VII COMPETITION POLICY IN DEVELOPING COUNTRIES: AN ASIA-PACIFIC PERSPECTIVE

by Pradeep S. Mehta[1]

Introduction

The diversity of the Asian and Pacific region cannot be ignored in discussions on competition policy

No other region in the world has so much diversity as the Asia-Pacific region. It is home to a few of the most developed countries in the world, like Japan and Australia, but it also houses many least developed countries, like the Lao People's Democratic Republic and Nepal. The newly industrialized countries as well as some of the rich oil-exporting countries are also part of this region. Yet out of the 1.2 billion poor people of the world who live on less than a dollar a day, about 800 million live in this region alone. When we talk about competition policy in the region or, for that matter, any other policy, this diversity cannot be ignored. Further, no policy response can be designed without looking at its effects on the 800 million poor. Competition policy is no exception.

The World Trade Organization (WTO) organized a Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System in 2000 at Phuket, Thailand, which was attended by representatives of a large number of Asian developing countries. The purpose of the Workshop was to examine progress in the enactment and enforcement of a competition regime in the countries of the region, including regional and international dimensions. At this meeting, the most important question raised was how a competitive environment could serve to enhance rather than impair economic development. There was a good degree of agreement that industrial policy, if it was to be useful, had to be combined with competition policy even if the mix between the two policies needed to vary with the level of economic development.

Competition policy aims to increase the efficiency and dynamism of the economy

The main objective of competition policy and law is to preserve and promote competition as a means of ensuring the efficient allocation of resources in an economy. This should result in lower prices and adequate supplies for consumers and, it is hoped, faster growth and a more equitable distribution of income. By lowering barriers to the entry of new firms into an industry, competition policy helps to create an enabling environment for entrepreneurial development, an essential prerequisite for a vibrant economy (OECD and Khemani 1998).

[1] Consumer Unity and Trust Society (CUTS) Centre for International Trade, Economics and Environment, Jaipur, India. Research assistance provided by Nitya Nanda of CUTS.

Competition policy also promotes good governance in the corporate sector as well as in government by diminishing the opportunities for rent-seeking behaviour and the corruption that often accompanies it. Competition law and regulatory tools are invoked mainly to take care of firm behaviour and market failures. Governments often intervene when markets fail but in the absence of a clearly defined competition policy and regulatory mechanisms, the intervention can be arbitrary and serve vested interests rather than the poor.

Increased liberalization and deregulation make the need for competition policy urgent

At present, several developing countries in the region are going through a phase of privatization and deregulation. Many State-owned enterprises affected by these policies currently enjoy monopoly power in the market. In such a situation the absence of a competition policy and an adequate regulatory mechanism will simply mean the transfer of monopoly power from the public to the private sector. This is likely to harm the interests of consumers, especially the poor.

International anti-competitive practices can also be harmful to small and developing countries without effective competition laws. The available evidence suggests that international cartels of private firms that engage in restrictive practices designed to limit competition in international trade do exist. These arrangements can be quite durable and detrimental to economic development (Levenstein and Suslow 2001). Cross-border mergers and acquisitions that lead to market dominance and the restrictive practices that some transnational corporations engage in further necessitate competition legislation. Discussions have been taking place under WTO auspices on the interaction between trade and competition policy, an area of great interest to the highly trade-dependent economies of the Asian and Pacific region.

This paper examines the contours of a competition law, with a brief consideration of regulatory policies. It concludes with a discussion on how a healthy and dynamic competition culture can be fostered in the countries of the region.

Nature of competition law

Some of the developing countries in the region enacted a competition law many years ago …

Of the countries in the region, some twenty have enacted a competition law so far (see appendix table). All the developed countries in the region – Australia, New Zealand, Japan and Israel – have quite a long history of such a regime. Some developing countries, namely, India, Pakistan, Sri Lanka and Lebanon, also have a reasonably long history of competition policy. Interestingly, the so-called newly industrialized countries (NICs) did not develop with a competition law in place – the Republic of Korea enacted such a law in 1980 and Taiwan Province of China in 1991, but Hong Kong, China, and Singapore do not as yet have a comprehensive competition law.

… but implementation has been weak

On the face of it, there seems to be no obvious connection between the existence of competition legislation and rapid economic growth. However, it may be rather naive to say that the NICs did not have a competition policy just because they did not have a competition law. There is evidence that these countries used various policy measures to promote competition in the

marketplace, reward efficient firms and punish inefficient ones, which is what a properly formulated competition policy does (Khemani and Dutz 1996). Further, they were able to ensure competition through industrial and trade policies. Countries like India, Pakistan and Sri Lanka, however, never implemented their competition laws in an appropriate manner. Enforcement either lacked the necessary vigour or was carried out in a distorted manner. There was undue government intervention on many occasions, especially in Pakistan. In India, the law was made ineffective by manning the body charged with enforcement with inadequately qualified or experienced staff who were also too few in number.

Evidence may not be overwhelming, but indications suggest that competition policy and law are likely to be beneficial to people even in this region (UNCTAD 1997). Furthermore, in this age of globalization, where many anti-competitive practices have a cross-border origin, countries ignore the importance of competition policy and law at their own peril.

Every country needs to tailor its competition law to its own specific set of circumstances

This is not to suggest that "one size fits all" and that countries should adopt either the model used by a developed country or neighbour or one of the models drafted by an international body such as that formulated by UNCTAD. On the contrary, every country needs to tailor its competition law to its own specific set of needs and conditions. The most important factor is that the law should be realistic and implementable. Introducing a law that cannot be properly implemented is not only futile but may be counterproductive. If the competition authority is seen as being incapable of discharging its role, then people may lose faith in the effectiveness of competition law as a whole.

Modern competition law requires giving a great deal of discretion to the competition authority

While the public in developing countries may appreciate the role of competition law in checking anti-competitive practices, people are also apprehensive that a competition authority vested with enormous discretionary power may not function in a predictable and transparent manner. Modern competition law and the authority that enforces it have to be discretionary in their approach. Removing discretionary power through more per se provisions could be even worse (Department of Company Affairs, Government of India 2000).[2]

Exceptions and exemptions to the law should be clearly defined and given with caution

Provisions in the law should be appropriate as well as realistic. There is scope for exceptions and exemptions in the competition law and countries should make careful use of them. If, for example, the national development strategy of a country includes policies to promote small and medium-sized enterprises, disadvantaged regions or groups, then there should be suitable exemptions. However, exemptions should be properly defined and included with caution. At the stage when legislation is being drafted and debated, many interest groups may lobby for exemptions from the law. It is more than likely that these attempts will not be based on any sound arguments of economic

[2] The per se rule is a judicial principle that an act or practice violates legal provisions simply if the act or practice occurs regardless of whether it is harmful or not. In contrast, the "rule of reason" refers to the judicial doctrine that whether an act or practice violates legal provisions is determined on the basis of its impact and/or other factors.

efficiency or consumer welfare but simply to prolong the protection of inefficient businesses from competition.

Monitoring the competition authority may require the creation of an oversight body

Owing to the existing complexities and multiplicity of objectives, developing countries in the region need to maintain exemptions and exceptions. This, coupled with a "rule of reason" approach, would give the competition authority a great deal of discretion. Thus, to ensure that the competition authority does not get overzealous or underperform, guidelines, which should be subject to periodic review by the legislature, need to be properly formulated. Empowering the Government to state policy guidelines from time to time, as has been proposed in the new draft Competition Bill in India, may invite undue government intervention. The Australian example, where a council at the national level comprising different stakeholders deals with the overall policy framework on competition policy and law, is instructive in this regard.

There is a case for separating investigative and judicial functions in competition cases

Another way to avoid overzealous or inadequate implementation of competition law would be to keep investigative and adjudicatory functions separate. Experiences in other jurisdictions, including Europe in recent times, have shown that combining the two functions enables a competition authority to act as judge, jury and executioner. This absolute power strips the system of internal checks and balances, thus leaving scope for its misuse.

Utility regulatory policies

There is no guarantee that good legislation will meet its aims. Creating a competition culture depends on effective implementation and a supportive policy environment. As mentioned above, competition law is just one element of competition policy. The effectiveness of the competition law will depend on the extent to which it is coordinated with other policies. It is beyond the scope of this paper to discuss all of them, but a brief discussion on regulatory policy may not be out of place.

The boundaries between the competition authority and sectoral regulators are sometimes blurred

The competition authority has the most direct overlap with regulators governing key utility sectors that usually have the mandate to create, promote and protect competition in these industries. Sectoral regulators are established where there is a natural monopoly or typically the possibility of market failure is high. The idea is to regulate firms in these industries in such a way that even when a competitive market cannot be ensured, the outcome in terms of prices and output will be nearly the same as if the market had been competitive. The boundaries between the roles of the sectoral regulators and the competition authority are difficult to define and in many countries the issue remains unresolved.

Anti-competitive practices in a regulated industry should fall within the purview of the competition authority

Ideally, the sectoral regulators should concentrate on tariffs and the setting of performance standards. The role of the competition authority would be to deal with the abuse of dominance and other anti-competitive practices when they arise. In any case, the competition authority should have the upper hand in competition matters, especially in smaller economies, as sectoral regulators are more exposed to groups of business people in their industries and hence more prone to regulatory capture.

International dimensions of competition policy

As trade and investment regimes are liberalized in most developing countries, the inflow of foreign products and companies creates new challenges for competition policy. While Governments regulate domestic markets through various measures, including a competition regime, there is little regulation of international markets. Added to this complexity, very few people in developed and developing countries appreciate the international dimension of competition policy and its integral relationship with trade and consumer welfare, and national economic development.

A national competition regime is only a first step in dealing adequately with cross-border competition issues

In order to face these challenges, countries require, in the first place, a national competition regime, backed by adequate resources. This would allow them to investigate and prosecute anti-competitive behaviour by transnational corporations operating in the domestic economy and to regulate them as appropriate. However, developing country competition authorities, in general, do not have the resources or the experience to tackle international competition challenges. Cartel cases are notoriously difficult to prove, even for the American and European authorities dealing with companies based in their territories. It will therefore be almost impossible for a developing country to carry out the tedious casework involved and conduct the necessary investigations leading to prosecution.

Cooperation agreements in the competition arena are best pursued in a multilateral framework

One way is to have cooperation agreements with developed countries. This can best be done in a multilateral framework, rather than on a bilateral basis, because of the sheer number of bilateral agreements that would be needed. Proposals for a multilateral framework, where cooperation is a major issue, are currently under discussion at UNCTAD and WTO. Several other initiatives are also being pursued in various forums, to build capacity in developing countries and enable discussions among lawyers dealing with competition issues in various countries.[3] High-level policy dialogue to develop mutual understanding, identification of "best practices" and provision of informal advice and feedback on the entire range of competition policy issues are other aims.

Within the Asia-Pacific region, an initiative has been made under APEC

Various regional initiatives are also in place. In the Asian and Pacific region, a working group on competition policy and deregulation was set up under Asia-Pacific Economic Cooperation (APEC) to discuss competition policy and issues of deregulation. APEC's most important and substantive output in the competition policy field has been the APEC Principles to Enhance Competition and Regulatory Reform, adopted at a ministerial meeting in 1999.

[3] These include the International Bar Association's Global Forum for Competition and Trade Policy, the OECD Global Forum on Competition and the International Competition Network.

WTO seems to be the most active forum tackling international competition policy issues

There is a growing consensus that there is a case for a multilateral competition framework, but there is by no means any agreement on what its scope and contours should be and on where the body to enforce it should be situated. UNCTAD has a long history of working on competition policy and could be a non-controversial forum for anchoring a multilateral competition agreement. However, it has very little background in negotiating international issues, except for commodity agreements, and it has no enforcement mechanism. The issues pertaining to competition were included in the Uruguay Round negotiations, although no separate agreement on trade and competition policy was negotiated. Three WTO Agreements contain provisions related to competition policy, namely Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS) and Trade-related Aspects of Intellectual Property Rights (TRIPs). The Ministerial Declaration signed at Doha refers to further work to be undertaken by the Working Group on the Interaction between Trade and Competition Policy related to core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hard-core cartels. It also includes the development of flexible cooperation modalities and technical cooperation. Five years after its introduction in the WTO arena through the Singapore Ministerial Declaration in 1996, members have finally recognized the case for addressing these competition policy issues and there are possibilities that negotiations may be launched after the Fifth Ministerial Meeting, to be held in November 2003.

Creating a competition culture

Competition law is subject to appropriate adaptation depending on local needs, aspirations and socio-economic, cultural and legal conditions. Traditionally, competition law and the competition authorities deal with issues that fall under three broad headings:

- Control of monopoly or abuse of dominance;
- Restrictive trade practices and other anti-competitive agreements;
- Regulation of combinations such as mergers, acquisitions and takeovers.

It can be argued that competition advocacy should be given equal weight with any of the three traditional functions.

Competition advocacy has not received as much attention as it warrants

A healthy competition culture is the hallmark of a good competition regime and competition advocacy is a basic prerequisite for this. The lacklustre performance of competition policy and law in many countries in the Asian and Pacific region is primarily due to the failure to recognize the importance of competition advocacy. A properly designed advocacy programme plays an important role in discouraging and sometimes eliminating anti-competitive practices. As prevention is always better than cure, advocacy not only reduces the incidence of anti-competitive practices but also substantially reduces the need for enforcement action, thus saving costs on both counts. In this regard it is extremely important that civil society,

especially consumer organizations, be closely involved in the advocacy efforts of the competition authorities. This will give not only better outreach but also acceptability as there is a danger otherwise that the efforts of the competition authorities may be taken as a mere publicity drive.

An active consumer movement could play an important role in making competition laws effective

An active consumer movement makes a significant difference to the effectiveness of competition law in other ways also. Empowered consumers and representative organizations will bring anti-competitive practices, including abuse of dominance and collusion, to the attention of the competition authority. They will also act as a countervailing power to businesses to ensure successful implementation of competition law. Thus, competition law should also include the right of consumer organizations to bring complaints to the competition authority. This would also help to deal with resource problems, where the competition authority's budget limits investigative capacity. Consumers also need to be included in the consultative process for policy questions. Putting the consumer at the heart of the legislation makes it more likely that the benefits of competition policy and law will be shared widely (CUTS 2002).

Competition advocacy may require developing a consumer movement that would benefit other areas of development policy

Many consumers are not aware of the relevance of competition policy, and consumer organizations have an important role in demonstrating the importance of competition policy by linking it to everyday experiences with which people are familiar. However, the consumer movement is not yet well developed in many countries of the region. That is a concomitant task for building a healthy competition culture. One important spin-off of developing a consumer movement is its impact on the whole economic agenda of the country: consumers generally support reforms so as to get better goods and services at lower prices and good governance to ensure that the systems work effectively.

A countervailing force to business lobbying could come from the increased awareness of consumers

Unfortunately, firms are better organized and financed, and often act as a powerful constituency against competition policies and laws, which directly affect their interests. In fact in many countries of the region, such as Thailand or Indonesia, enforcement of a competition law would meet with strong pressure from the business lobby. In India the business lobby has worked hard against the enactment of a new, modern competition law. Thus, a strong and vibrant consumer movement is an important factor in the success of legislation on competition. It can also check undue interference on the part of the Government in the affairs of competition and regulatory authorities, which otherwise is so prevalent in the region.

Appendix table. Enactment of competition law in Asia-Pacific countries

	Year of enactment
Australia	1906
New Zealand	1908
Japan	1947
Israel	1957
Lebanon	1967
India	1969
Pakistan	1970
Thailand	1979
Republic of Korea	1980
Sri Lanka	1987
Cyprus	1989
Kazakhstan	1991
Taiwan Province of China	1991
Fiji	1992
Uzbekistan	1992
China	1993
Tajikistan	1993
Kyrgyzstan	1994
Turkey	1994
Georgia	1996
Indonesia	1999
Azerbaijan	In Process
Jordan	In Process
Malaysia	In Process
Mongolia	In Process
Nepal	In Process
Philippines	In Process
Viet Nam	In Process
Turkmenistan	In Process

***Note*:** Prepared by CUTS from various sources. Some other countries may also be in the process of enacting a competition law and may have been inadvertently omitted here.

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