World Bank insisted these countries implement.

f) Another motive for adopting competition laws arises from commitments made under free trade agreements (FTAs). Guatemala, Singapore, and Jordan each had to adopt a competition law because of commitments made in FTAs with the US. A contrary example is that of Sri Lanka, which has diluted its law by removing the provisions on M&As under pressure from the US during negotiations on their respective FTA. Norway, Iceland, and Switzerland are western European nations that are not members of the EU, but they have aligned their laws with the EC model as part of their commitments under the European Economic Area (EEA) agreement.

g) Another (optimistic) explanation for the adoption of competition laws is the realisation that it is good public policy. If markets are to be liberalised and state intervention reduced, then complementary measures are needed to ensure that any harm done by poorly designed and implemented state regulations is not replaced by private anti-competitive practices. Some have argued that India's recent reform of its competition

11 India is a typical case. While the telecom sector was liberalised so allowing private players in the sector, no telecom regulator was introduced. Moreover, as the competition law was also outdated, there was no agency to oversee the privatisation efforts through a competition lens. In contrast, in Chile, the competition authority is empowered to oversee privatisation so that it does not lead to monopolistic situations. Sri Lanka is another case where these matters were handled badly. Here reforms began in 1976, but ended up turning public monopolies into private monopolies. Malawi also a similar situation, where for example, the petroleum control corporation was privatised and it was taken over by the petroleum importing company, which thus maintains a monopoly.

law reflected its own realisation of the need to improve matters, rather than any pressure from the outside.

Opposition to the Adoption and Enforcement of Competition Laws

7.19 It would be wrong to think that there has been no opposition to the adoption and enforcement of competition laws. After all, the firms targeted by competition authorities hardly welcome such intervention. These firms, and other opponents of competition laws, have made a number of arguments against competition law and here we will briefly review some of the highest profile claims made in this regard.

7.20 One contention is that many countries are too small or their markets too special that they do not need a competition law. It has been claimed that smaller domestic firms would be forced out of the market if they faced competition. Such sentiments have been expressed in the Caribbean and in Jordan, in the latter case right up until a competition law was adopted in 2004.

7.21 A distinct argument is that when an economy is dominated by the informal sector market forces ensure competition. Moreover, it is said that such competition is extremely difficult to police in the informal sector. Consequently, it is claimed that a formal competition law is unnecessary and ineffective.

7.22 Another reason extended by some countries is that they are at a very nascent stage of adopting new regulatory laws and that, as resources are limited, these need to be deployed towards more pressing priorities. Tajikistan is one such country where 80 percent of the people live below the poverty line. Even so, Tajikistan adopted a law in 1993, scrapped it, and adopted another one in 2000. However, the policy makers there believe that the promotion of investment and business has a greater priority than overseeing corporate conduct through competition law.

7.23 In many countries business has opposed the adoption and implementation of a competition law for several reasons, perhaps the most important one being that it could become another millstone around their necks. This perspective is reflected in some of the country-specific chapters in this book and is fairly common in many developing countries. For example, in Egypt, Malawi, and Mauritius business opposition resulted in several drafts of the competition law being made before the law was enacted. Having failed to prevent the adoption of a law, some businesses then seek to frustrate the implementation of the law. At the timing of writing, a competition law has passed in these three countries, but the implementation has yet to happen. Thailand is a typical example, where the opponents of competition law managed to take seats on the competition authority and thus ensured that it does not function properly. In Taiwan, there was a similar situation but better sense prevailed over the government after lobbying by consumer groups and academics.

7.24 Some of the opposition to the adoption of competition law has official sources as certain government officials seek to preserve their powers and privileges in policy areas influenced by the successful implementation of competition law and policy. It would be a mistake, therefore, to think that the private sector is the only opponent of competition law. The following discussion on the relationships between competition law and industrial policy, sectoral regulation, and IPRs points to the ways in which certain official interests can seek to frustrate the enactment and/or the implementation of competition law.

The Relationship between Competition Law and other Important Policies

7.25 In recent years, industrial policy has made something of a comeback. The reasons for this revival are unclear but it may have something to do with dissatisfaction with the supply side performance of economies during the post-1985 era of reforms. With World Trade Organisation (WTO) disciplines preventing much discrimination against foreign firms, governments have come under pressure from national business interests (or have on their own volition decided) to take domestic measures to foster corporate performance.

7.26 A related development has been the renewed interest in national champions, especially in Europe. These changes can have direct implications for the design of competition law and its enforcement. One concern expressed in the Malaysian debate over whether to adopt a competition law is that such legislation could prevent local firms from growing into bigger firms and, so the argument goes, enabling them to compete effectively with much larger foreign companies. In Germany, two very large public utility firms (Eon and Ruhrgas) were allowed to merge after a minister overrode the veto of this transaction by the national competition authority. More recently, a government-sponsored merger of two energy companies was announced in France, in late February 2006.

7.27 In other countries concerns about firm size manifest themselves in different ways. For example, in India the new competition law has very high thresholds before the M&A provisions can be attracted. Another alternative is to exempt small and medium-sized enterprises (SMEs) entirely.

7.28 In the EU, sometimes, industrial policy manifests itself in terms of state aids to firms or to sectors. In its attempt to level the so-called playing field in Europe, the EC has deployed far reaching powers to investigate and potentially sanction member states that give competition-distorting state aid. Disputes over these matters tend to be very acrimonious, with national governments and the firms involved often pleading special circumstances, etc. As further reforms in Europe raise competitive pressures, the demands from some European firms for further state support are likely to intensify. Ensuring that those demands are only met in appropriate circumstances is one of the most important contributions of competition law.

7.29 Looking across the country chapters in this report there is a diverse set of relationships between competition authorities and sectoral regulators. Many of the regulated sectors are critical for the development prospects of the poor and they can also account for a sizeable share of national economies. Putting in place the right policy framework in these sectors is especially important and ensuring that competition principles are a significant consideration in policymaking in these sectors is vital.

7.30 It has been forcefully argued that having a competition policy framework in place is a pre-requisite to successful deregulation and privatisation. Unfortunately, exactly the opposite has tended to occur in much of the developing and industrialised world. The Philippines, Malaysia, Hong Kong, and Singapore (until recently) all regulated important sectors directly and without a competition law in place. Worse, some countries, such as Sri Lanka, established regulatory reforms back in late 1970s and early 1980s without a serious competition law regime and then never vigorously applied the regulatory framework.

7.31 In most of the country chapters in this volume the competition-related regulatory structures in place are described. They vary markedly in the autonomy or independence of the sectoral regulators and in their relationship to the competition authority (if one exists). The latter has often proved to be a contentious matter, but some effective solutions have been found. For example, in the UK there is a concurrence party (coordinating body) of the competition agency and the sectoral regulators, which decide on a case-by-case basis which is the best agency to deal with a particular matter. Furthermore, the UK's Competition Appellate Tribunal hears appeals against competition authority's decisions as well as those emanating from sectoral regulators' orders. In France, there is a clear cut division of responsibilities embedded in both the competition law and the regulatory laws. Here the competition authority deals with all behavioural issues, while the regulator deals with structural issues, and as a matter of law they have to consult each other. This model appears to be the EU's prescription to other member states, as we observe in this report. Similar provisions exist in Japan, Brazil, Portugal, Jordan, Kyrgystan, and Uzbekistan. There is yet another model where the interface has been managed well. In Australia, New Zealand and Papua New Guinea, the competition authority also deals with sectoral regulation. The institutional and legal configurations generate clarity which can help firms plan effectively and prevent forum shopping. In many countries, such as Kenya, Georgia, India, unfortunately these matters have not been clarified and a certain amount of confusion prevails.

7.32 Another sensitive matter concerns the potential overlap between competition law and IPR regimes. Perhaps surprisingly most competition laws allow exceptions for IPRs, often because they are seen as legitimate monopolies. (Zimbabwe is an exception is this regard, but no cases have been brought to date.) Yet, as the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement makes clear, nations can take action against the business conduct of an IPR holder if it is anticompetitive. In addition, some jurisdictions' bodies of case law, or the IPR law itself, may circumscribe the manner in which the market power conferred by IPRs is used.

Institutional Arrangements for the Implementation of Competition Law

7.33 In addition to the varied inter-relationships between competition authorities and sectoral regulators, countries have adopted a diverse set of institutional arrangements for the enforcement of competition law proper. In large part this reflects the fact that there are number of different functions that must be fulfilled in enforcing competition law and that it may not be efficient, expedient, or indeed appropriate to combine them in one authority. As a result, many countries have two or more competition agencies including the US, Brazil, Portugal, UK, and Malta. Moreover, in many cases, an executive agency can investigate and prosecute a competition-related matter but it is up to the courts to decide whether or not any laws were broken. In others the competition agency can make a determination which can be appealed.

7.34 Within countries, there can be sub-national competition laws and agencies, as in the US and Australia. Another alternative is to have regional offices of the central competition authority to oversee matters that take place locally. Such arrangements are found in Russia, Spain, Uzbekistan, and Chile.

7.35 The status within government accorded to the officials, and in particular the head, of the competition authority varies across countries. Korea's case is unusual and in many respects exceptional as that nation's competition law confers cabinet minister's status on the head of the KFTC. The arrangements in Russia and Czech Republic were also similar but that has changed now. In most other jurisdictions, however, the head of the competition authority has sub-ministerial status. In some countries they are given the status of an apex court judge which can be as good as that of a minister. Although making the competition authority head attend the cabinet, as done in Korea, may also run the risk that the competition authority may come under government or political influence. *Refer Annexure-2 for information on the existing competition authorities in various countries.*

7.36 Many countries also have an advisory body or committee to look into structural matters and to advise the government and/or the competition authority. Such advisory bodies can be found in Germany, Austria, Jordan, and Mauritius. Similarly, Australia has a National Competition Council, though it has substantially more powers than the typical advisory body. Zambia has a hybrid Competition Commission, which has part-time members representing major stakeholders and where the executive authority lies with the Executive Director. Egypt and Thailand have a similar approach to Zambia, where the

competition agency is composed of a variety of stakeholders. Albeit, in both Thailand and Egypt, the agency has a higher representation of business compared to other stakeholder groups.

7.37 Another important difference across jurisdictions is whether non-competition law functions are "bundled" with antitrust functions in the same agency. For example, the US Federal Trade Commission combines both consumer protection and antitrust functions. Likewise, Peru's INDECOPI combines consumer protection, IPRs, fair trade, and competition law enforcement under the roof of one agency. The KFTC combines competition law-related functions with powers to restructure the large industrial conglomerates (the *chaebol*). Much ink has been spilt on the wisdom of these combinations of powers, with the benefits of economies of scale and reputational advantages being weighed against the costs of forgone specialisation and a lack of clarity about the agency's true priorities.

7.38 Jurisdictions vary in the extent to which there is *de jure* or *de facto* ministerial overrides of the decisions of the competition authority. Obviously, when a competition agency is part of a government ministry and the ministers are responsible to the legislature for the decisions taken in their domain, then overrides and higher reviews are almost a matter of course. However, under some nations' laws even an independent competition authority can have their decisions overturned in specified circumstances. This is not just a logical possibility, it has happened in the past (recall the German energy merger mentioned earlier) and may well happen in the future. Even when a minister has no *de jure* rights, the head of the competition agency may be swayed by the considerations of ministers, especially if the budget, powers, and even the future of the competition agency are in doubt. Influence can work in subtle and publicly undisclosed ways.

Cross-border Competition Matters

7.39 Another challenge relates to firm conduct whose effects spill over national borders, potentially affecting firms and consumers in another jurisdiction. In an attempt to cope with this problem, many countries assert extra territorial application of their laws, that is, they have the right to examine, and potentially sanction, practices that do not take place within their borders but which have an impact on their markets. The approach is associated with the 'effects doctrine'. For example, the German competition authority reviewed the merger of Gillette and Wilkinson even though neither company had a manufacturing presence in Germany. The right to examine actual or proposed corporate acts abroad does not translate into the right to cooperation from competition agencies abroad. In effect, this hamstrings competition authorities in developing countries who may not have the resources, information, or clout necessary to investigate acts undertaken abroad.

7.40 There are many examples where a merger, that took place in an industrialised country, effectively resulted in the combination of their subsidiaries in a developing country. In such a situation, the competition authority in a poor country often has little choice but to allow the consummation. In a few cases some kind of undertaking has been obtained from the merging parties. For example, when the two tea giants Brooke Bond and Lipton merged their subsidiaries in Pakistan, they were allowed to merge on the condition that they would plant tea gardens in Pakistan. In Zimbabwe, when the local subsidiaries of BAT and Rothmans combined following a parental merger, the competition authority was able to force them to sell one factory to a local entrepreneur to manufacture cigarettes. Otherwise, the new merged company was planning to shut down and strip one of their two factories, as it was felt that there was no need for two factories in the newly merged entity. In South Africa, when the competition authority was faced with similar situation in mergers of leading pharmaceutical companies, they ordered a divestiture of some product lines which it felt otherwise would have led to a dominant position.

7.41 There are two reasons why, in most cases, developing country competition authorities have to accept international M&As. First, they may not have the 'effects doctrine' or extra territorial jurisdiction in their laws to challenge the parental merger, in which case one solution is to amend their competition laws. When Glaxo Wellcome merged with Smith Kline Beecham worldwide, the Sri Lankan competition authority did not challenge the merger of their local subsidiaries. The reason given by the competition authority was that their law did not provide for an 'effects doctrine', hence the merger was beyond their reach. Secondly, due to a lack of analytical and technical capacity many competition authorities would not be able to accurately analyse the impact of the merger, to check that there were no *prima facie* competition concerns. This was seen, for example, in Pakistan when the investigation into the merger of Glaxo Laboratories Pakistan Limited and Wellcome Pakistan Limited was abandoned midway as they did not have the necessary capacity to proceed.

7.42 From time to time, mega-mergers have proved contentious. The Boeing-McDonnell Douglas merger and the proposed GE-Honeywell mergers are cases in point. In these two US-based mergers, the US had no problem, but the EU authorities had some problems Arguably, the associated disagreements have led to greater attempts at cooperation and convergence across the Atlantic. Plus, concerns about the possibility of inconsistent rulings in merger, and other competition cases, is one of the reasons given for establishing the ICN. This Network is for five years only and is probably too soon to judge its capacity to encourage convergence in competition standards around the world. Over time it will be interesting to examine the extent to which convergence extends beyond industrialised

economies, many of whose competition agencies, were founder members of the ICN, to developing countries. Another important matter to watch is whether cooperation spreads markedly beyond the informal and from the merger area into investigations of cartels and abuse of dominance.

VIII. Concluding Remarks

8.1 Although many jurisdictions have enacted a competition law, and more claim to promote competition more broadly, the implementation and effectiveness of such initiatives across the globe has been uneven. This may reflect a number of factors: the initial design of the law, institutional considerations, implementation decisions, resources available, and the strength of supporters and opponents of competition legislation and promoting competition. The country- and region-specific chapters in this volume point to considerable diversity. In essence, the world is undertaking a number of concurrent experiments in competition law and its enforcement and in competition policy. The outcomes of these ongoing experiments, which we hope will be documented in further editions of this volume (both as hard copy and a website version), will provide fertile ground for cross-country learning and technical support.

8.2. Such experimentation may reveal better practices in institutional design (for example, identifying what forms of independence really matter for a competition authority), the factors determining the optimal balance of efforts between competition law enforcement and advocacy, the need (if any) for further formal initiatives to promote effective cooperation between competition agencies, and the appropriate objectives for competition law. Much still remains to be learned from one another.

8.3 The spread of competition law around the globe appears to have reached the point of no return. Barring a major shift away from using markets as the principal means to allocate resources in societies, competition laws are probably here to stay. We hope that this marks the beginning of the end of debates about whether to have a competition law, allowing stakeholders to focus on discussions on how to tailor competition law and associated enforcement to their own country's needs. This is not to say that one should be complacent about the opponents to competition law or complacent about the use of competition law. Merely, that the debate looks like it will continue to shift from 'whether' to 'how.'