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Contents

Preface v

Chapter 1: The Role of Competition Policy in Structural Reform and Creating Competition Culture

Introduction 1

1. The importance of competition policy in structural reform 1
   1.1 What is competition and why is it important to an economy?..... 1
   1.2 What is competition policy? 2
   1.3 Role of competition policy in structural reform..... 2

2. Promoting competition policy in APEC 4
   2.1 Early discussion on competition policy in APEC..... 4
   2.2 Competition policy since LAISR..... 5

3. Important elements of an effective competition policy..... 7
   3.1 The attributes necessary for an effective competition regime 7
   3.2 Important elements for successful introduction of competition policy 8
   3.3 Important elements for promoting competition policy and enforcement of competition law 9
   3.4 Important elements of Competition Law – provisions from competition laws of APEC economies..... 10

4. Possible future work 12

Conclusion 13

Bibliography 15

Annex 1-1 Characteristics of substantial provisions in competition laws in APEC economies..... 17

Annex 1-2 Characteristics of procedural provisions in competition laws In APEC economies 19

Chapter 2: Lessons from the Introduction and Implementation of Competition Policy in Economies at Different Stages of Development: the Case of APEC Economies

1. Introduction 21

2. The introduction of competition policy in the APEC economies 22

3. Competition law within the APEC region 24
   3.1 The goals of competition law 24
   3.2 Substantial provisions analysis..... 26
   3.3 Enforcement institutions and processes 31

4. Variables that influence effectiveness of competition policy in APEC economies..... 32
   4.1. Classification of economies according with development indicators..... 32
   4.2 Correlations between competition policy and economic-development-related-variables within the APEC-Region 33

5. Conclusions 39

References 41

Annex 2-1 Relevant bibliography on competition policy and development 44

Annex 2-2 Statistics and indicators.....46

Chapter 3: Overview - Competition Policy in APEC Economies

1. Introduction 47

2. Competition policy in APEC economies 47
   2.1 Key Features in Competition Policy.....47
   2.2 Developments supporting important elements of an effective competition policy regime.....47
      Independence.....48
      Transparency.....48
      Accountability 48
      Awareness.....48
      Enforcement 49
      Legal framework.....49
   2.3 Future challenges and lessons learned in creating an effective competition policy regime.....49

Annex 3-1 Economy summaries.....51

Annex 3-2 Individual economy reports on competition policy.....57
- Australia 59
- Canada 65
- Chile.....71
- Hong Kong, China 79
- Indonesia 81
- Japan 85
- Republic of Korea 89
- Mexico.....93
- New Zealand.....97
- Peru 103
- Philippines.....109
- Singapore.....113
- Chinese Taipei 117
- Thailand 123
- United States.....127
- Viet Nam 133

Abbreviations and Acronyms 137

Preface

Structural reform is vital to supporting sustainable economic growth and improved citizen wellbeing within APEC economies and the Asia-Pacific region more broadly.

The first ever APEC ministerial meeting wholly dedicated to structural reform was held in Melbourne from 3-5 August 2008. Ministers underlined the benefits of structural reform and reaffirmed their commitment to progressing the five priority work streams identified in the 2004 *APEC Leaders' Agenda to Implement Structural Reform Toward 2010* (LAISR 2010) —competition policy, regulatory reform, public sector governance, corporate governance, and strengthening economic and legal infrastructure.

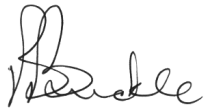
The annual *APEC Economic Policy Report (AEPR)* published by the APEC Economic Committee (EC) is an important resource for Ministers and officials from APEC economies on key economic issues. This year's report focuses on a specific theme of the LAISR agenda—*competition policy*. Competition policy is an important element of achieving structural reform. A strong competition policy and legal framework helps to drive greater productivity, efficiency, product quality and diversity. Consumers benefit from the wider choice and lower price that competition brings. Ultimately, enhanced competition contributes to increased macroeconomic stability, greater productivity and higher economic growth for the economy as a whole.

This year's *APEC Economic Policy Report* contains three chapters. The first chapter focuses on the importance of competition policy in structural reform and outlines the key elements of an effective competition policy regime. It concludes by suggesting possible areas of future work to help fulfil the objectives of the LAISR forward work program on competition policy.

The second chapter traces the implementation of competition policy in APEC economies at different stages of development. It finds that all 21 APEC economies have some form of competition policy in place, although the objectives of the policies may differ from one economy to another depending on their respective level of development.

The third chapter reviews individual economies' domestic competition policies, laws and initiatives and identifies key priorities and challenges in future years. It has sought to identify the key similarities and differences in the way in which economies approach competition policy.

The *APEC Economic Policy Report* is made possible through the collaborative effort of all member economies, the APEC Secretariat and the Economic Committee Chair's Office. I would like to extend a special thanks to Japan for contributing the first chapter, Peru for drafting the second and third chapters, and member economies that submitted individual reports on their competition policy and legal frameworks.



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Wellington, New Zealand, September 2007

Chapter 1

The Role of Competition Policy in Structural Reform and Creating Competition Culture

INTRODUCTION

In 2005, the APEC leaders adopted the *Leaders' Agenda to Implement Structural Reform toward 2010 (LAISR 2010),* explicitly acknowledging the importance of structural reform as a means of achieving economic growth and prosperity and to build on APEC's achievements thus far through trade and investment liberalization in the region. The LAISR 2010 aims to promote five policy priority areas, namely, competition policy, regulatory reform, public sector governance corporate governance and strengthening economic and legal infrastructure.

The Economic Committee (EC) has a mandate to promote structural reform within APEC. The EC has in place a detailed and ambitious multi-year work program outlining how it will advance APEC's structural reform agenda, including competition policy. In 2007, the EC focused intensively on competition policy and carried out a number of activities related to it.

This chapter aims to provide a summary of the key learnings and discussions from APEC's competition policy-related activities and in doing so further promote the importance of competition policy in structural reform. To provide context, the chapter commences with discussion on the importance of competition policy in structural reform. It then highlights recent achievements and activities by APEC on competition policy and summarizes some of the key insights and learnings from these activities. Finally, based on these discussions, the chapter puts forward some suggestions on APEC's future work on competition policy.

1. THE IMPORTANCE OF COMPETITION POLICY IN STRUCTURAL REFORM

The objective of this section is to explain the importance of competition policy in the context of structural reform. To do this, the section first attempts to define competition along with competition policy and explains why they are important to an economy. Then it clarifies the link between competition policy and structural reform and explains why competition policy is important for structural reform.

1.1 What is competition and why is it important to an economy?

Competition is an important driver for strong economic performance.

At the most basic level, competition arises where two or more firms operating in the same market seek to obtain the patronage of consumers. The firm who succeeds will do so by offering the most favorable terms for its goods or services. This is usually determined, amongst other things, as a function of price, quality or quantity of its products. As rivalry between individual firms to achieve the greatest market share or make the most profits spreads throughout an industry, such competition will have important effects in total as follows.

> *"Competition is the way more productive firms win out. Productivity increases as more productive firms expand and take market share away from less productive firms. Sometimes the less productive firms go out of business. Other times they react to the competitive pressure and increase their own productivity. Either way, overall productivity increases.[1]"*

[1] William Lewis, "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability" (2004), pp. 13.

The interaction of firms will result in lower costs which will reduce prices. That is, competition is expected to deliver improvements in production efficiency and bring lower costs of production and newer and better products and services to the market through innovation. The competition also acts to discipline managers against waste. Firms who cannot compete will be encouraged to exit markets and new firms will enter. In the end, consumers will benefit with greater choice and lower price, and so too the economy as a whole. Competition is fundamental to the efficient operation of markets.

Indeed, competition between economic actors is a cornerstone of the modern economy. Well functioning markets lead to the efficient allocation of scarce resources. Efficient markets will provide participants with timely and accurate transfer of price information. This will enable an appropriate response from consumers and firms, further increasing competition.

Where there is no competitive pressure, firms may not have the incentive to reduce costs or to innovate, which in turn leads to higher prices, lower quality, and fewer choices for consumers as well as low productivity and efficiency. Productivity growth is the foundation of economic growth. In order to maintain economic growth, there is a need, therefore, for economies to proactively pursue competition. Governments can do this by creating an environment where competition can flourish through implementing competition policy. Thus, consumers can ultimately enjoy the benefits of competition.

1.2 What is competition policy?

Competition policy refers to laws, cases (or enforcement), policies, rules and regulations of government that are aimed at protecting and preserving the competitive process in an open and free marketplace with the goal of promoting economic efficiency and consumer welfare. It also entails advocacy of pro-competitive principles when the government formulates other laws, policies, rules or regulations. In this sense, competition policy in APEC discussions has a broad meaning.

1.3 Role of competition policy in structural reform

What is the role of competition policy in structural reform and why is it so important? This section provides a short definition of structural reform, its objectives and how these objectives are closely aligned with the objectives of competition policy. Finally, the section explains how competition and competition policy are at the heart of structural reform.

Structural reform consists of improvements made to institutional frameworks, regulations and government policies so that behind-the-border barriers to improved economic performance are minimized. Structural reform helps foster an economic environment that supports the efficient functioning of markets, contributes to macroeconomic stability, productivity and economic growth, and ultimately enhances living standards in a sustainable way.

Competition policy leads to improved economic performance by creating stronger and more efficient markets, which provide benefits to both consumers and firms. Consumers benefit from the lower prices and the wider choices that competition creates. Firms benefit from competition for their business from input suppliers, which tends to increase their competitiveness and reduce their costs. Thus, the economy as a whole benefits from a more efficient allocation of resources to industries in which it has a comparative advantage. Increased competition also encourages innovation and productivity gains. Ultimately, competition leads to a higher level of macroeconomic stability and economic growth.[2]

Competition policy assists governments in addressing the allocative inefficiency that results from anticompetitive business conduct. Economies may seek to correct such market distortion through appropriate competition laws that prohibit or place restrictions on certain types of business practices that are considered anticompetitive. One example of anticompetitive behavior occurs when a business abuses its dominant position in the market

[2] Massimo Motta "Competition Policy – Theory and Practice" Cambridge University Press (2004), pp. 2-3.

Competition policy is a key element of well-designed structural reform. Structural reform should be designed in such a way that each element of reform works to complement the others. For example, changes to the regulatory regime should not have a negative impact on competition. Ensuring such policy coherence will maximize the benefits of structural reform. Thus, when competition policy works together with other policy measures such as regulatory reform, businesses are stimulated to improve their performance and to reduce their prices or enhance quality so as to obtain an advantage over competitors. In addition, such well-designed reform enhances the predictability of the business environment and hence promotes business activities.

Competitive domestic markets lead to benefits in the global context. In a global market, the benefits of structural reform spill across borders. For example, domestic structural reforms that improve market efficiency can increase trade and foreign direct investment. This is because gains from trade and investment are realized through well-functioning markets provided by competition policy. Reductions in costs and prices, as well as increases in competitive pressures, sustained by competition policy within one economy, can also enhance economic outcomes in other economies.[3]

The globalization of business heightens the importance of both structural reform and competition policy. People involved in cross-border business more frequently encounter the differences between the competitive environments in various economies. Therefore, enhanced competition policy can contribute to attracting business activities to markets in the APEC region. It does this by encouraging economies to create pro-competitive markets relative to other economies. As an economy becomes more attractive in terms of competition, trade and investment opportunities will expand.

Importantly, competition policy should continuously evolve to meet the changing needs of economies. Structural reform is by nature "forward-looking" because the benefits of reform only become apparent in the longer term. Even where there are signs that an economy is realizing well-functioning markets as a result of competition policy, policymakers should seek to ensure that the momentum of structural reform is maintained. As market participants are given greater freedom, governments should be mindful that market discipline is achieved and the benefits of reform are locked in. Accordingly, the effectiveness of an economy's competition policy should be continually evaluated.

In this context, it is notable that a number of developing economies are demonstrating the forward-looking development of competition policy. For example, Indonesia began introducing comprehensive structural reform and competition policy in the mid 1980s. Its structural reform included eliminating regulatory obstacles to economic activities, stimulating employment and growth, and encouraging economic participation from private sector. At the same time, Indonesia introduced broad-based competition policy and then proclaimed a comprehensive competition law in 1999. Indonesia is now observing that the competition policy is working to stabilize and maximize the fruit of structural reform.[4]

Another example is Viet Nam, which is in transition to a market economy. Vietnam recognizes that competition is one of the drivers of its comprehensive reform as well as its development. It took a number of steps in enforcing the law by inaugurating an enforcement agency and undertaking enforcement activities,[5] and since it has been enjoying an expanding economy with notable inward investment. It recognized that the introduction of the competition policy, and the sound enforcement of it, functioned to stabilize the good economic conditions brought by the reform.[6]

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[3] *Ibid.* pp. 3.

[4] Presented by Mr. Mohammad Iqbal, Chairman of Supervision of Business Competition (Indonesian Competition Commission), at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.

[5] Presented by Mr. Tran Anh Son, Deputy General Director of Competition Administration Department for Ministry of Trade Vietnam, at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.

[6] Presented by Mr. Toshiyuki Nanbu, Chair of Competition Policy and Deregulation Group, at "Economic

Thus, structural reform is best achieved with the support of appropriate competition policy to secure the competitive environment during and after the reforms. In this sense, competition policy is a basic economic infrastructure for structural reform.

2. PROMOTING COMPETITION POLICY IN APEC

Since the inclusion of competition policy in the Osaka Action Agenda, which was agreed by APEC Leaders in 1995, APEC has contributed significantly to enhancing its members' capacities to understand, design and/or implement competition policy. This section reviews APEC's recent activities on competition policy and presents key insights and learnings from these activities.

2.1 Early discussion on competition policy in APEC

The "Osaka Action Agenda" to implement the Bogor Declaration included competition policy as one of the 15 specific areas in which APEC economies would take action to achieve trade liberalization and ultimately consumer benefits. It states that, "APEC economies will enhance the competitive environment in the Asia-Pacific region by introducing or maintaining effective and adequate competition policy and/or laws and associated enforcement policies, ensuring the transparency of the above, and promoting cooperation among APEC economies, thereby maximizing, *inter-alia*, the efficient operation of markets, competition among producers and traders, and consumer benefits.[7]"

The Osaka Action Agenda also designated "deregulation" as one of the 15 specific areas, stipulating that APEC economies will promote the transparency of their respective regulatory regimes and eliminate trade and investment distortion arising from domestic regulations.[8] Accordingly, since 1995, a series of workshops on competition policy and deregulation was held in order to deepen the understanding of competition policy and regulation, under the guidance of the CTI (Committee on Trade and Investment).[9] Then in 2000, the Competition Policy and Deregulation Group (CPDG) was established as a sub-group of the CTI, to more actively progress the discussions on competition policy and deregulation.

"The APEC Principles to Enhance Competition and Regulatory Reform[10]" (the Principles) endorsed by Leaders in 1999 stated that "Open and Competitive Markets are the Key Drivers of Economic Efficiency and Consumer Welfare" and recognized "the strategic importance of developing competition principles to support the strengthening of markets to ensure and sustain growth in the region." They believed the Principles would "provide a framework that links all aspects of economic policy that affect the functioning of markets" but that they would be flexible and take into account the diverse circumstances of the member economies. The Principles also provide for nondiscrimination, comprehensiveness, transparency and accountability in relevant levels of competition and regulatory principles, policies and rules. The Principles state that the APEC Member Economies will make efforts to "address anticompetitive behavior" and consider "timing and sequencing" when introducing competition. The importance of fostering confidence and building capacity is also stated in the Principles.

In 2001, APEC Leaders agreed that the Osaka Action Agenda should be broadened to "reflect fundamental changes in the global economy," including strengthening the functioning of markets. The implementation of competition policy was recognized as one of the key elements to contribute to the broadened Agenda since it provides a framework that encourages market discipline, eliminates distortions and promotes economic efficiency. Also in 2002 and 2003,

Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.

[7] APEC The Osaka Action Agenda – Implementation of the Bogor Declaration (1995).

[8] The Osaka Action Agenda – Implementation of the Bogor Declaration (1995), "Part One: Liberalization and Facilitation, Section C: Actions in Specific Areas, 10. Deregulation."

[9] Work programs for competition policy and deregulation under the Osaka Action Agenda were combined in 1996.

[10] Available at http://www.apec.org/apec/leaders__declarations/1999/attachment_-_apec.html.

APEC leaders reaffirmed the commitment to implement the APEC transparency standards including in the area of competition policy.[11]

2.2 Competition policy since LAISR

In 2004, the Leaders recognized the value of structural reform in achieving sustainable economic growth, through improving the functioning of markets.[12] The LAISR set five priority areas (regulatory reform, strengthening economic legal infrastructure, competition policy, corporate governance and public sector management) to stimulate policy-oriented discussions on structural reform.

The EC was mandated by the APEC Leaders to promote the benefits of structural reform in APEC economies. The "APEC Work Plan on LAISR toward 2010" was established by the EC in this context, and welcomed by the Leaders in Busan 2005, "as a policy-oriented approach to bring about needed structural reforms.[13]" The Ministers also affirmed that the LAISR 2010 "set out a roadmap to address structural reform issues across APEC over the next five years consistent with the LAISR declaration.[14]" Acknowledging "that structural reform was a key 'behind-the-border' issue facing APEC economies and an essential vehicle to realize the benefits of trade and investment liberalization and facilitation," Ministers "welcomed the new role of the EC of coordinating structural reform activities across APEC and encouraged the development of capacity-building initiatives to narrow gaps identified in the APEC Structural Reform Action Plan." At the same time, the Ministers expressed their expectation to "further developing this 'whole of APEC' approach to structural reform in 2006, which would include establishing closer links and better coordination with other relevant APEC fora, including the Strengthening Economic Legal Infrastructure (SELI) Coordinating Group and the CPDG, and the Finance Ministers' Process. Ministers encouraged these groups to collaborate closely with the EC on structural reform issues.[15]"

In 2007, APEC Leaders endorsed "Forward Work Program for LAISR," annexed by detailed action items in five policy areas including competition policy. This work program will be progressively implemented from 2007 to 2010. The Forward Work Program for LAISR reaffirms that "competition policy is an important means to achieving a more productive and dynamic economy." The aim of the Forward Work Program for competition policy includes (i) increasing awareness of the importance of competition policy to economic growth, (ii) instilling knowledge on the practical elements of introducing a sound competition regime, and (iii) exploring practical guidance on how governments can facilitate competitive markets in key infrastructure sectors.[16]

More specifically, a series of activities relating to competition policy has been held since the inclusion of competition polices in LAISR as follows:

- APEC Seminar on the Role of Competition Policy in Structural Reform organized by Japan with co-sponsors Australia and Indonesia (27 June 2007)
- Roundtable Discussion on "How to Create a Competition Culture" organized by Australia (29 June 2007)
- APEC Seminar on Utilizing the "APEC-OECD Integrated Checklist on Regulatory Reform" in the Competition Policy and Deregulation Aspects organized by Indonesia in cooperation with Japan (13-15 June 2007)
- APEC Training Course on Competition Policy, 2005–2007 co-organized by Japan, Philippines, Thailand and Singapore (CPDG)
- APEC Competition Policy and Law Database: Website managed by Chinese Taipei (CPDG)

[11] CPDG "Review of Operations."

[12] 2004 Leaders' Meeting, Santiago Declaration "One Community, Our Future," Santiago de Chile, 20-21 November 2004.

[13] 13th APEC Economic Leaders' Meeting, Busan Declaration, Busan, Korea, 18-19 November 2005.

[14] The 17th APEC Ministerial Meeting, Busan, Republic of Korea, 15-16 November 2005, Joint Statement.

[15] *Ibid.*

[16] "Forward Work Program for LAISR – Report to APEC Ministers," pp.4.

The most recent activities, "APEC Seminar on the Role of Competition Policy in Structural Reform," "Roundtable Discussion on 'How to Create a Competition Culture,'" and APEC Seminar on Utilizing the "APEC-OECD Integrated Checklist on Regulatory Reform" in the Competition Policy and Deregulation Aspects, provided useful insights into competition policy and structural reform. While section 3 comprehensively covers these insights in terms of important elements required for an effective competition policy regime, a short summary of each activity is provided below:

APEC Seminar on the Role of Competition Policy in Structural Reform

The seminar was held in order to increase understanding among APEC economies about competition policy.[17] This was achieved through sharing knowledge, experiences and lessons on competition policy, and raising awareness about the economic importance of competition policy and emphasizing the role that competition policy plays in achieving structural reform.

The key points shared were as follows:

- The key attributes of effective competition authorities are independence, transparency and accountability.
- It is important to share both good and challenging experiences in order to deepen economies' understanding in the area of competition policy as practical experiences demonstrates the contribution of competition policy to economic growth.
- Economies often face similar challenges in setting up competition regimes; for instance, insufficient expertise, the need to build a competition culture, a lack of coordination across agencies on competition issues and limited resources.
- The demands for training assistance for voluntary review processes could be addressed on a bilateral or targeted basis, with care being taken to avoid duplication.
- The EC could focus on the OECD's Competition Assessment toolkit and identifying the institutions necessary for an effective competition regime.

Roundtable Discussion on "How to Create a Competition Culture"

The EC sought to engage members in policy discussions aimed at encouraging economies to share experiences in creating and promoting a competition culture in their economy.

Key insights of the roundtable included: while the circumstances of each economy needed to be taken into account, the creation of a competition culture usually encompassed three key components—factors that can impede competition, how governments could achieve community awareness, and support for a robust competition framework—to produce effective results and build community awareness; a focus on both competition law and broader government policy that impacts on competition would be most effective.

APEC Seminar on Utilizing the "APEC-OECD Integrated Checklist on Regulatory Reform" in the Competition Policy and Deregulation Aspects

The Seminar focused on regulatory reform and competition policy. The competition policy part of the seminar focused on enhancing the awareness of participants on the need for further improvements in competition policy and law implementation and improving the capacity of competition (related) authorities in member economies through information sharing and discussion of recent experiences. During the two-day seminar, the following points were shared:

- Economies had a chance to consider ways in which competition assessment, regulatory reform, and competition policy might be adopted by their own economies.
- Further technical assistance should be considered for economies, in which the existing tools such as APEC-OECD Integrated Checklist on Regulatory Reform could

[17] The seminar provided four sessions including discussions between participants during the breakout session.

be utilized to promote practical understanding of how economies could apply the tools to their unique circumstances.

- Participants also confirmed that continuous information and experience sharing would be crucial on issues such as undertaking regulatory impact analysis or promotion of regulatory reform and competition.
- Importance was placed on the need to develop the technical skills and abilities of economies to undertake structural reform. This included on developing institutional structures that would provide effective leadership and coordination across governmental agencies to pursue reform, together with promoting cross checking among the governmental agencies.
- Competition authorities were recognized as being central in achieving the self-reliant development of competition policy and law. However, the acknowledgement by broader stakeholders, including ministers, law makers, governmental agencies (sectoral regulators, prosecutor's office, etc.), business (large and small, domestic and foreign) and consumers, would be essential for promoting competition policy and creating a competition culture within an economy.

These discussions indicated that capacity-building activities aimed at assisting APEC member economies to undertake and implement competition policy would be crucial. Importantly, any such initiatives would need to take into account the different requirements of target participants and their stages of development. For example, officials in charge of economic policy may have different priorities in comparison to officials from a competition authority or businesspeople. At the same time, it was also evident in the discussion that participants had an increasing understanding of competition policy and the theoretical aspects from economics and politics. Economies managed to share experiences and their knowledge of other international organizations and on issues that they were commonly facing and needed to settle together. The topics of particular interest included the development of an effective competition framework; consideration of the relationship between deregulation and competition policy; information sharing and network building; and the development of skills to coordinate agencies and review their regulations.

3. IMPORTANT ELEMENTS OF AN EFFECTIVE COMPETITION POLICY

As mentioned in Section 1, the concept of competition policy, as defined by the EC, includes enforcement of competition laws by competition authorities as well as government laws, regulations and policies affecting competition. Policy measures that contribute to creating and maintaining competition culture can be regarded as a part of competition policy in a broad sense. Section 3 provides insights into important elements of competition policy for its effective implementation from both theoretical and practical angles.

3.1 The attributes necessary for an effective competition regime

The introduction and maintenance of a robust competition law, needs to be combined with appropriate enforcement of competition policy, for an effective competition and regulatory regime. The ECII Seminar in 2007: Role of Competition Policy in Structural Reform, identified three important attributes of an effective competition authority—independence, transparency and accountability.[18]„[19]

[18] Presented by Dr. Stephen Corones, Professor of Law at Queensland University of Technology, Australia, at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.

[19] The statement by Dr. Corones went on as "independence consists of structural independence and operational independence. The OECD identified independence as the element most likely to determine success. Its advantages are freedom from interference, freedom to investigate and enforce laws against government-owned business, and freedom to criticize government legislation that lessens competition." There is likely to be a consensus that, in the context of APEC, the timing or sequence of assuring independence of the authority shall be considered according to the situation of each economy.

Independence

With respect to independence, competition agencies should have a significant degree of independence from other agencies of the Government and political influence. It should be noted that there is structural independence and operational independence. Operational independence, which is the dominant goal, means that the agencies' actions are based on the facts and the law and not on political considerations, and they do not discriminate in favor of local companies or against foreign companies. The structural independence is expected to support the operational independence.

Independence is most likely the most important determinant of success for the implementation of competition policy. Key benefits of independence are freedom from political interference, freedom to investigate and enforce laws against government-owned business, and freedom to criticize government legislation that lessens competition, by shielding the enforcement agencies.

Transparency

Competition and regulatory enforcement agencies should act in as transparent and open a manner as possible. Transparency requires the institutions to disclose in advance their administrative procedures and decision-making processes. Competition agencies can increase transparency in a number of ways, such as by publishing guidelines on their enforcement policies that explain their analysis of the law. Although public consultation seeks the disclosure of all relevant information, competition agencies must have proper processes for protecting confidential information appropriately.

Accountability

APEC has endorsed both transparency and accountability as being necessary attributes for an effective competition and regulatory regime.[20] Good governance requires that any authority that needs statutory independence to carry out its functions also must have appropriate accountability and reporting requirements. Enforcement agencies must be accountable for their decisions. One way of introducing or maintaining accountability is to ensure that firms that have been the subject of agency enforcement or some other form of action have the ability to appeal to an independent body for a review of the final agency decision.

3.2 Important elements for successful introduction of competition policy

The ECII Seminar on the Role of Competition Policy in Structural Reform also discussed important elements during the process of introducing competition policy, and some economies' experiences were shared. Discussions on best practices cover, i) the introduction of competition policy was positioned as an important element of structural reform, ii) the importance of the current economic situation was emphasized; iii) comprehensive reform may be undertaken in all sectors under the clearly defined policy targets. As a consequence, it was illustrated that in many economies, the introduction of competition policy accompanied by regulatory reform brought durable economic success. Important elements in the process of introducing competition were identified.

- The means of introducing competition might include: the creation of an economy-wide competition law; the removal of regulatory restrictions to competition; and structural reform of public monopolies. These objectives can be linked to the broader policy of enhancing market forces and economic efficiency.[21]

[20] See APEC principles to Enhance Competition and Regulatory Reform, Principle (vi) and (vii) attached to the APEC Leaders' Declaration, Auckland, New Zealand, 13 September 1999.

[21] Presented by Mr. Brian Cassidy, CEO of Australian Competition and Consumer Commission introduced "the Hilmer reforms" at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.

- Some of the challenges of promoting competition are that the boundaries between competition law and economic regulation can be vague, responsible agencies enforcing various laws can overlap and levels of competition policy enforcement in respective sectors can be uneven. One effective way to resolve these issues is to establish an independent authority to deal with competition matters.

3.3 Important elements for promoting competition policy and enforcement of competition law

Sound enforcement of competition policy and competition law promotes economic growth and efficiency by eliminating or minimizing the distorting impact imposed by regulations, administrative policies, practices and procedures on the market and by prohibiting or deterring private anticompetitive business practices by firms.[22] Several economies with experience in the enforcement of competition policy and competition law provided key policy lessons in promoting competition policy and enforcement of competition law. The experiences of economies that have introduced competition policy and law are expected to contribute to those economies which just initiated and promoted competition policy, as well as those economies about to introduce, or those that have recently introduced, competition policy. The following are some of the important elements in promoting competition policy and enforcement of competition law suggested during the EC Seminar,[23] classified by objective.

Policy Implementation - Proper introduction of laws, regulations and guidelines[24] - Continuous review of competition legislation and existing policy measures[25] - Enhancing transparency for business by introducing guidelines on implementation and interpretation of competition laws and enforcement procedures - An agency that is accessible, transparent and independent in its dealing with stakeholder community including consumers, business and governmental agencies - Encouraging citizens' awareness on effects of promoting competition
Law Enforcement - Objective enforcement of competition laws, meaning that enforcement actions are based on the facts and the law and not on political considerations, and they do not discriminate in favor of local companies or against foreign ones - Performing authority's role in a prompt, effective, efficient and consistent manner that respects the confidentiality of information provided to assist it - Responsible in accountability and reporting requirement in authority's measures - Effective handling of cross-border issues by maintaining close links with other regulators, particularly international bodies and foreign competition authorities - Introduction/Promotion of voluntary compliance program

[22] Presented by Dr. Koki Arai, Senior Planning Officer, Japan Fair Trade Commission at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.
[23] Mr. Brian Cassidy (2007).
[24] Mr. Ong Beng Lee, Chief Executive of the Competition Commission of Singapore, presented competition regime of Singapore at "Economic Committee II Seminar: Role of Competition Policy in Structural Reform," 27 June 2007.
[25] *Ibid.*

3.4 Important elements of Competition Law – provisions from competition laws of APEC Economies

3.4.1 Substantive provisions

Among 21 APEC member economies, 17 have introduced comprehensive competition laws and established competition authorities.[26] Competition laws of 17 APEC economies have both substantive and procedural provisions. Developments of competition laws in the APEC economies are as follows:

- **Canada and USA** are the oldest member economies which introduced the competition laws in 19th century or early 20th century. This was followed by **Japan,** which introduced the *Anti Monopoly Act in 1947*.
- From 1970 to the early 1990s, eight economies (**Chile, Australia, Republic of Korea, New Zealand, Peru, Russia, Chinese Taipei and Mexico**) introduced comprehensive competition laws.
- From 1999 to 2008, six economies (**Indonesia, Thailand, Papua New Guinea, Singapore, Viet Nam, and People's Republic of China**) introduced comprehensive competition laws.
- **Malaysia, the Philippines** and **Hong Kong, China** are currently in the process of introducing or drafting competition law.

Also most economies supplement the laws with regulations and guidelines, or accumulation of precedents. Important elements of substantive provisions in competition regime,[27] which are common in APEC economies' competition laws, as seen in "Annex: Characteristics of Competition Laws in APEC Economies (substantive provisions)," are summarized as follows:[28]

- prohibition of cartel/collusion/conspiracy/bid-rigging
- prohibition of abuse of dominant position/monopolization
- review of mergers and acquisitions, and prior notifications

On the other hand, areas where laws differ include consumer protection, unfair trade practices or unfair methods of competition, abuse of administrative power and monopoly, third-party access to essential facilities, regulation of holding companies and economic concentration, and special regulations of trade associations. Economies have varying definitions for these additional provisions. For example, each economy's law on consumer protection is likely to be unique. Further, various exemptions exist among the competition laws in all APEC economies.

Regarding competitive market process, Stanley Metcalfe identifies, in "the Evolution of Industrial Dynamics," three claims that are often made:

i) it is more effective in rewarding firms with better technology and organization and that it does this by facilitating the differential growth of firms and also by facilitating the entry of "better" firms;
ii) it rewards firms that innovate relative to their rivals in terms of products and business processes so that the consequent competitive advantages allow them to increase their relative share of the market; and
iii) it eliminates the least efficient contributors to an industry and thereby releases resources to be absorbed by more productive firms.

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[26] Presented by Nanbu (2007).

[27] Ms. Elley Mao, Principal Economist, Financial Secretary's Office, Hong Kong, China and Vice Chair of Economic Committee opened the Session 2 "Important Elements of an Effective Competition Regime" of the ECII Seminar on Role of Competition Policy in Structural Reform, by mentioning the speakers will investigate this from both theoretical and practical angles. Since the discussion of the Session 2 of the ECII Seminar mainly dealt with the competition law in narrow definition where the discussion and activities by the competition authorities are accumulated within APEC, the focus of this section is also narrowly defined competition policy.

[28] The elements listed below are not exhaustive but illustrations of common elements among seen in. common among

Collusive practices, including cartel and bid-rigging, allow firms to exert market power they would not otherwise have, and artificially restrict competition and increase prices, thereby reducing welfare.[29] Abuses of dominant position or unlawful monopolistic conduct also negatively affect consumers and businesses that buy goods and services, for example by exclusionary or predatory conduct that results in higher prices than otherwise would have prevailed in the absence of such conduct.[30]

Merger might allow the merged firm to unilaterally exercise market power and raise prices. It might also make collusion more likely, more perfect (e.g., industry coordination around a higher price), more complete (e.g., coordination across a wider spectrum of products or customers), or more durable (e.g., coordination sustained over a longer period of time). These collusion-enhancing effects could occur through any of three main channels:

- first, by removing at least one independent decision-maker from the market, a merger will tend to make reaching and sustaining a consensus incrementally easier by increasing each surviving supplier's self-interest or ability to restrict output in order to elevate price and punish competitive behavior;
- second, a merger could align more closely suppliers' incentives and abilities to coordinate by homogenizing rivals' product attributes, cost structures, planning horizons, geographic coverage, or excess capacities;
- third, a merger could narrow opportunities for particular suppliers to disrupt coordination by keeping disruptive new technologies or products off the market, by raising barriers to expansion for industry mavericks, or by increasing transparency in suppliers' strategies or payoffs.

3.4.2 Procedural provisions

To ensure implementation and enforcement of competition laws, the importance of which has been pointed out by a number of officials and experts in several fora including the ECII Seminar on Competition Policy and Structural Reform, that procedural provisions within the competition laws are also important. Generally, most competition laws stipulate the following elements to ensure the effective enforcement of the law, and sometimes produce the regulations and guidelines for detailed rulings (See also Annex1-2: Characteristics of Competition Laws in APEC Economies (procedural provisions).

Elements found in many APEC economy competition laws:

- mandate and organization of the authority
- processes of notification and investigation of mergers
- enforcement action taken by the competition authority to deter or sanction anticompetitive behavior
- investigation procedure
- relationship between the competition authority and other governmental or regulatory, or judicial bodies

[29] *Ibid,* pp.137.
[30] APEC-OECD Integrated Checklist on Regulatory Reform (2005), pp24.

With respect to enforcement, there are two types: singular agency or plural agencies, while operation of agency/agencies in each economy varies. Singular agencies operate under a commission system while plural agencies can operate under a commission and special tribunal, commission and agency, or agency and special tribunal system. The situation of enforcement agencies in APEC economies are as follows:

Single agencies - Commission system: **Japan, Korea, New Zealand, Peru, Chinese Taipei, Mexico, Indonesia, Thailand, Papua New Guinea, Singapore** - Agency system: **Russia**
Plural agencies - Commission and special tribunal: **Australia** - Commission and agency: **USA** - Agency and special tribunal: **Canada, Chile, Viet Nam**

Commission is the most popular enforcement agency having been introduced by 12 of the 17 economies that have comprehensive competition law.[31]

APEC economies practice investigation through administrative investigation, civil investigation and/or criminal investigation. The investigation power of enforcement agencies in APEC economies are categorized as follows:

Administrative investigation: **Australia, Chile, Korea, New Zealand, Peru, Russia, Chinese Taipei, Mexico, Indonesia, Singapore, Viet Nam**
Criminal investigation: **Canada, Thailand**
Both administrative investigation and criminal investigation: **USA, Japan, Papua New Guinea**

* Some economies also conduct civil investigation. For example, Australia has both administrative and civil investigation; New Zealand is mainly a civil investigation regime.

In addition, there are numbers of provisions included in competition laws of APEC economies to realize "important elements for promoting competition policy and enforcement of competition law" in 3.3 above, such as to make the enforcement fair and precise; enhance transparency and predictability; promote prompt, effective and consistent enforcement; and respect confidentiality. One of the typical provisions is to identify a specific time frame of certain procedures. Also there are provisions to guarantee rights of investigated parties or parties concerned to claim or to ask for information, and to require confidentiality of authorities.

As for the enforcement, merely stipulating the provisions above is not enough, but independence, transparency and accountability are the key themes in promoting sound competition regimes,[32] as mentioned through this section.

4. POSSIBLE FUTURE WORK

The Economic Committee (EC) has responsibility for advancing APEC's structural reform agenda. In 2006, the EC developed a detailed and ambitious forward work program outlining how it will progress structural reform across the five priority areas identified in the APEC Leaders' Agenda to Implement Structural Reform. The work of the EC is built upon the three tools of policy dialogue, capacity building and awareness-raising. Importantly, the EC also aims to reflect a whole-of-APEC approach in its work, with the EC engaging with other APEC fora as needed.

[31] The framework of competition authority has not been decided in People's Republic of China as of February 2008.
[32] Presented by Mao (2007).

The competition policy component of the forward work program was developed by the EC Friends of the Chair group on competition policy to ensure that the priorities of member economies were reflected. The forward work program on competition policy has three main objectives:

- Increase awareness of the importance of competition policy to economic growth;
- instill knowledge on the practical elements of introducing a sound competition regime, including aspects of institutional arrangements, implementing competition law and enforcement systems; and
- provide practical guidance on how governments can facilitate competitive markets in key infrastructure sectors, such as transport, electricity and telecommunications.

Potential fruitful areas of future work could include:

- Setting the stage for productive discussion on competition policy within APEC by disseminating the key insights and messages from the seminar on the "role of competition policy in structural reform" and a roundtable on "how to create a competition culture," both held in 2007.
- Promoting the sharing of information and experiences on competition policy, including assembling a list of key references for distribution and discussion.
- Disseminating the APEC Principles to Enhance Competition and Regulatory Reform.
- Identifying areas of need in competition-related issues. The Individual Economy Reports contained in this volume, for example, may be used to review the progress in each APEC economy to identify economy-specific and cross-cutting regional challenges and priorities in the Asia-Pacific.
- Promoting better understanding of practical measures to strengthen competition policy. For example, a seminar held in late 2008 on competition in key infrastructure sectors will raise awareness of the use of competition policy in infrastructure markets.
- Capacity building to implement practical measures including a workshop on competition policy, as appropriate, to train APEC officials and share lessons on the enhancement of competition policy. This will be done with ongoing coordination of work within APEC to promote dialogue between various APEC groups.

CONCLUSION

It has been recognized, through the work of the EC, that it is important to address barriers at the border and also behind-the-border impediments to efficient markets. Structural reform is intended to remove these barriers. Structural reform and competition policy share the same objectives, in particular, effective markets, enhanced welfare, etc., and competition policy is a part of the means to complete structural reform, where other policies also have organic linkage. Structural reform is a comprehensive concept, and it includes economic legal infrastructure other than competition policy and laws. In other words, across the five LAISR themes, competition policy and other economic legal infrastructure work in a complementary way to achieve structural reform.

The following are key messages obtained from discussion in this report to be shared among APEC member economies.

- Competition policy, facilitated by competition authorities that are independent, transparent and accountable, contributes to efficient markets by providing economic entities with sound competitive environments that improve their performance and competitiveness. Also, competition policy encourages the innovation and productivity that lead to a higher level of macroeconomic stability and economic growth.

- Enhancement of competition policy contributes to attracting business activities to markets of the APEC region by minimizing boundaries or differences of competition environment between each economy, and then competition policy promotes trade and investment liberalization and their facilitation.

- Structural reform, including regulatory reform, is best achieved with the support of appropriate competition policy which would help maintain the competitive environment during/after the reforms. In this sense, competition policy is a basic economic infrastructure for structural reform.

- In addition to strong initiatives of Leaders, the education of broader stakeholders—including ministers and other governmental agency officials (such as sectoral regulators and prosecutors), legislators, the judiciary, academics, the business community and consumers—with regard to the benefits of competition is important for introduction and promotion of competition policy and competition law in an economy and for the promotion of competition culture.

Competition policy will continue to play an important role even after a certain level of structural reform has been achieved. In some developing economies, it has been demonstrated that the outcome of the structural reform was stabilized by introduction and/or development of competition policy. Thus, there is already a certain level of understanding of the importance of competition policy among the APEC economies. Further advocacy of competition culture is essential for the future. Those economies with competition policy already in place should progress based on constant implementation and the accumulation “lessons learned” from major cases in domestic competition law and policy and ensure that their domestic markets become, and remain competitive.

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Arai, Koki, Senior Planning Officer, Japan Fair Trade Commission

Cassidy, Brian, CEO of Australian Competition and Consumer Commission

Corones, Stephen, Professor of Law at Queensland University of Technology, Australia,

Iqbal, Mohammad, Chairman of Supervision of Business Competition (Indonesian Competition Commission)

Ong, Beng Lee, Chief Executive of the Competition Commission of Singapore

Mao, Elley, Principal Economist, Financial Secretary's Office, Hong Kong, China and Vice Chair of Economic Committee

Nanbu, Toshiyuki, Chair of Competition Policy and Deregulation Group

Philips, Bernard, Head of OECD Competition Committee

Son, Tran Anh, Deputy General Director of Competition Administration Department for Ministry of Trade Vietnam

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Annex 1-1: Characteristics of Substantial Provisions in Competition Laws in APEC Economies[33]

Economy	Domestic competition law	Competition law includes provisions on:					
		Common Substantive provisions[34]	Consumer Protection	Unfair trade practice	Abuse of adminis-trative power and adminis-trative monopoly	Special regula-tions of trade associa-tions	Others
Australia	Trade Practices Act (1974)	✓	✓	✓			Access to essential facilities
Canada	Competition Act (1986)	✓	✓				
Chile	Decree Law No. 211 (1973, last amended in 2003 and reenacted in DFL Nov. 1, 2005)	✓					
People's Republic of China	Competition Law (2007)	✓			✓	✓	
Indonesia	Act No. 5/1999 on Prohibition of Monopoly Practice and Unhealthy Business Competition.	✓					
Japan	Anti-monopoly Act (Act No. 54 of 1947, as amended by subsequent acts), Act against Unjustifiable Premiums and Misleading Representations (Act No. 134 of May 15, 1962, last amended in 2003), Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of June 1, 1956, last amended in 2003), etc.	✓	✓	✓		✓	Regulation of holding company and economic concentra-tion,
Korea	Monopoly Regulation and Fair Trade Act (1980, last amended in 2002)	✓	✓	✓		✓	Regulation of holding company and economic concentra-tion
Mexico	Federal Law on Economic Competition (1993) Code of Regulations to the Federal Law on Economic Competition(1998)	✓					
New Zealand	Commerce Act 1986 (amended in 2001)	✓					Control of regulated goods or services

[33] Among 21 APEC member economies, 17 have introduced comprehensive competition laws and established competition authorities. The four economies which have not introduced comprehensive competition laws are Malaysia; the Philippines; Hong Kong, China; and Brunei Darussalam. The People's Republic of China has approved the competition law in 2007. Also, Malaysia and the Philippines are in the process of introducing or drafting comprehensive competition laws.

[34] Horizontal restraints (cartels), Vertical restraints (some economies' laws address vertical restraints through broad provisions dealing with "restraints on free agreements in restraint of trade" or related conduct), Abuse of dominant position or monopolization, mergers.

Economy	**Domestic competition law**	**Competition law includes provisions on:**					
		Common Substantive provisions[34]	Consumer Protection	Unfair trade practice	Abuse of adminis-trative power and adminis-trative monopoly	Special regula-tions of trade associa-tions	Others
Peru	Legislative Decree No. 701 (1991)	✓		✓			
Russian Federation	Law No 948-1 of 22.03.1991 on Competition and Restriction of Monopoly Activity on Commodity Markets as amended by subsequent acts Federal Law No 147-FZ of 17.08.1995 on Natural Monopolies Federal Law No 117-FZ of 23.06.1999 on Protection of Competition in the Financial Services Market, etc.	✓		✓	✓		
Singapore	Competition Act (Cap. 50B)	✓					
Chinese Taipei	Fair Trade Law (1992, last amended in 2002)	✓	✓	✓			
Thailand	Business Competition Act (1999)	✓	✓	✓			
United States	Sherman Act (1890), Clayton Act (1914), FTC Act (1914) Hart-Scott-Rodino Act (1976),	✓	✓				
Viet Nam	Competition Law (2004)	✓	✓	✓	✓	✓	

Source: Aggregated from APEC Competition Database, Laws of APEC economies, WTO documents and information provided by the APEC economies.
Note: See also website of the competition agency of each economy.

Annex 1-2: Characteristics of Procedural Provisions in Competition Laws in APEC Economies

Economy	Authority		Procedure		
	Agency responsible for administering the law	Singular or plural	Investigation	Private parties' right of action before a court	Criminal penalty
Australia	Australian Competition and Consumer Commission (ACCC)	plural	adm. civil	available	available
Canada	Commissioner of Competition (supported by the staff of the Competition Bureau) Competition Tribunal	plural	criminal	available	available
Chile	National Economic Prosecutor's Office Competition Tribunal (Tribunal de Defensa de la Libre Competencia, TDLC)	plural	adm.	available	n.a.
People's Republic of China	Competition Authority	plural	adm.	available	available
Indonesia	Commission for the Supervision of Business Competition (KPPU)	singular	adm.	available	n.a.
Japan	Japanese Fair Trade Commission (JFTC)	singular	adm. criminal	available	available
Korea	Fair Trade Commission (KFTC)	singular	adm.	available	available
Mexico	Federal Competition Commission	singular	adm.	n.a.	n.a.
New Zealand	Commerce Commission	singular	civil	available	n.a.
Peru	INDECOPI (National Institute for the Defense of Competition and the Protection of Intellectual Property) The Commission on Free Competition	singular	adm.	available	n.a.
Russian Federation	Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship Office of Public Prosecutor Federal Energetic Commission	singular	adm.	available	n.a.
Singapore	Competition Commission of Singapore	singular	adm	available	n.a.
Chinese Taipei	Fair Trade Commission	singular	adm.	available	n.a.
Thailand	Competition Commission	singular	crim.	available	available
United States	Antitrust Division of the Department of Justice Federal Trade Commission	plural	adm. criminal civil	available	available
Viet Nam	Competition Council Competition Administration Department	plural	adm.	available	n.a.

Source: Aggregated from APEC Competition Database, Laws of APEC economies, JFTC "Competition Law in the World" (Japanese), WTO documents and Information provided by the APEC economies.
Note: See also the websites of the competition agency of each economy.

Chapter 2

Lessons from the Introduction and Implementation of Competition Policy in Economies at Different Stages of Development: The Case of APEC Economies

1. INTRODUCTION

In the APEC region, most of the economies support and enforce competition policy, which evidences a shared belief in competition as a key factor for economic and social development.

In competitive markets, companies strive to capture consumers' preferences, a competitive process that yields productive and innovative efficiencies such as lower prices, better quality goods and services, a greater variety of products and easier access to such products. Furthermore, these efficiencies tend to make companies more competitive in the local and global markets, enhancing sales and hence productivity.[35] Accordingly, an intensity of competition creates a value chain that *helps* achieve economic development[36] and an increase in aggregate welfare. In this sense, competitive markets are important for promoting efficiency in economies, regardless of their stage of development.

Competition policy is comprised of a set of public policy instruments by which governmental authorities protect and promote competition in the marketplace. Competition policy involves more than enactment of laws; its effectiveness requires that the design of specific policies that are coherent and consistent. For example, policies involving labor and capital markets, open trade and investment policy and economic deregulation should align to enhance competition, both in local and international markets. In this context, there are tools available that economies can use as references to improve the design and implementation of competition laws and policies, like the OECD Competition Assessment Toolkit and the APEC-OECD Integrated Checklist on Regulatory Reform.

This chapter presents valuable lessons on how APEC economies have shaped and enforced competition policy, including both unique and shared challenges. The chapter will examine how competition law has been adopted in consideration of different historical backgrounds and different levels of economic development. Then, it will describe how current goals and legal features reveal similarities as well as differences among the APEC economies. Finally, chapter two will explore how economic, institutional and legal variables can influence the effectiveness of competition policy in APEC economies.

It is worth mentioning that the first sections of this chapter (2 and 3) only consider a limited concept of competition policy; i.e., instruments aimed at prohibiting and sanctioning anticompetitive conduct—abuse of dominant positions/monopolization, horizontal and vertical collusive practices, and those that seek to control mergers and acquisitions.

The rationale for limiting the analysis to antitrust law is a response to the fact that the basis of antitrust law permits APEC-wide comparison. As stated in Chapter 1, competition law widely differs and may include laws on consumer protection, unfair trade practice or unfair methods of competition, abuse of administrative power and state monopoly, third-party access to essential facilities, the regulation of holding companies and economic concentration, and the regulation of trade associations.

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[35] It is a tendency rather than a rule, because there are, in unusual cases, market structures where economies of scale or scope suggest that society would be better off by regulating access.

[36] Economic development is a concept commonly understood to relate to the capacity of producing sustainable increases in the national income, but, in some economies, it also includes a measure of fairness and social justice.

2. THE INTRODUCTION OF COMPETITION POLICY IN THE APEC ECONOMIES

The history of competition law enactment in APEC reveals a wide variation in timing in relation to the prevailing economic *momentum* at which such laws were adopted. Hence, it is worth putting competition laws in their historical context.[37]

While Canada and the US adopted competition laws a century ago, most of the economies did so only after the 1970s, and mostly—with the exception of Japan (1947)—not until the 1990s.

In 1889, Canada adopted *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade (the Combined Act)*. The Act responded to criticism of the economic concentration that had resulted from the government's 1879 National Policy to protect and encourage manufacturing.

In the United States, a modern economy developed in the last three decades of the nineteenth century (OECD 2002, 2004a). As the economy evolved from one made up primarily of farmers and small entrepreneurs to one that was more highly industrialized, concern arose over anti-competitive practices by railroads and large corporate "trusts" that controlled a number of major industries. To curb the power of the railroads and trusts, the US Congress passed several pieces of legislation, including the Sherman Antitrust Act of 1890. The adoption of competition law in Canada and the United States was in direct response to perceived concentrations of economic power.

In the case of Chile (1973), Peru (1991) and Mexico (competition law became effective in 1993), competition law was adopted using a top-down approach. These economies had traditionally been government-owned planned economies (or at least partially planned). In this scenario, competition law was part of a comprehensive reform initiative aimed at adopting market-based economic principles; which typically included measures directed toward trade liberalization, privatization and deregulation. In this context, competition policy was primarily intended to prevent state-owned companies' monopolies from becoming private ones. As competition policy is best understood within each market paradigm, it has taken some years for the business community to internalize its key principles. However, with the passage of time competition policy has become a more accepted part of the legal and economic regulatory system in these economies (OECD, 2004b. 2004c, 2004d).

It is worth considering the case of New Zealand. Until 1984, New Zealand's economy was relatively closed, characterized by high levels of trade protection, considerable regulation of the production sector, a major role for government in the provision of services, price controls, and many legal monopolies. The resulting economic climate in the early 1980s was not positive as evidenced by persistent budget deficits, heavy overseas borrowing and sluggish economic performance. A change in government in 1984 brought about a program of deregulation, privatization and liberalization. The implementation of competition policy, as a consequence of the passage of the Commerce Act (1986), was an important part of this transformation. The Commerce Act reflected the new regulatory regime and included the removing of regulations such as tariff protection, price controls and subsidies. An open and competition-oriented economy was introduced.[38]

The example of Russia (1991) is also of particular interest, as the former Soviet Union was a centrally planned command economy (as opposed to formerly partial-planned ones like Chile, Mexico and Peru). In the late 1980s, the Soviet Union introduced a plan to adopt a market economy, which included measures such as regulating monopoly enterprises, de-concentrating the markets and privatization (with exclusion for so-called strategic activities).

From 1992 to 1994, competition policy shifted from one of gradual change to a policy of rapid privatization. This was due to the recognition that: (i) many regulated markets were under

[37] Economies referred to below were chosen according to the perceived accuracy and availability of information.
[38] INDECOPI questionnaire.

monopoly control simply because of trading patterns—a lack of transportation and distribution channels, and an absence of market-supporting information systems—rather than any durable qualities of the markets or the products; the State was ill-equipped to determine efficient size and structures for deconcentration purposes; and, (iii) cost-based regulation did not create incentives for enterprises to increase efficiencies.

Since then, a tendency toward separating regulatory functions has been observed, along with a redefined role aimed at monitoring anticompetitive behavior of dominant enterprises and creating institutions and market conditions (eliminating structural barriers to entry, promoting investment and the creation of infrastructure, etc.) to allow competition post-privatization (OECD 2004e).

In many of the Asian economies, the interest in developing a comprehensive competition policy increased in the 1990s, in part because of the experience of the 1997 financial crisis and the newly perceived need to promote competitive undertakings that are able to compete efficiently in global markets. As stated by Lin (2002), competition policy was not a priority, as many governments held a long-standing preference for direct intervention and because competition policies might have been in conflict with other domestic policies, especially policies aimed at promoting large corporation and conglomerates in industries such as heavy manufacturing, chemicals, semiconductors, etc. (Lin, 2002).

In the case of Japan, at the end of the World War II its economy was dominated by monopolistic family-run conglomerates, the so-called *Zaibatsu*. After the war, General Headquarters of the Allied Forces promoted the adoption of the Antimonopoly Act (1947) in order to ensure economic democratization and the dispersion of economic power (i.e., the dissolution of the *Zaibatsu*). This reform agenda was strongly influenced by the United States' antitrust policy. Competition policy was strengthened and bought about a change from a producer-oriented policy to a consumer-conscious one.[39]

In Korea, when the government tried to introduce a competition law in the 1970s, many doubted the utility of such legislation. In fact, there were many who believed that Korea needed national champions to overcome Korea's relatively small market by competing in export markets. This partially explains a high concentration in Korean markets during this period. The Monopoly Regulation and Fair Trade Act (MRFTA) came into effect in 1981 and after the 1997 financial crisis, the need for reinforcing competition policy became apparent. This led, for instance, to a reduction in the ratio of industry concentration from 62.4% in 1980 to 45.4% in 1999. As a consequence of this and other regulatory reforms, the Korean economy has become more business-friendly and attractive to foreign direct investment (OECD, 1999).

The case of Chinese Taipei's economy is also illustrative. In 1984, a new policy emphasizing economic liberalization, internationalization and institutionalization was adopted, outlining the guiding principles for future economic development. Since then, Chinese Taipei's economy has shifted steadily from an interventionist to a liberalized footing. The subsequent passage of the Fair Trade Act in 1992 further demonstrated that economic development had reached the age of competitiveness. These changes have since driven many industries to undergo major structural and market adjustments, and have also had an extremely positive impact on consumers' interests while simultaneously spurring macroeconomic development.[40]

This historical perspective reveals that some economies enacted competition laws to reduce the concentration of economic power (e.g., the United States and Canada); in other instances the primary purpose of competition laws was to the eliminate economic dominance of state-owned companies (e.g., Chile, Mexico, Peru and New Zealand); and in other cases the main reason for competition law was to prevent the loss of competitiveness of local industry in the global markets (e.g., Japan, Korea and Chinese Taipei).

[39] INDECOPI questionnaire.
[40] INDECOPI questionnaire.

3. COMPETITION LAW WITHIN THE APEC REGION

Although the basic principles of competition law is generally applicable to all economies, differing cultural traditions and differing levels of economic, institutional and legal development may lead to variation in competition law enforcement priorities and approaches.

The current competition laws of APEC economies contain three main types of provisions that are worth mentioning: goals, substantial law and enforcement institutions and processes provisions. This section presents a comparison across these three areas of APEC economies' competition laws, which will help identify important characteristics, as well as similarities and differences.

3.1 The goals of Competition Law

This section presents a transversal comparison of the current goals of competition laws in APEC economies.

Table 1 offers a comparison between the varieties of explicit goals of competition law within the APEC region.

Table 1: Competition Law Goals within the APEC Economies

Economy	Current Law or Act relating to competition (Date)	Efficiency Goals	Distributive and Other Goals
Canada	Competition Act (1986)	To promote efficiency and provide consumers with competitive prices and product choices	To ensure equitable opportunities for small and medium-sized enterprises
United States 1/	Sherman Act (1890)	To promote economic efficiency The maximization of consumer welfare	
Japan	The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (1947)	To promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, to promote the democratic and wholesome development of the national economy, to assure the interests of general consumers	See left column
Chile	Decree Law Nº 211/1973, as amended by Law in 2003 (currently reenacted in DFL Nº 1, 2005)	To promote economic efficiency in markets	No explicit goal
Australia	Trade Practices Act (TPA) (1974)	To enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection	To promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and to provide a framework and guiding

Economy	Current Law or Act relating to competition (Date)	Efficiency Goals	Distributive and Other Goals
			principles to encourage consistent approach to access regulation in each industry
Korea	Monopoly Regulation and Fair Trade Act - MRFTA (enacted in 1980, but came into force in 1981)	Innovation and dynamic efficiency, consumer protection	Balanced economic development
Mexico	Federal Economic Competition Law (enacted in 1992/ effective in 1993)	To protect the competitive process and free access to markets	No explicit goal
Chinese Taipei	Fair Trade Law (1992)	To order trade and protect consumers	To ensure fair competition, promote economic stability and prosperity
Singapore	Competition Act (2004)	The Competition Act aims to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore.	No explicit goal
Russia	Law On Protection of Competition (2006)	To ensure common economic area, free movement of goods, protection of competition, freedom of economic activity in the Russian Federation and to create conditions for effective functioning of the commodity markets	No explicit goal
Peru	Legislative Decree 1034 on Repression of Anticompetitive Behaviors (2008)	To protect economic efficiency for the consumer welfare	No explicit goal

1/ Although antitrust statutes do not list explicitly these goals, these have been developed by case law.
Sources: APEC IAP, OECD, APEC Competition Policy Database.

The promotion of economic efficiency and the protection of the competitive process are generally regarded as fundamental goals of competition policy; however, in some cases, non-competition goals such as employment, regional development, economic stability, etc., are also included.

In the case of APEC economies, a tendency toward the so-called economic or consumer welfare goals may be observed, but there are also non-economic objectives present (small-business protection, fairness, etc.). Furthermore, within economic goals, there are both efficiency and distributive ones. In these circumstances, it should be expected that competition *policy* will also vary across the APEC economies.

History shows that competition law may not pursue the same goals over time. For example, in the United States, the focus of competition policy has changed from including populist goals to an emphasis on consumer welfare and economic efficiency. Likewise, competition law has been influenced by changes in economic theory—from classic to neoclassic approaches. Accordingly, it may be expected that competition policy varies from one APEC economy to another according to economic and social factors, including the development level.

3.2 Substantial provisions analysis

According to the UNCTAD Model Law on Competition, substantial competition law provisions are threefold: abuse of dominant position/monopolization, restrictive agreements or arrangements, and merger and acquisitions (M&A). The first two are conduct controls (*ex post* approach), while the latter implies the need for structural control of commercial practices (*ex ante* approach). The Model Law outlines these provisions as follows:

Table 2: UNCTAD Model Law on Competition: Substantial Competition Law Provisions

Restrictive Agreements	*1. Prohibition of the following agreements between rival or potential rival firms, regardless of whether such agreements are written or oral, formal or informal:* (a) agreements fixing prices or other terms of sale, including in international trade; (b) collusive tendering; (c) market or customer allocation; (d) restraints on production or sale, including by quota; (e) concerted refusals to purchase; (f) concerted refusals to supply; (g) collective denial of access to an agreement, or association, which is crucial to competition. *2. Authorization or exemption* Practices falling within paragraph 1, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.
Abuse of dominant positions/ monopolization	1. *Prohibition of acts or behavior involving an abuse, or acquisition and abuse, of a dominant position of market power.* A prohibition on acts or behavior involving an abuse or acquisition and abuse of a dominant position of market power: (a) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services; (b) Where the acts or behavior of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having, or being likely to have, adverse effects on trade or economic development. 2. *Acts or behavior considered as abusive* (a) Predatory behavior toward competitors, such as using below-cost pricing to eliminate competitors; (b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises; (c) Fixing the prices at which goods sold can be resold, including those imported and exported; (d) Restrictions on the importation of goods which have been legitimately marketed abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing economy where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices; (e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or services: i. Partial or complete refusal to deal on an enterprise's customary commercial terms; ii. Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; iii. Imposing restrictions concerning where, or to whom, or in what form or quantities,

	goods supplied or other goods may be resold or exported; iv. Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee. *3. Authorization or exemption* Acts, practices or transactions not absolutely prohibited by the law may be authorized or exempted if they are notified before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.
Mergers and acquisitions	*Notification, examination and prohibition of mergers affecting concentrated markets* 1. Notification Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when: (a) At least one of the enterprises is established within the economy; and (b) The resultant market share in the economy, or any substantial part of it, relating to any product of service, is likely to create market power, especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by firms whose conduct is under scrutiny. 2. Prohibition Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when: (a) The proposed transaction substantially increases the ability to exercise market power (e.g. to give the ability to a firm acting jointly to profitably maintain prices above competitive levels for a significant period of time); and (b) The resultant market share in the economy, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms. 3. Investigation Procedures Provisions to allow investigation of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, which may harm competition could be set out in a regulation regarding concentrations. In particular, no firm should, in the cases coming under the preceding subsection, effect a merger until the expiration of a waiting period from the date of the issuance of the receipt of the notification, unless the competition authority shortens the said period or extends it by an additional period of time with the consent of the firms concerned, in accordance with the provisions of Possible Elements for Article 7 below. If a full hearing before the competition authority or before a tribunal results in a finding against the transaction, acquisitions or mergers could be subject to being prevented or even undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant part of the relevant market within the jurisdiction.

Source: Extracted from UNCTAD (2000).

Based on the general provisions established by this Model Law, a cross-economy comparison of competition laws has been developed (a detailed description of competition laws by economy may be found in the appendices). The main substantive provisions relating to conduct controls within the APEC economies are summarized in Table 3. Table 4 summarizes provisions relating to structure controls.

As can be seen in Table 3, there is some homogeneity in the practices typically prosecuted by economies; the main apparent difference is that while all the economies prosecute exclusionary abuses of dominant positions (e.g., discrimination, tying, refusals to deal, exclusive dealing), only a few of them also sanction so-called exploitative conducts (e.g., abusive pricing).[41]

[41] In this regard, WB-OECD makes a distinction between exploitative abuses and exclusionary abuses: Exploitative abuses – in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices. Exclusionary abuses – in which a firm attempts to suppress competition for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices.

In the case of US, none of the practices listed under “monopolization” (shown in Table 3) are specified in the US antitrust statutes as “monopolization” offenses, although offenses noted by pale shadow cells are included in other US antitrust laws. Offenses noted by cross-thatched cells, as shown in Table 3, are not explicitly included in any US antitrust statute, although these practices have, in certain circumstances, been found by courts to violate those statutes.

Likewise, none of the practices listed under “restrictive agreements/restraints of trade” are explicitly mentioned in any US antitrust statute, although price-fixing, bid-rigging and customer or territorial market allocation would constitute per se violations under US case law. Concerted refusals to deal have been found to constitute a violation of the US antitrust laws in certain circumstances.

It is worth noting that Chilean competition statute has broad provision for anticompetitive illicit behavior—“…any deed, act or contract that prevents, restricts or obstruct free competition, or that tends to produce these effects”—only illustrating in following subsections exemplary anticompetitive conduct (such as collusive agreements, abusive exploitation of dominant position and predatory practices with an objective related to market dominance).

For this reason, all considered practices could be, under certain circumstances, an anticompetitive illicit by the Competition Tribunal. None of the pale shadow cells are explicitly specified in the Chilean competition statute.

In relation to sanctions, one of the criteria for graduating fines established in Art. 26 of DL No. 211 is “the seriousness of the conduct.” Even though the law does not define what is understood by this, it is considered that the phrase corresponds to the extent of the harm or detriment to free competition.

Table 4 indicates that most of the APEC economies do have structure controls; the main difference being that some of them do not control conglomerates alongside horizontal and vertical integrations.

In particular, the Chilean Competition Law does not consider special rules regarding merger reviews (and does not consider a previous mandatory notification procedure for mergers), however, it is well understood that mergers are part of the acts or contracts that could tend to prevent, restrain or obstruct free competition.

Nevertheless, the National Economic Prosecutor’s Office (FNE) is entitled to file a complaint against the parties of an existing operation if considered competitively risky and in such case the Competition Tribunal (Tribunal de Defensa de la Libre Competencia-TDLC) may order divestitures or other conditions for its approval. For this reason, it is very common that the parties of large-scale mergers make voluntary use of a non-adversarial procedure before the TLDC in order to have legal certainty regarding the competition risks of their mergers.

Table 3: Conduct Control in Competition Laws within APEC Region

WBC income group	Economy	Year of enactment of first competition law	Comprehensive Competition Law	Name of Competition Law that restricts anticompetitive behavior	Control of Anticompetitive Behavior																				
					Anticompetitive practices																				
					Abuse of dominant position/monopolization											Restrictive agreements / Restraints of Trade									Cross-border agreements
					Practices							Sanctions				Practices					Sanctions				
													Criteria									Criteria			
					Price discrimination	Tie-ins	Refusal to deal	Predation practices	Exclusive dealing	Resale price fixing	Abusive pricing	Administrative (Fines)	Based on firms' revenue	Based on economic damage effect	Imprisonment	Market sharing (market or customer allocation)	Restraints on production or sales	Price fixing agreements	Quality fixing agreements	Concerted refusal to deal	Administrative (Fines)	Based on firms' revenue	Based on economic damage effect	Imprisonment	
High income economies	Brunei Darussalam	-		-																					
	Singapore	2004	✓	Competition Act (2004)																					
	United States	1890	✓	Antitrust laws (Sherman Act, Clayton Act, Federal Trade Commission Act, Hart-Scott-Rodino Antitrust Improvements Act)																					
	Hong Kong, China 1/	-		-																					
	Canada	1889*	✓	Competition Act -(1986)																					
	Australia	1974	✓	Trade Practices Act (1974)																					
	Japan	1947	✓	The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (known as Antimonopoly Act-AMA) (1947)																					
	Chinese Taipei	1992	✓	Fair Trade Law (1992)																					
	New Zeland	1986	✓	Commerce Act, Part II (1986)																					
	Korea, Rep.	1980	✓	Monopoly Regulation and Fair Trade Act - MRFTA (1980)																					
Upper middle income economies	Russia	1991	✓	Law on Competition and the Limitation of Monopolistic Activity in Product Markets																					
	Chile	1973	✓	Decree Law Nº 211/1973 which establishes the rules for the defense of free-competition (1973)																					
	Malaysia	-		-																					
	Mexico	1992	✓	Federal Law of Economic Competition (1992)																					
Lower middle income economies	Thailand	1979	✓	Anti-Monopoly Act (1979), replaced by the Trade Competition Act (1999)																					
	Peru	1991**	✓	Legislative Decree 1034 on Repression of Anticompetitive Behaviors (2008), Decisión 608 (of Andean Community) (2005)																					
	China	1980	✓	Regulations on development and protection of competition (1980), Law of the People's Republic of China for Countering Unfair Competition 1993), Price law (1998) and the Anti-monopoly Law (2007)																					
	Indonesia	1999	✓	Law No. 5/1999 : Concerning prohibition of monopolistic practices and unfair business competition (1999)																					
	Philippines	-		The Philippine Constitution of 1987 prohibits anti-competitive practices, (article XII, section 19)																					
Low income economies	Vietnam	2005	✓	Competition Law (2005)																					
	Papua New Guinea	2002	✓	Independent Consumer & Competition Commission Act (2002)																					

Indicates that the item is explicitly present in the provisions of the Law (amendments are also considered). Indicates that the item is implicitly present in the provisions of the Law/Act/Statutes

*Act for the Prevention and Suppression of Combinations in Restraint of Trade (1889); ** Legislative Decree 701 against monopolistic, controlling and restrictive practices affecting free competition (1991)

1/ Sector-specific approach to encourage competition and regulate anticompetitive conducts (i.e. the Telecommunications Ordinance and the Broadcasting Ordinance, which contain legislative provisions for anticompetitive practices). 2/ References to administrative fines are read as civil pecuniary penalties.

Sources: UNCTAD (2000), respective competition laws, APEC Electronic Individual Action Plans (e-IAP), and APEC Competition Policy Database.

Table 4: Structural Control in Competition Laws within APEC Region

WBC income group	Economy	Competition Law with general concern on Mergers&Acquisitions Control	Mergers and Acquisitions Control							
			Competition Authority	Competition Law with general concern on Mergers&Acquisitions Control	Type of integration				Type of notification	
					Horizontal Integrations	Vertical Integration	Conglomerates	Trans-border acquisitions	Mandatory	Voluntary
High income economies	Brunei Darussalam		-	-						
	Singapore	✓	Competition Commission of Singapore -CCS	Competition Act (2004)						
	United States	✓	Antitrust Division of the Department of Justice -DOJ Federal Trade Commission -FTC	Antitrust laws (Sherman Act 1990, Clayton Act, Federal Trade Commission Act, Hart-Scott-Rodino Antitrust Improvements Act)						
	Hong Kong, China		Telecommunication Authority -OFTA (applied only on Telecom sector)	Telecommunications Authority Guidelines - Mergers and Acquisitions in Telecommunications Markets (2004)						
	Canada	✓	Competition Bureau	Competition Act -(1986)						
	Australia	✓	The Australian Competition and Consumer Commission - ACCC	Trade Practices Act (1974)						
	Japan	✓	Japan Fair Trade Comission - JFTC	The Act on Prohibition of Private Monopolizaction of Fair Trade (known as Antimonopoly Act-AMA) (1947) Last amendment in 2005 that came into force in 2006						
	Chinese Taipei	✓	Fair Trade Commission -FTC	Fair Trade Law (FTL), February 4, 1992						
	New Zeland	✓	Commerce Commission	Commerce Act (1986)						
	Korea, Rep.	✓	Korea Fair Trade Commission -KFTC	Monopoly Regulation and Fair Trade Act - MRFTA (1980)						
Upper middle income economies	Russia	✓	Ministry of Antimonopolistic Policy -MAP	Law "On Competition and the Limitation of Monopolistic Activity in Product Markets"						
	Chile	✓	National Economic Prosecutor's Office Tribunal of Defense of Free Competition (Competition Tribunal)	Decree Law Nº 211/1973 which establishes the rules for the defense of free competition (1973)						
	Malaysia	✓	The Securities Commission -SC The Foreign Investment Committee -FIC	Securities Commission Act -SCA (1993) and the Malaysian Code on Take-Overs and Mergers (1998) " Guidelines for Regulation for Acquisition of Assets, Mergers and Takeovers"						
	Mexico	✓	Federal Competition Commission - CFC	Federal Law of Economic Competition (1992) - Chapter II						
Lower middle income economies	Thailand	✓	Competition Commission	Trade Competition Act (1999) - Section 26						
	Peru		National Institute for the Defense of Competition and the Protection of Intellectual Property-INDECOPI (applied only on Electricity Sector)	Law 26876 (1997) Supreme Decree 017-98-INTINCI (1998), amended by S.D. 087-2002-EF (2002)						
	China	✓	The Fair Trade Bureau -FTB of the State Administration for Industry & Commerce -SAIC	Regulations on development and protection of competition (1980), Law of the People's Republic of China for Countering Unfair Competition 1993), Price law (1998) and the Anti-monopoly Law (2007)						
	Indonesia	✓	Commission for the Supervision of Business Competition (Komite Pengawasan Persaingan Usaha – KPPU)	Law No. 5/1999 : Concerning prohibition of monopolistic practices and unfair business competition (1999)						
	Philippines	✓	-	Corporation Code of the Philippines Y RA 8799 (The Securities Regulation Code)						
Low income economies	Vietnam	✓	Competition Council Competition Administration Department	Competition Law (2005)						
	Papua New Guinea	✓	Independent Consumer & Competition Commission -ICCC	Independent Consumer & Competition Commission Act (2002)						

Indicates that the item is explicitly present in the provisions of the Law. ▨ Indicates that the item is implicitly present in the provisions of the Law/Act/Statutes

Sources: UNCTAD (2000), respective competition laws, APEC Electronic Individual Action Plans (e-IAP), and APEC Competition Policy Database.

3.3 Enforcement institutions and processes

Table 5 summarizes the institutional design developed to enforce competition law in the APEC economies. As can be observed, most economies use a collective body approach in which the authority to prosecute antitrust conduct relies on an organization comprised of a range of tribunals and or commissions. In this sense, the civil responsibility of the administrative decision making is shared by the group who make the decision. In the case of APEC specifically, 13 out of 17 use the collective body as the institutional design in the decision taking process. Only a few economies use an individual decision making approach where the administrative decision relies on an individual public officer.

It is worth noting that economies differ in the style of investigation: 12 economies use an administrative investigation procedure; two, a criminal one, and three, a mixed investigation. Finally, most of the economies use independent authorities (from a ministry, for example).

Table 5: Institutional design of competition authorities in the APEC Region

WBC income group	Economy	Competition Authority	Institutional Design						
			Political Independence		Decision-taking-process		Type of Investigation		
			Attached to a Ministry	Independent Authority	Collective Body *	Individual agent	Administrative	Criminal	Mixed
High income economies	Brunei Darussalam	-							
	Singapore	Competition Commission of Singapore -CCS		■	■		■		
	United States	Antitrust Division of the Department of Justice -DOJ Federal Trade Commission -FTC	■		■				■
	Hong Kong, China	Telecommunication Authority Broadcasting Authority (applied only on Telecom sector)							
	Canada	Competition Bureau		■	■			■	
	Australia	The Australian Competition and Consumer Commission - ACCC		■	■		■		
	Japan	Japan Fair Trade Comission - JFTC		■	■				■
	Chinese Taipei	Fair Trade Commission -FTC		■	■		■		
	New Zeland	Commerce Commission		■	■		■		
	Korea, Rep.	Korea Fair Trade Commission -KFTC		■	■		■		
Upper middle income economies	Russia	Ministry of Antimonopolistic Policy -MAP	■		■		■		
	Chile	National Economic Prosecutor's Office Tribunal of Defense of Free Competition (Competition Tribunal)		■	■		■		
	Malaysia	-							
	Mexico	Federal Competition Commission - CFC		■	■		■		
Lower middle income economies	Thailand	Competition Commission	■			■		■	
	Peru	National Institute for the Defense of Competition and the Protection of Intellectual Property-INDECOPI The Commission on Free Competition		■	■		■		
	China	The Fair Trade Bureau -FTB of the State Administration for Industry & Commerce -SAIC	■			■	■		
	Indonesia	Commission for the Supervision of Business Competition (Komite Pengawasan Persaingan Usaha – KPPU)		■	■		■		
	Philippines	-							
Low income economies	Vietnam	Competition Council Competition Administration Department	■				■		
	Papua New Guinea	Independent Consumer & Competition Commission -ICCC		■		■			■

■ Shaded cell indicates the presence of explicit characteristics found in the sources for each authority.
(*) Australia uses a commission and a special tribunal; The United States uses a commission and an agency; and Canada, Chile and Viet Nam employ an agency and a special tribunal.
1/ United States and New Zealand also have a civil investigation regime.
Sources: Respective competition laws, APEC Competition Policy Database.

According to an indepth mapping of competition law across the APEC economies (full study may be accessed at http://www.apec.org/apec/apec_groups/economic_committee.html); competition law has both similarities and differences in goals and law-related provisions. Such variations reflect the differing economy contexts and the fact that enforcement is subject to different goals (as explained above).

4. VARIABLES THAT INFLUENCE EFFECTIVENESS OF COMPETITION POLICY IN APEC ECONOMIES

Although competition policy principles apply to every economy, the performance will vary according to design and enforcement. In the former section it has been shown that competition policy is based on goals and legal provisions that differ across the APEC region. This section explores the ways in which the degree of economic, legal and institutional development, influence the effectiveness of competition policy.

4.1. Classification of economies according with development indicators

Although the meaning of development itself will differ among societies, it is traditionally associated with the economy's capacity to generate and sustain an increase in national income, often measured as Gross Domestic Product (GDP). More precisely, per capita income has been adopted as an indicator of economic development. In fact, the World Bank (WB) uses per capita GDP to classify economies into four income groups.[42]

Due to different economic and social conditions among economies, per capita GDP does not directly measure well-being. In fact, economies with similar per capita GDP do not necessarily exhibit the same living standards. Notwithstanding these issues, per capita GDP at purchasing power parity (PPP) allows us to apply a cross-economy comparison analysis.

One indicator used to measure economic development that does take into account a social dimension is the Human Development Index (HDI)[43] developed by the United Nations Development Program (UNDP). The HDI measures social variables as gains in literacy, schooling, health conditions and services, among others.

With the above in mind, the following Table 6 shows three development indicators for the APEC economies—per capita GDP based on the Atlas Method, the HDI and per capita GDP at PPP and the current WB income classification. As can be observed, the WB classification fits well with the rankings of HDI and per capita GDP at PPP: higher income economies have a higher HDI ranking.

[42] The World Bank divides its member economies into four groups according to income ranges based on 2006 Gross National Income (GNI) per capita calculated using the World Bank Atlas method. Economies with populations of less than 30,000 are excluded. The groups are: low income, US$905 per capita or less; lower middle income, US$906–3,595; upper middle income, US$3,596–11,115; and high income, US$11,116 or more. The whole list for all World Bank member economies with the classification is available: http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS.

[43] The HDI is based on a score ranging 0 to 1; a score of up to 0.5 indicates low level human development, a medium level is indicated by a score of 0.5 to 0.8, and finally, a high level of development is indicated by a score of more than 0.8 (United Nations, 2007/2008).

Table 6: Development Indicators in APEC Region

Economies		GDP per capita, Atlas Method (2006)1/		Human Development Index 2/		GDP per capita based on purchasing-power-parity PPP (2007) 3/		Income Group WB Classification 4/
		(US Dollars)	Ranking	HDI (2005)	Ranking	(Current international Dollars)	Ranking	
Brunei Darussalam	BD	25600	9	0.894	10	51005	1	High income
Singapore	SG	29320	6	0.922	8	49714	2	High income
United States	US	46000	1	0.951	4	45845	3	High income
Hong Kong, China	HK	28460	7	0.937	6	41994	4	High income
Canada	CA	36170	3	0.961	2	38435	5	High income
Australia	AU	35990	4	0.962	1	36258	6	High income
Japan	JP	38410	2	0.953	3	33577	7	High income
Chinese Taipei	TW	29800	5	0.925	7	30126	8	High income
New Zealand	NZ	27250	8	0.943	5	26379	9	High income
Korea	KR	17690	10	0.921	9	24783	10	High income
Russia	RU	5780	14	0.802	14	14692	11	Upper middle income
Chile	CL	6980	13	0.867	11	13936	12	Upper middle income
Malaysia	MY	5490	15	0.811	13	13315	13	Upper middle income
Mexico	MX	7870	11	0.829	12	12775	14	Upper middle income
Thailand	TH	2990	17	0.781	15	7900	15	Lower middle income
Peru	PE	2920	18	0.773	17	7803	16	Lower middle income
China	CN	7598	12	0.777	16	5292	17	Lower middle income
Indonesia	ID	3400	16	0.728	19	3725	18	Lower middle income
Philippines	PH	1420	20	0.711	20	3378	19	Lower middle income
Vietnam	VN	2600	19	0.733	18	2587	20	Low income
Papua New Guinea	PG	770	21	0.53	21	1972	21	Low income

Sources:
1/ World Bank and CIA Factbook.
2/ United Nations (2007/2008) Human Development Report.
3/ International Monetary Fund, World Economic Outlook Database, April 2008.
4/ World Bank, statistics database: http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS

Hereinafter and for the sake of simplicity, the WB income group division will be taken as a proxy of the stage of development, and per capita GDP at PPP will be taken as the economic development indicator for across and within group analysis.

4.2 Correlations between competition policy and economic development-related variables within the APEC region

In order to explore the relationship between competition policy and several economic and institutional variables we use as primary data sources the World Economic Forum and the World Bank. Indicators of per capita income, intensity of local competition index,[44] extent of market dominance index and effectiveness of antimonopoly (competition) policy index[45] will be used.

The latter two indices are based on questions asked of business leaders in the various economies. The first index measures whether or not competition policy is too flexible or ineffective in promoting competition; the second asks if market dominance by a few enterprises is common or rare in key industries. In both cases, high scores indicate good conditions, an effective antimonopoly policy and rare presence of market dominance by few enterprises in key industries.

Regulatory quality, a proxy of institutional quality, measures the government's ability to formulate and implement sound policies and regulations that permit and promote private sector development. Regulatory quality affects competition because a higher level of regulatory quality has a positive effect on long-run expectations and therefore on investment incentives. Hence, this indicator measures the performance and quality of regulations according to three important elements: regulatory policies, regulatory tools and regulatory institutions.

[44] Intensity of local competition indicator is based on the assignation of a statistical value on a scale from 1 to 7. The score is assigned according to responses to statements concerning the level of competition: i.e., "Competition in the local market is (1) limited and price-cutting is rare, (2) intense in most industries as market leadership changes over time" (WEF 2006/2007, Krakwoski, 2005). This indicator will be used as proxy for the level of competition in domestic markets.

[45] In both cases, the value varies on a scale of 1 to 7, where 1 indicates low effectiveness of competition policy and common presence of market dominance by few enterprises in key industries (in the case of the extent of market dominance index); and 7 indicates high effectiveness of antimonopoly policy and rare presence of market dominance by few enterprises.
The effectiveness of antimonopoly policy is gauged from a response to the following question put to business leaders: Is the antimonopoly policy in your country lax and not effective at promoting competition or effective and promotes competition? (WEF 2007/2008; Krakowski, 2005).

4.2.1 Competition policy and levels of competition/market concentration

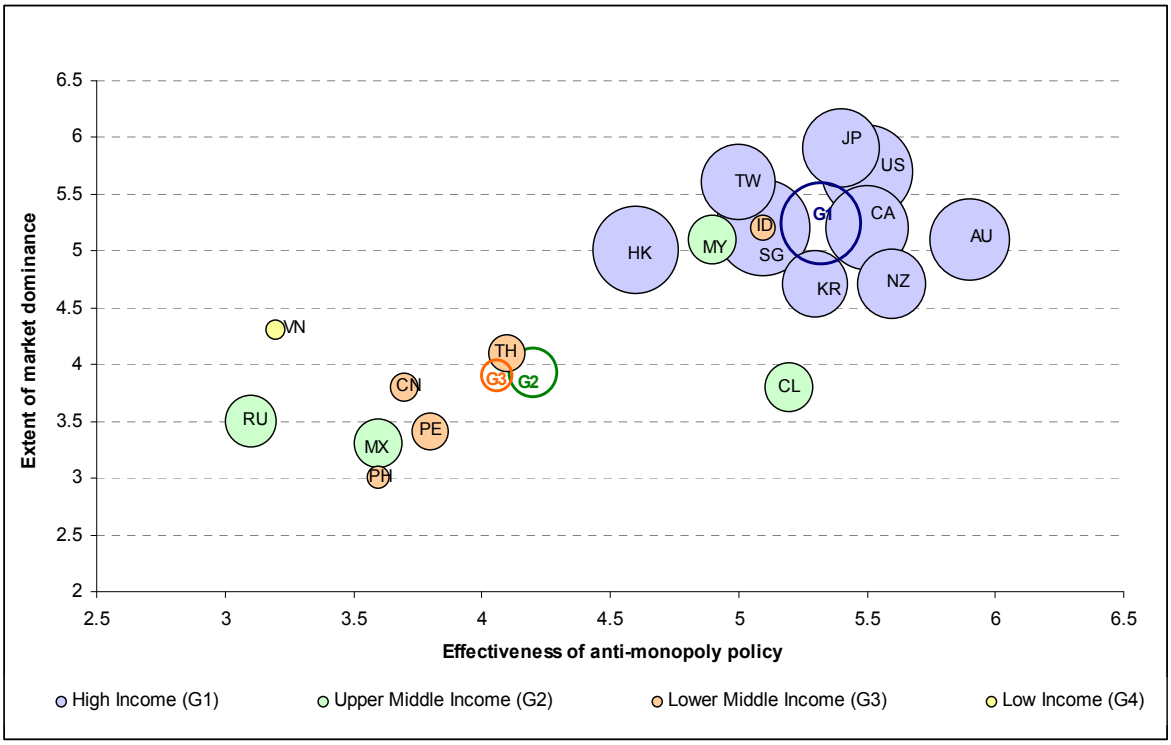
Effectiveness of competition policy and extent of market dominance

In general, a sound antimonopoly policy would be expected to permit firms to gain a high market share through legitimate and vigorous competition, while guarding against the use of this market power to exclude rivals and entrench the dominant position. Successful exclusion is typically associated with high market shares, but high market shares do not imply that exclusionary practices have occurred. Successful firms very often gain high market shares without engaging in exclusionary practices.

From the data collected on APEC economies, a significant and positive relationship between effectiveness of antimonopoly policy (high scores) and rare presence of extensive market dominance (high index scores) is found.[46] As can be observed from Figure 3, high income economies are more effective in their antimonopoly policy and exhibit less market dominance (higher market dominance index).

In spite of their lower income level, Malaysia and Indonesia outperformed their income group since they have both reached levels of performance associated with higher income economies. Among the economies of the second group, Chile tends to have a more effective antimonopoly policy, but experienced the presence of more market dominance than Malaysia.

Figure 1: Effectiveness of competition policy and extent of market dominance



The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Effectiveness of antimonopoly policy index for 2007. Extent for market dominance index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Economic Forum (2007/2008).
2/ International Monetary Fund, World Economic Outlook Database, April 2008.

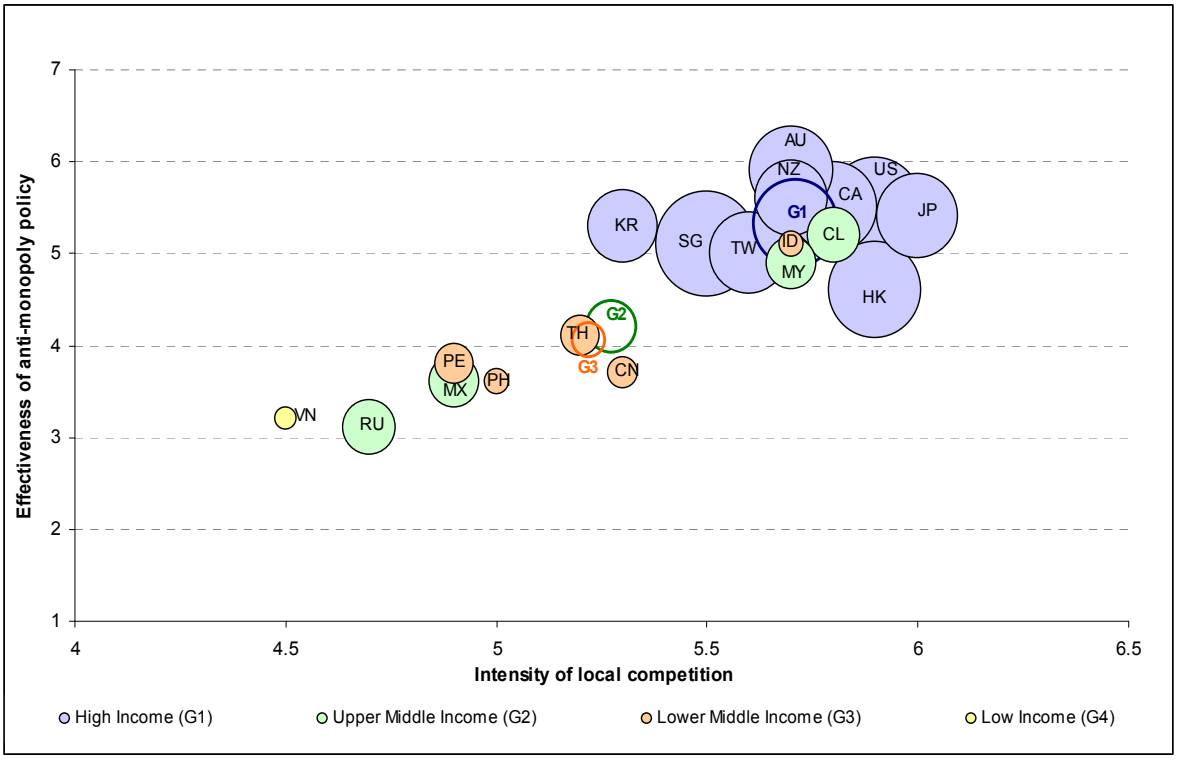
[46] From the data collected, a coefficient of correlation of 0.75 between effectiveness of antimonopoly policy index and extent of market index is found.

Effectiveness of competition policy and intensity of local competition

One of the most important results derived from the analysis developed in this document has to do with the significant, strong and positive correlation between the effectiveness of antimonopoly policy and the intensity of local competition.[47]

As can be observed in Figure 1, economies with a high level of competition tend to have effective antimonopoly policies. On average, the higher the income levels of an economy, the better the competition conditions.

Figure 2: Effectiveness of competition policy and intensity of local competition



The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Effectiveness of antimonopoly policy index for 2007 Intensity of local competition index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Economic Forum (2007/2008).
2/ International Monetary Fund, World Economic Outlook Database, April 2008.

High income economies show higher levels of effectiveness of antimonopoly policy and intensity of local competition than upper middle and lower middle ones. This implies that economies with a stronger competition policy tend to show a higher intensity of local competition.

4.2.2 Institutional quality, intensity of local competition and extent of market dominance

Institutional quality and intensity of local competition

From the statistical analysis, using the aforementioned indicators, a strong and positive relationship between institutional quality and level of competition is found. Moreover, both of these indicators are also strongly related to the economic development indicator, and especially regulatory quality.[48]
As shown at Figure 3, most of the developed economies have a higher level of competition com-

[47] The coefficient of correlation between effectiveness of antimonopoly policy and the intensity of local competition is 0.89.
[48] The coefficient of correlation between regulatory quality index and intensity of competition index is (0.75). Additionally, there is a stronger coefficient of correlation between regulatory quality and GDP per capita at 2007 PPP (0.89), than the one between the latter and the intensity of local competition (0.75).

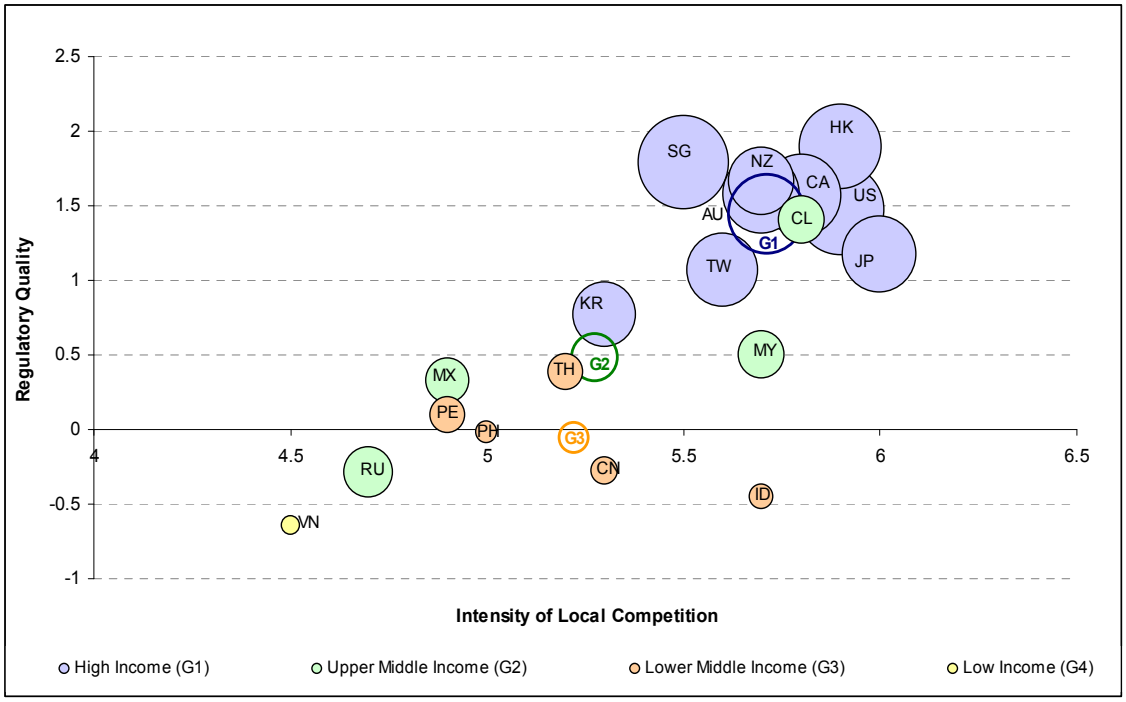
bined with higher institutional quality levels. On average, the lower income group tends to have lower levels of institutional quality and competition intensity.

The second and third groups on average exhibit similar levels of competition and a small difference in regulatory quality levels. Within the second group, a significant dispersion among economies regarding the assessed indicators is observed.

The position of Chile is significant; despite its relatively lower income status, it behaves as a high income economy. Its position is similar to the average of high income economies regarding both the level of competition and institutional quality.

On the other hand, the third group—comprising lower middle income economies—still has low regulatory quality, and almost the same level of competition of the second group. Thailand appears to have a higher regulatory quality—actually it behaves almost as the average of the second group, but it is surpassed, by far, by Indonesia in terms of competition. The case of Indonesia is interesting, because it exhibits a competition intensity at the same level as high income economies, achieved with poor regulation quality.

Figure 3: Institutional quality and level of local competition



The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Regulatory quality index for 2005. Intensity of local competition index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Bank – Governance indicators.
2/ World Economic Forum (2007/2008).
3/ International Monetary Fund, World Economic Outlook Database, April 2008.

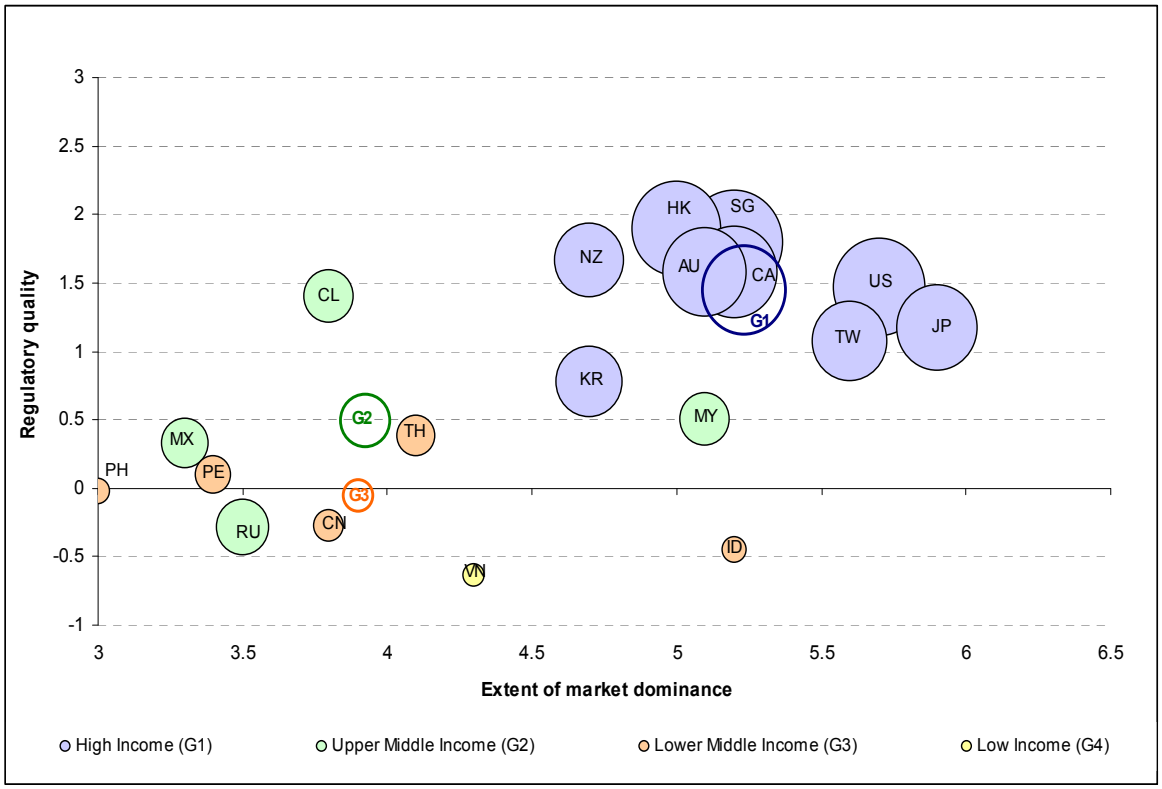
The underlying hypothesis behind the apparent positive and strong correlation between intensity of local competition and regulatory quality is that a higher level of regulatory quality has a positive effect on long-run expectations and, therefore, on investment incentives. Higher investment has an influence on market dynamism by allowing economies to obtain more efficiency gains, and in this manner investment reinforces the competitive environment.

Institutional quality and extent of market dominance (market deconcentration)

Regarding the relationship between regulatory quality and extent of competition, a positive (slightly

significant) correlation is found.[49] From Figure 4 it can be observed that high income economies tend to show good regulatory quality unaccompanied by the presence of market dominance. This stands in contrast to lower income economies, which exhibit a higher presence of market dominance.

Figure 4: Institutional quality and extent of market dominance



The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Regulatory quality index for 2005. Extent of market dominance index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Bank – Governance indicators.
2/ World Economic Forum (2007/2008).
3/ International Monetary Fund, World Economic Outlook Database, April 2008.

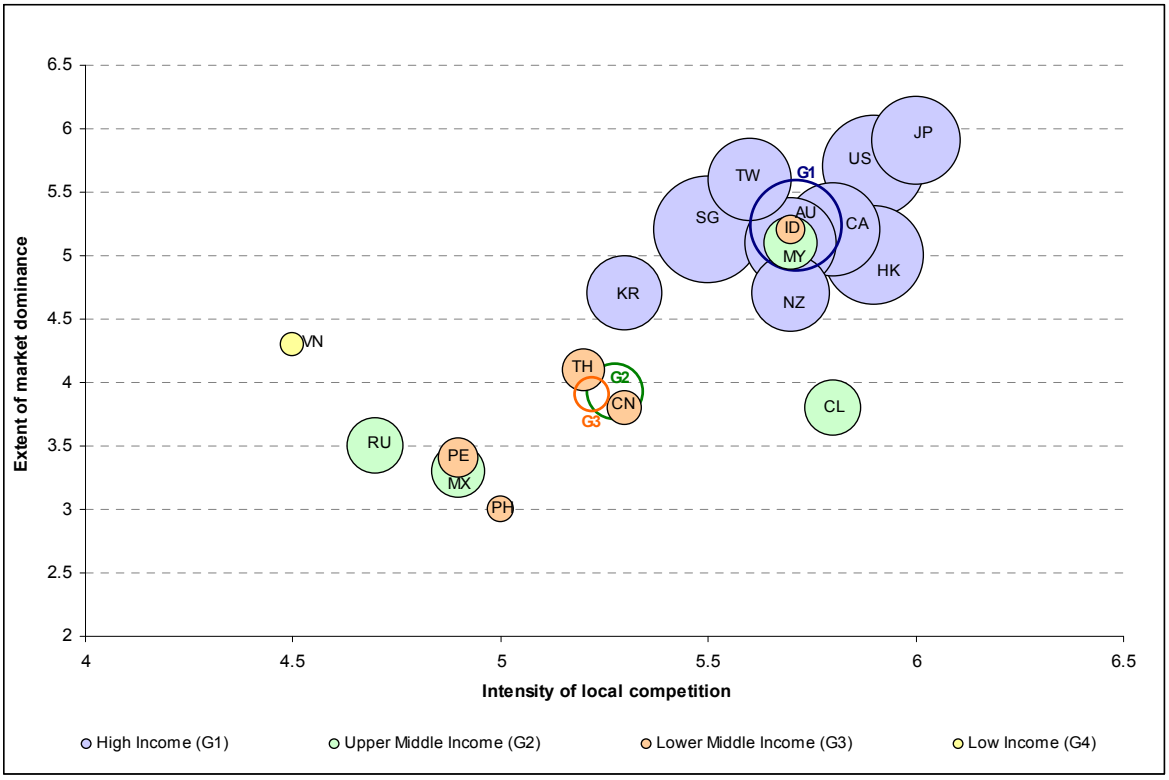
Extent of market dominance and intensity of local competition

From the analysis of APEC economies, it emerges that a positive correlation exists between less market dominance and the local competition intensity.[50]

Figure 5 shows that higher income economies tend to exhibit high levels of competition and less market dominance (high score). It is important to note that Malaysia and Indonesia tend to be out-performing their income group and are positioned in the high income group of economies.[51]

[49] The relationship between the extent of competition and the regulatory quality shows a coefficient of correlation of 0.57.
[50] A coefficient of correlation of 0.71 between extent of market dominance (high score means less market dominance presence) and intensity of local competition.
[51] Seeking for an explanation of the link between extent of market dominance and competition intensity, a positive and significant relationship between business sophistication and extent of market dominance is found. That means that economies with sophisticated business networks and industries may show higher levels of competition. The coefficient of correlation between business sophistication and low presence of market dominance is strongly positive, 0.82.

Figure 5: Extent of market dominance and intensity of local competition



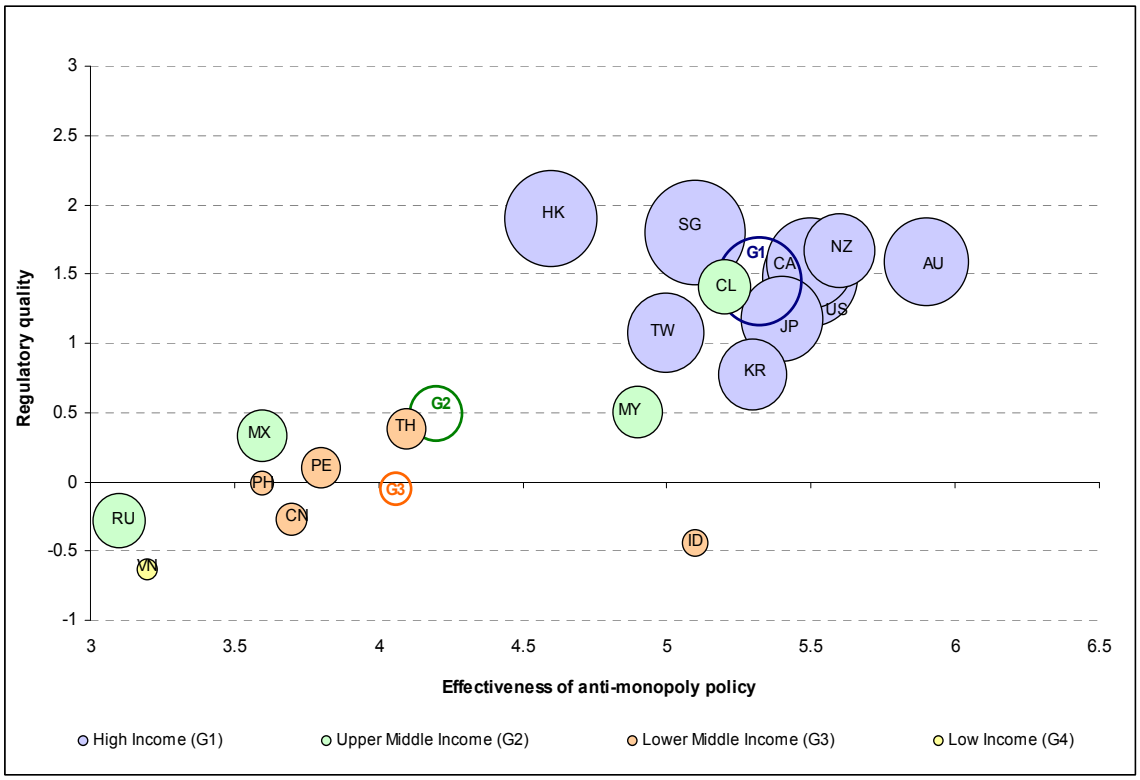
The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Extent of market dominance index for 2007. Intensity of local competition index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Economic Forum (2007/2008).
2/ International Monetary Fund, World Economic Outlook Database, April 2008.

4.2.3 Institutional quality and effectiveness of competition policy

Figure 6 shows a clear positive relationship among levels of economic development, regulatory quality and effectiveness of antimonopoly policy.[52] As shown in other cases, Chile tends to be at a similar level of high income economies, despite its lower income position. With the exception of Indonesia, most of the lower middle income economies show lower regulatory quality and lower effectiveness of their antimonopoly policy.

[52] In fact, there is a strong and positive correlation between effectiveness of antimonopoly policy and regulatory quality (0.81), and similar correlation is shown with the per capita GDP PPP (0.72).

Figure 6: Institutional quality and effectiveness of competition policy



The size of individual bubbles reflects the level of per capita GDP (PPP).
* Brunei Darussalam and Papua New Guinea are excluded from the analysis because of lack of information.
Notes: Regulatory quality index for 2005. Effectiveness of antimonopoly policy index for 2007. GDP per capita PPP for 2007.
Sources:
1/ World Bank – Governance indicators.
2/ World Economic Forum (2007/2008).
3/ International Monetary Fund, World Economic Outlook Database, April 2008.

High income economies exhibit higher levels of regulatory quality and effectiveness of antimonopoly policy than upper middle and lower middle ones. In fact, the strong and positive correlation between regulatory quality and the effectiveness of antimonopoly policy is consistent with the fact that regulatory quality measures, *inter alia*, the government's ability to implement sound policies.

The above analysis may be summarized as follows:

- The effectiveness of competition policy is positively correlated with the intensity of local competition (and negatively correlated with market dominance).
- The intensity of local competition is positively correlated with institutional quality (and negatively correlated to the extent of market dominance).
- Institutional quality is positively correlated with the effectiveness of competition policy.

Furthermore, economic development levels are positively correlated with the intensity level of local competition, with a strong institutional quality and with an effective competition policy.

5. CONCLUSIONS

1. An historical review of the adoption of competition law shows that some economies enacted competition laws to weaken the concentration of economic power (e.g., the United States and Canada); in other cases the primary purpose of competition law was to eliminate economic concentration of state-owned companies (e.g., Chile, Mexico, Peru and New Zealand); and in other cases, the main rationale was to prevent a loss of competitiveness by domestic industry in relation to global markets (e.g., Japan, Korea and Chinese Taipei).

2. According to an in-depth mapping of competition laws across APEC (see full study may be accessed at http://www.apec.org/apec/apec_groups/economic_committee.html), competition law has been enacted in most of the 21 member economies. Some laws were enacted a long time ago, others much more recently. A common aim among them is that they pursue efficiency goals. Nonetheless, there are some differences in the objectives and enforcement often related to the variances in economic development among member economies.

3. Although competition policy principles apply to all economies, policy design and enforcement vary throughout the APEC region. According to this study, institutional quality has been identified as an important difference. The Chilean experience demonstrates how institutional quality can empower effectiveness of competition policy, allowing Chile to achieve competition outcomes akin to those of high income economies.

4. This chapter has revealed that high income economies exhibit higher levels of effectiveness of antimonopoly policy and intensity of local competition than upper middle and lower middle economies. This suggests that economies with a stronger competition policy tend to exhibit a higher intensity of local competition.

5. It was found that wealthier economies have a higher level of competition combined with higher institutional quality levels, while the lower income group tends to have lower levels of institutional quality and competition intensity.

6. Overall, the analysis suggests that, within the APEC region, the intensity of local competition is positively correlated with institutional quality and negatively correlated with the extent of market dominance. Moreover, institutional quality is positively correlated with the effectiveness of competition policy.

7. These findings show that while a comprehensive set of competition laws is an important prerequisite, the right institutional environment is also essential for competition to thrive.

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ANNEX 2-1: Relevant Bibliography on Competition Policy and Development

Study	Summary
Stewart, T.; J. Clarke & S. Joekes (2007)	The study explores—by analyzing the experience of several emerging economies—the competition law and its enforcement, as well as the relationship between competition policy and law through the analysis of cases. The authors stated that a society ideologically prepared for market competition is more likely to have an effective competition law. The authors found that competition law can enhance consumer protection in order to maximize social welfare; moreover, its enforcement may bring confidence to foreign investors with respect to institutional stability, especially when markets suffer from political disturbances. The authors conclude that "one size does not fit all" and that competition law should be tailored-made according with the economy idiosyncrasies.
Singh, A. (2002)	Economies at different levels of development and with different governance capacities require different types of competition policies. Particularly, the author mentions that current competition policies in the United States and the European Union serve as useful guidelines, but the author states that those are not necessarily suitable for developing economies unless an accurate adaptation is done. This, since these economies differ from one another and need policies that combine forces of competition and cooperation to enhance economic development and industrialization, as it has happened with East Asian Economies such as Japan during the fifties and sixties of the last century. Differences among economies are mainly in terms of the definition of dominance; the treatment of cartels; and the enforcement (World Bank, 2002, cited in Singh (2002)).
Gal, M. (2001, 2003)	The author states that the size of an economy necessarily affects the optimal competition policy that should be adopted by it. Gal shows the effects of market size on rules of thumb used in competition policy as well as on more general policy prescriptions, such as policy goals, trade-offs and remedial tools.
Voigt, S. (2006)	The study is based on an econometric analysis applied to a sample of around 100 economies, and attempts to measure the effects of the legal foundation of competition policies and the level of independence of competition authorities on the way that competition policy is performed. The author finds a positive correlation between the existence of competition policy and an economic approach to competition law and an independent competition agency. Notwithstanding, the results are not robust—as expected—with the inclusion of indicators for the general quality of institutions.
Cook, P. (2002)	This study suggests that a competition policy focused primarily on market structure can result in decisions that increase the risk of anticompetitive practices among enterprises in developing economies.
Choi (1999)	The author explores the increasing role of competition policy for the APEC region and defines the accepted four general principles of competition policy: non-discrimination, comprehensiveness, transparency and accountability. Likewise the study recognizes that legislation alone does not ensure the promotion of competition; rather, a pro-competitive perspective is needed.
Lin, P. (2002)	In this paper, the author describes and evaluates the competition policies in Japan, China and Hong Kong, China. The author found that although Japan has developed a modern antitrust system, its system could be further improved to enhance the deterrence effect of the law. China and Hong Kong, China are still in the early stages of developing an adequate and effective competition policy. In the special case of Asian economies, the interest in developing a comprehensive competition policy has been strengthened after the Asian financial crisis. Previously, competition policy perhaps was not needed, as far as they showed a long-standing history of direct government intervention and because competition policies might be in conflict with other domestic policies, especially policies to promote large corporations and conglomerates in selective industries such as chemicals, semiconductors, etc.

Krakowski, M. (2005)	The study explores the relationship between competition policy, enforcement, intensity of local competition and the standard of living. It finds that the richer and larger the economy, the sooner it introduces competition policy. Likewise, it states that the intensity of local competition is influenced by the antitrust policy enforcement, as well as by the size of the economy. It also observes that the intensity of local competition is positively correlated with the standard of living. It concludes that economies should seek to increase their standard of living to introduce competition legislation.
Evenett, S. (2005)	The author studies the relationship between competition policy, competition law and economic development. The author shows theoretical and empirical support that favors the positive effect of competition on the dynamics of economic performance: higher competition leads to cost reduction and productivity improvement and stimulates innovation. Likewise, it states that economic liberalization benefits tend to be greater when accompanied by effective pro-competitive legislation. Nevertheless, it also recognizes that the opposite may occur where economies of scale, network economies, and/or an innovation-led competition prevail. In such scenarios, the author concludes that greater competition does not necessarily lead to greater efficiency. Therefore, the author recommends designing competition policy taking into account the economic factors (such as technology) that characterize each market.
Dutz, M & Vangliasindi, M. (2000)	They analyze competition policy on 26 economies from Central and Eastern Europe and the former Soviet Union. The study concludes that the main factors hindering an effective enforcement of competition law—aside from the lack of expertise by competition agencies—are institutional ones: lack of independence, transparency and effectiveness of appeals. They find a positive relationship between competition policy enforcement and intensity of local competition.
Aubert, C. (2003)	By using a two-economy model, the author shows that a less developed economy prefers fewer firms. Furthermore, a poorer economy prefers less frequent antitrust intervention, when the market is closed. With a common market, economies can free ride on the antitrust effort of other members. A poorer economy may gain or lose from opening markets.
Lee, C. (2005)	The study compares models of competition laws developed by the World Bank-OECD and UNCTAD. There are some differences between these models: WB-OECD is focused on specific objectives—economic efficiency and consumer welfare—and uses quantitative benchmarks and thresholds extensively, while UNCTAD targets broader objectives. According to the author, the broader and more qualitative the objectives of a competition law are, the more difficult it might be to enforce such a law.

Annex 2-2: Statistics and Indicators

APEC Economies	GDP per capita ppp (current international dollar) (2007)1/	Real GDP Growth in APEC Member Economies 2006 (annual percent change) 1/	World Bank clasification (2008) 2/	GDP per capita, Atlas Method (2006) 3/	IDH (2005) 4/	Intensity of Local Compe-tition Index (2007) 5/	Regulatory Quality Index (2007) 6/	Extent of market dominance Index (2007) 5/	Effectiveness of antimonopoly policy Index (2007)5/
Brunei Darussalam	51005	5.1	High income	25600	0.894	-	-	-	-
Singapore	49714	7.9	High income	29320	0.922	5.5	1.8	5.2	5.1
United States	45845	2.9	High income	46000	0.951	5.9	1.47	5.7	5.5
Hong Kong, China	41994	6.9	High income	28460	0.937	5.9	1.89	5	4.6
Canada	38435	2.8	High income	36170	0.961	5.8	1.57	5.2	5.5
Australia	36258	2.7	High income	35990	0.962	5.7	1.58	5.1	5.9
Japan	33577	2.2	High income	38410	0.953	6.0	1.2	5.9	5.4
Chinese Taipei	30126	4.7	High income	29800	0.925	5.6	1.07	5.6	5
New Zeland	26379	1.6	High income	27250	0.943	5.7	1.66	4.7	5.6
Korea.	24783	5	High income	17690	0.921	5.3	0.77	4.7	5.3
Russia	14692	6.7	Upper middle income	5780	0.802	4.7	-0.29	3.5	3.1
Chile	13936	4	Upper middle income	6980	0.867	5.8	1.4	3.8	5.2
Malaysia	13315	5.9	Upper middle income	5490	0.811	5.7	0.5	5.1	4.9
Mexico	12775	4.8	Upper middle income	7870	0.829	4.9	0.33	3.3	3.6
Thailand	7900	5	Lower middle income	2990	0.781	5.2	0.38	4.1	4.1
Peru	7803	7.6	Lower middle income	2920	0.773	4.9	0.1	3.4	3.8
China	5292	11.1	Lower middle income	7598	0.777	5.3	-0.28	3.8	3.7
Indonesia	3725	5.5	Lower middle income	3400	0.728	5.7	-0.45	5.2	5.1
Philippines	3378	5.4	Lower middle income	1420	0.711	5.0	0.0	3.0	3.6
Viet Nam	2587	8.2	Low income	2600	0.733	4.5	-0.64	4.3	3.2
Papua New Guinea	1972	2.6	Low income	770	0.53	-	-	-	-

Sources:
1/ International Monetary Fund, World Economic Outlook Database, April 2008.
2/ World Bank, statistics database, April 2008. http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS
3/ World Bank and CIA Factbook.
4/ United Nations (2007/2008) Human Development Report.
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6/ World Bank – Governance indicators.

Chapter 3

Overview - Competition Policy in APEC Economies

1. INTRODUCTION

The purpose of this paper is to present the key initiatives undertaken by APEC economies to enhance the effectiveness of competition policy, including the implementation or improvement of competition law in the economies, and to present the lessons and challenges assumed for future years.

For the purpose of this report, "competition policy" and "competition law" refer to those policies and laws whose purpose is to promote competitive markets, e.g., regulatory policies applied in sectors with natural monopoly characteristics, and laws addressing issues such as cartel conduct, merger review and abuse of dominance/monopolization.

This part summarizes the similarities and differences, and presents the lessons and challenges, noted in the IEPRs. A detailed summary of each economy's report can be found in Annex 3-1 and full reports in Annex 3-2.

2. COMPETITION POLICY IN APEC ECONOMIES

2.1 Key features in competition policy

According to some of the economies, the objectives of competition policy have changed as the markets evolved. The evolution of competition policy includes the recognition of the critical importance of the dynamic efficiencies and innovation incentives, and an understanding by the competition agencies of the current state of the marketplace. Most of the economies recognize that the principal objectives of competition policy are the promotion of efficiency and consumer welfare. The first competition laws were approved by Canada in 1896 and since then many new laws and amendments to competition laws have been approved by the economies, especially in the last five years.

The laws in some economies are applied to all sectors, while in other economies there are exceptions, basically for regulated sectors.

Several economies have a single competition agency, while others have more than one.

Some economies have not yet approved competition laws, and some economies have approved competition laws, but have yet to implement them.

2.2 Developments supporting important elements of an effective competition policy regime

This section refers to the competition institutions of the economies that regulate for competitive outcomes, including sectoral and generic competition regulators, and their significant achievements over the last five years.

Independence

The economies believe that the effective implementation of competition law and policy requires that their competition agencies be "independent." that is, their actions should be based on facts and law, and not on political considerations.

Additionally, within the authority, responsibilities are divided between those of the investigative staff and the decision-making officials. For most of the economies of APEC, the decision making is performed by a board of three to nine members, although for some decision-making responsibilities may reside with just one person. In most cases, the law sets a fixed term and provisions for dismissal of board members.

Independence is demonstrated through a fair, impartial and consistent application of antitrust law.

Transparency

Transparency is one of APEC's most important principles, as enshrined in APEC's 1995 Osaka Action Agenda, and is essential to the sound application of antitrust law and the maintenance of its effectiveness and credibility. Laws should exist, however, to assure the confidentiality of certain information and establish liabilities for its disclosure.

There is a vast amount of written information that the competition agencies set forth for extensive public consultation or industry feedback, inter alia, recommendations, advisory opinions, drafts of laws or their amendments, regulations, administrative procedures, guidelines (Precedents of Mandatory Compliance) and studies, including technical backgrounders. Also, the authorities publish annual reports, periodical bulletins and provide public explanation of cases.

A significant development toward better transparency is the use of information and communication technology. Most economies provide the public with better access to government information through the enhanced web-presence of governmental agencies.

Accountability

The economies place a high level of importance on ensuring the accountability of the decisions they make to enforce competition policy and law and on guaranteeing the confidence of society in the competition authorities. Since the performance and results of most agencies are accountable to a higher authority in their economy, they submit periodic reports to the Parliament, Congress, Diet, Office of the Ombudsmen or the Office of the Auditor-General. Sometimes this information is made public through different media.

Also, to guarantee effectiveness and legal certainty, most economies have provided the right of the parties to access the judiciary after the administrative decision is made by the competition authority.

Awareness

Public awareness of competition culture is a cornerstone of assuring a sound competitive economy over the long term. Most agencies are engaged in educating its principal stakeholders, business people and business associations, judges, journalists, academia and the general public about the benefits of antitrust enforcement through, inter alia, publications and media releases, different events (conferences, interviews, roundtables, workshops, training programs) and liaisons with business people and consumers. For example, Japan takes into consideration the views and opinions of the various networks of established intellectuals; Korea has consistently implemented the Compliance Program to promote a competition culture; and Singapore has launched a Distinguished Speaker Series to raise awareness of competition law.

Some of the agencies rely on competition advocacy as an essential activity for increasing public awareness of competition principles. They are active in submitting comments (some of them binding) on drafts and laws that may harm competition, and advising legislatures and policymakers to incorporate competition principles in their analyses. Some economies strive to establish closer relationships with other domestic public entities and regulators, local governments, etc.

On an international level, some economies have stated that they are promoting chapters on competition in their free trade agreements.

Enforcement

Economies basically take action against conduct included in their laws such as cartels and abuse of dominant position. Most agencies also follow procedures in the case of merger and acquisition notifications. Some economies have confirmed an increasing number of complaints relating to competition matters.

Most economies have amended the procedures in their laws to improve the efficiency of investigations and the consequent results. Some economies have promoted and subscribed to bilateral cooperation instruments between agencies to allow cooperation with peers in investigations in order to promote efficient enforcement of competition laws, especially regarding cross-border conduct. Developed economies have mentioned their goal of continuing the pursuit of international cartel behaviour.

Most economies participate in events organized by international organizations such as the International Competition Network (ICN) and the Competition Committee of the OECD, and some of them have applied the recommendations of those organizations in the enforcement of their competition laws.

Legal framework

Most of the competition laws of the economies have been amended in the last several years either to include new conduct or to update procedures similar to those of their peers so as to strengthen the power of the competition agency. The revised procedural matters are most often related to market investigations, onsite inspections, leniency, consent agreements, and criminal prosecution and indictment.

2.3 Future challenges and lessons learned in creating an effective competition policy regime

Priority has been given by the economies to operations related to:

- positioning the importance of competition principles in the domestic agenda;
- amending the law to expand its sectoral scope, ensure the independence of the authority or to strengthen the authority's investigative powers allowing it to incorporate new procedural features such as, inter alia, leniency programs, onsite investigations, market investigations and transparency actions;
- enforcing the competition law against the principal anticompetitive conduct identified domestically;
- strengthening the authority by increasing its resources and updating the expertise of its investigative staff with high quality training;
- performing competition advocacy through a closer relationship with other government entities, especially regulators, judges and magistrates; and
- improving public awareness, especially that of small and medium enterprises and trade associations.

One of the initiatives for identifying improvements to be made in future years is the inside view of the development of the agency. The United States Federal Trade Commission project of agency self-assessment will yield recommendations for improvements in commission operations in the years leading up to its centennial in 2014 and beyond, and supply a template for comparable exercises in the future.

Developing economies are conscious of their dependence on international cooperation for the development of their investigative powers and are making efforts to attend training events organized by the international organizations or by peers; and having their representatives attend international events. More developed economies have been supporting the efforts of the young

Economies through their technical assistance programs. A greater challenge is the convergence bilaterally and in multilateral competition organizations.

For increasing cooperation within the investigative process, some agencies are prioritizing bilateral cooperation instruments between peers and, when necessary, the amendment to their legislation to be able to share information related to cross-border conduct.

Annex 3-1: Economy Summaries

Australia

The objective of the competition law in Australia is to enhance the welfare of Australians through the promotion of competition and fair trading. In response to the *2003 Dawson Review* of the competition provisions in Australia, the competition law was amended to improve its operations by providing for greater accountability, transparency, timeliness and clarity. In 2008, competition and business regulation were included as one of the seven priority work streams of the National Reform Agenda, and further amendments to the competition law are expected this year that will help clarify the misuse of market power provisions and strengthen the authority's role by enabling it to fully investigate suspected breaches of the law. Australia intends to introduce criminal penalties for serious cartel conduct later in 2008.

Canada

Besides the benefits to consumers, competition is recognized in Canada as a key driver of innovation, productivity and international competitiveness. Changes to the competitive regime have been introduced to support its independence, transparency, accountability, awareness and enforcement.

Canada considers one of the purposes of its competition legislation to be the expansion of opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada. Critical elements identified are the need to foster cooperation and coordination among competition authorities around the world for more effective enforcement of competition laws through various mechanisms and fora.

Chile

Chile has a tradition in competition enforcement since 1959 when the first statute on competition and market access was enacted. But it was in 1973 when the statute was improved creating its first authority. Recently the current decisional structure was set up with the creation of the Competition Court.

In 2006, a bill was submitted to Congress encompassing a number of amendments related to granting the authority additional investigative powers, as well as strengthening its independence and procedures, and raising the maximum fines.

Efforts have been made to increase the transparency of decisions and activities through granting access to information, while protecting confidential information and granting certainty about procedures by issuing internal guidelines. Accountability is addressed through the management of institutional resources that makes information freely available for fiscal transparency and monitoring. The budget execution that allows the community awareness through the Transparent Government portal; and, the merits review processes

Hong Kong, China

Hong Kong, China is a staunch supporter for free competition. The objective of the government's competition policy is to enhance economic efficiency and the free flow of trade, thereby benefiting consumer welfare. With a view to implementing the competition policy effectively, the government plans to introduce a cross-sector competition law. The target is to introduce a Competition Bill in the 2008–09 legislative session.

In order to let the public have a better understanding of the extent and the likely effect of the proposed law, in early May 2008 the government issued a paper setting out the details of the major provisions and invited comments from the public. The proposals include:

- General prohibitions against anticompetitive conduct in all sectors, i.e., agreements between competing firms and abusive conduct by firms with substantial market power that have the purpose or effect of substantially lessening competition.
- An independent Competition Commission to investigate anticompetitive conduct and determine whether infringement of the law has taken place.
- An independent Competition Tribunal to hear reviews of decisions by the Commission. Decisions of the tribunal would be subject to further review by the Court of Appeal on points of law.
- Appropriate penalties for proven anticompetitive conduct.
- The gathering of opinions on how best to address the issue of merger regulation in Hong Kong, China.
- Full rights of private action, i.e., both “follow-on” and “stand-alone” actions by parties who consider that they have been affected by anticompetitive conduct.

Indonesia

The fragility of its economic structure, the weakness of its business competitiveness and the lack of priority for competition in the domestic agenda have restricted full enforcement of the competition law of 1999. The weak institutional status and constrained budget of the competition agency have also influenced enforcement. Advances have been made in the quality and quantity of the recommendations and suggestions of the authority, on procedural issues and in the advocacy work done, which seeks collaboration and coordination with other regulatory bodies, judges, police and high-level officials of the government. Still, many challenges remain to be faced.

Japan

Japan has promoted progress in making the economic system free, fair and open internationally, based on the principle of self-responsibility and market principles through the implementation of competition policy and law. In recent years, its government has been engaged in making substantial amendments to the law in order to promote vigorous enforcement against anticompetitive conduct.

An interesting approach is the establishment of various networks of intellectuals concerned with competition issues, among other mechanisms for improving public awareness of competition policy.

Republic of Korea

Korea has a 27-year history in competition law enforcement, and an independent central administrative agency since 1994 that was upgraded to a ministerial status in 1996. Statutory and regulatory amendments and guidelines keep the law updated, assuring transparency and accountability in the implementation of competition and enforcement of the law. The Compliance Program for promoting a competition culture has been consistently implemented.

The OECD-KOREA Regional Center for Competition provides educational training workshops on competition law to non-OECD economies in Asia as part of its technical assistance program. This Economy has been the host for various competition training programs of international organizations.

Mexico

The new competition law of Mexico, approved in 2006, has strengthened the institutional powers of its authority and given it stronger tools to combat anticompetitive conduct and increase its regulatory effectiveness, legal certainty and transparency. Competition principles are positioned prominently in the domestic agenda. To promote competition advocacy, constant coordination has been established with other public authorities, in particular with the consumer protection authority, regulators, business associations, state and local governments, the academic community and the judicial branch.

Its higher officials actively participate on the executive boards of international organizations that work on competition issues.

New Zealand

New Zealand's size and location have a significant impact on its competition policy regime due to a comparatively high level of concentration in its structure. As a result, competition policy and law has been tailored to meet the specific needs and conditions of the economy. A high level of importance is placed on maintaining the independence of the authority, and promoting transparency and awareness. The challenges of the significant costs and special resources required have been addressed through drawing on overseas experience and case law.

Since the economy is dependent on trade, emphasis has been placed on cooperation with overseas competition agencies, and currently the government is working on domestic legislation so as to allow information sharing with other competition authorities. Also, competition chapters are included in most of its free trade agreements, which involve cooperation provisions and official assistance for international events and working groups.

Peru

Fifteen years since the approval of its competition law, Peru has made various efforts and recorded success in improving the enforcement of competition policy and law, especially considering that, before 1990, the Peruvian economy was small and highly protected, with few producers, low technological development, subsidized processes and low value added-oriented production. However, challenges remain such as creating effective competition in highly concentrated market sectors with oligopolistic characteristics, bettering the quantity and quality standards of investigations and decisions and assuring a high quality trained investigative staff, even while working with the scarce resources available. In June 2008, a new competition law was approved that clarifies the anti-competitive conduct to be investigated, strengthens the authority's investigative powers and assures the authority's independence.

Continuous competition advocacy activities have been developed, which have been given high priority and oriented to highly sensitive sectors, different governmental entities (especially regulators and judges), academia and the community. International cooperation has been of great help. Peru is now actively participating in international fora and has established the priority of negotiating competition chapters in its free trade agreements, considering the importance of trade. The competition authority also considers it a priority to establish inter-agency agreements for cooperation in competition investigations.

The Philippines

Even through the Philippines believes that an uncompetitive economic environment should not diminish the benefits of liberalization in trade and investment, there is no comprehensive competition law or central authority to enforce competition. Competition-related laws are implemented by different government agencies and have proven ineffective in preventing anticompetitive structures and behavior in the market. The government, through the legislature, has been attempting to pass antitrust legislation during the last 20 years, without success.

Singapore

Competition is a key tenet of Singapore's economic strategy. Policies that encourage market competition have been fundamental to the development of Singapore's economy since its independence in 1965. On 1 January 2005, the Competition Commission of Singapore (CCS) was established to administer and enforce the Competition Act. The Competition Act will further ensure that markets remain competitive by protecting the competitive process.

The Competition Act contains three prohibitions: the section 34 prohibition against anticompetitive agreements and concerted practices, the section 47 prohibition against abuse of dominance,

and the section 54 prohibition against anticompetitive mergers. The sections 34 and 47 prohibitions came into force on 1 January 2006, while the section 54 prohibition came into force on 1 July 2007.

In order to provide guidance to businesses and industry on how CCS will interpret and give effect to the Act, CCS has published 13 guidelines. As a competition authority, it undertakes a holistic approach to championing competition by pairing effective enforcement of the Act with active advocacy. This involves educating businesses, consumers and public sector agencies on the importance of pro-competition practices and policies.

Chinese Taipei

The competition law in Chinese Taipei was an important element of the program of economic reforms that moved the economy from a centrally directed emphasis on manufacturing and exports to a market-driven emphasis on services and high technology. Approved in 1992, the competition law—that has as its ultimate objectives to attain stability and progress—was amended in 1999, 2000 and 2002, and a new amendment draft is being proposed for 2008.

The authority's independence from the government and political parties is urged. Regulations assure compliance with standards of transparency, predictability, non-discrimination, accountability and expediency in administrative procedures; and education is preferred as an awareness mechanism for which activities like symposia, seminars, workshops and training courses are celebrated as a benefit for the stakeholders, industrial associations, university students and the community. Information is also released by the media and websites.

Thailand

The competition policy in Thailand reflects the intent to promote economic restructuring, thus enhancing efficiency and fairness in the long term. A future challenge is to effectively implement the competition law, considering the independence of the authority, the enforcement of the law as to all economic agents and the need to build up expertise among the members of the authority (technical knowledge and practical know-how). Currently, efforts have been made to assure transparency by opening access to information, accountability for the enforcement of the law and awareness on competition issues through publications and media programs.

United States

The United States antitrust enforcement regime has evolved significantly in its more than 100 years of experience, creating an effective policy regime, even though substantial challenges still remain. The evolution of antitrust policy includes the recognition of the critical importance of dynamic efficiencies and innovation incentives—including intellectual property rights and an understanding by the competition agencies of the current state of the marketplace—including emerging trends. To improve institutional mechanisms, a project of agency self-assessment has been announced by the Federal Trade Commission.

US antitrust enforcement is characterized by fair, impartial and consistent application of the antitrust laws, based on sound economic and legal principles. US antitrust enforcers maintain an active advocacy program, and also strive to educate the business community and the general public on the important role of competition and its benefits to consumers. In 2007, industry-specific websites have been launched.

On the international level, the competition authorities routinely cooperate with foreign competition agencies on cross-border cases and engage in efforts to converge toward consistent competition policies based on sound economic principles. Efforts will continue on a bilateral basis and in multilateral competition organizations.

Viet Nam

Since the opening up of the economy, together with positive outcomes, anticompetitive and unfair competition practices among enterprises have also become rampant, threatening the legitimate rights and interests of business and consumers alike, and hampering the business environment. In that context, Viet Nam's Competition Law was enacted in December 2004 and entered into force in July 2005. Two State authorities were established to implement the Competition Law—The Vietnam Competition Administration Department (VCAD) of the Ministry of Industry and Trade and the Vietnam Competition Council (VCC).

The general competition law applies to all enterprises in all industries and sectors. However, there are some specific competition legislations for particular sectors such as: electricity, telecommunications, pharmaceutics, banking and credit institutions, which are controlled by sector regulators, with which the VCAD closely coordinates.

Viet Nam is currently making efforts to raise public awareness on Competition Policy and Law, using various instruments such as workshops, seminars and training courses conducted at both central and provincial levels, as well as mass media.

Annex 3-2: Individual Economy Reports on Competition Policy

- Australia 59
- Canada 65
- Chile 71
- Hong Kong, China 79
- Indonesia 81
- Japan 83
- Republic of Korea 89
- Mexico 93
- New Zealand 97
- Peru 103
- Philippines 109
- Singapore 113
- Chinese Taipei 117
- Thailand 123
- United States 127
- Viet Nam 133

Australia: Developments in Competition Policy

1. Introduction: Key features of the Australian competition policy regime

Competition policy and law contribute to creating stronger and more efficient markets by providing economic entities with fair competitive environments that improve their performance and competitiveness. The *Trade Practices Act 1974* (TPA) is the primary competition and consumer protection legislation in Australia. The object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The TPA not only prohibits restrictive trade practices, such as cartel conduct and arrangements that substantially lessen competition, but also prohibits unconscionable conduct and provides for the regulation of access to a number of significant and essential services, such as telecommunications.

Australia's National Competition Policy

In 1992, a Committee of Inquiry into a National Competition Policy for Australia was established to examine a number of significant areas of economic activity not already subject to competition policy, such as government instrumentalities and the professions. In 1995, the Council of Australian Governments (COAG), which is the peak intergovernmental forum in Australia, agreed to implement the reforms recommended by the Committee in a coordinated and comprehensive National Competition Policy (NCP). The underlying principle of the NCP was that competitive markets will generally serve the interests of the wider community and therefore arrangements that detract from competition should only be retained if they can be shown to be in the public interest.

The NCP reforms were wide ranging and included: the extension of the TPA to previously excluded businesses in Australia, including state and territory government businesses; governance and structural reform of government businesses to make them more commercially focused and expose them to competitive pressure; regulatory arrangements to secure third-party access to nationally significant infrastructure services and, more generally, to guard against overcharging by monopoly service providers, especially in the infrastructure area; and a process for reviewing, and where appropriate, amending, a wide range of legislation which restricted competition.

The NCP also included: the creation of independent authorities to oversee, administer and ensure compliance with the TPA; the establishment of reform programs which had been previously agreed for the electricity, gas, water and road transport sectors; and payments by the Australian Government to the states and territories in recognition of the principle that all jurisdictions should benefit from the revenue proceeds that were expected to flow from a stronger economy.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

Australia believes that the independence of statutory authorities to regulate and oversee competition law and policy is essential to effective implementation. The Australian Competition and Consumer Commission (ACCC) is the primary competition authority in Australia, independent from the Government. Its powers and functions, which are drawn from a wide range of provisions in the TPA, include: investigating possible breaches of the competition and consumer protection provisions of the TPA; bringing proceedings against those suspected of

breaching the TPA; considering applications for immunity from the TPA on a range of public interest grounds; arbitrating on disputes over access to essential facilities; and assisting consumers who have suffered as a result of breaches of the TPA.

Although the ACCC is within the portfolio responsibility of the relevant Minister[1], the Minister has no power to direct the ACCC on how to fulfil its obligations in relation to the enforcement of competition law. The Minister's powers are limited to giving general directions to the ACCC. Moreover, members of the ACCC are appointed by the Governor-General with the majority support of Australia's states and territories.

The Australian Energy Regulator (AER) has been established to administer the regulation of Australia's national electricity market, which came into effect in 1998 and provides for open access to the electricity transmission and distribution networks in most of Australia. From 1 July 2008, the AER will also be the economic regulator of gas transmission and distribution networks (other than in Western Australia).

The National Competition Council (NCC) was also set up as an independent statutory authority in 1995 to oversee third-party access to infrastructure and to monitor the implementation of NCP reforms across the states and territories. The NCC contributed to the successful implementation of the NCP by bringing accountability and transparency to the reform process. The NCC regularly reported on the progress of the NCP reforms and identified areas where commitments had not been met or where actions fell short. Since 2007, the NCC's primary role is to undertake functions in relation to third-party access to infrastructure, with the newly established COAG Reform Council taking on the role of monitoring reforms.

2.2 Transparency

Major competition policy reviews in Australia are often carried out by independent, ad hoc panels of eminent members of the community or by the Productivity Commission, Australia's independent research and advisory body focusing on economic productivity. Following the establishment of terms of reference by the Government, a typical review would involve public input through invitations for submissions, hearings and other consultative forums, and may include the release of draft reports and preliminary findings. Recommendations made to Government are usually made public, followed by a Government response to the findings and recommendations.

Australia has various measures in place to promote transparency of its competition policy and law. The TPA requires the ACCC to publicly release annual reports with respect to its operations. Annual reports, amongst other things, must include details of time taken by the ACCC to make decisions and determinations, information in relation to its information-gathering powers and a summary of the kinds of complaints received and how it dealt with them. To further aid transparency, the TPA also requires the ACCC to set up and maintain public registers of its decisions.

The *Freedom of Information Act 1982* (FOI Act) also provides for any person to access information in the possession of the Federal Government and its authorities. The FOI Act requires federal agencies, including the ACCC and the NCC, to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public. In addition, the FOI Act requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation. Consistent with the FOI Act, the ACCC issues regular publications and media releases in relation to its powers and operations.

[1] The Minister for Competition Policy and Consumer Affairs

2.3 Accountability

Australia places a high level of importance on ensuring accountability of decisions made by enforcement agencies. The ACCC makes decisions on whether or not to grant immunity under the TPA, and makes arbitration decisions in cases involving access to essential facilities. Parties not satisfied with the decision of the ACCC may apply to the Australian Competition Tribunal (the Tribunal) for a review. The Tribunal also reviews decisions made by the Minister on whether or not a particular service should be opened up to access by third parties. And since 2007, the Tribunal considers applications, at first instance, for authorizations in relation to mergers and acquisitions, under the TPA.

The ACCC may bring representative court actions in relation to contraventions of the anticompetitive and consumer provisions of the TPA. However, provision is also made for a person to independently seek a remedy from a court. This right of private action enables a person who considers that the TPA has been contravened, to approach a court directly, irrespective of the view of the ACCC.

Cases relating to restrictive trade practices and consumer protection under the TPA are heard by the Federal Court of Australia (Federal Court). A party not satisfied with a determination made by a single judge of the Federal Court may appeal the decision to the full Federal Court. A determination of the full Federal Court may then be appealed to the High Court of Australia.

The ACCC is funded by the Australian Government, with its resourcing determined as part of the Government's Budget process, and is subject to regular reviews. The ACCC is accountable and answerable to the Australian Parliament, which can require the ACCC to provide Parliament with any information concerning the performance of its functions.

2.4 Awareness

While the enforcement function is a cornerstone of an effective competition law and policy, there also needs to be a range of education, outreach and liaison activities to create and maintain a culture of competition. Australia is active in promoting awareness in competition policy and law both within Australia and overseas. The ACCC issues publications and media releases, conducts public meetings and conferences, and liaises with and informs businesses and consumers about the law so that they can, in turn, inform their members and customers. During 2006-7, the ACCC issued 378 media releases, undertook 173 speaking engagements and extensive briefings by the Chairman, Commissioners and senior staff, and produced 93 consumer and small business articles for external publication.

Moreover, Australia is committed to international engagement on competition law and policy and continues to be active in competition programs run by multilateral organizations such as the OECD and APEC.

Australia has become increasingly involved in the development of Free Trade Agreements. Competition chapters have been included in Australia's current Free Trade Agreements with Singapore, Thailand and the United States. These chapters promote competition, curtailment of anticompetitive conduct and provide mechanisms to enhance cooperation and information sharing between competition authorities. Competition chapters are seen by Australia as an essential part of a comprehensive Free Trade Agreement.

2.5 Enforcement

Competition law is strongly enforced in Australia, with the ACCC formally investigating around 100 competition matters and conducting 390 mergers, asset sales and joint venture reviews during 2006–07. It receives and assesses many more complaints every year (52,598 alleged contraventions of the TPA were assessed by the ACCC in 2006–07).

To further aid the enforcement of cartel conduct, in 2005 the ACCC issued a revised "first-in" Immunity Policy for Cartel Conduct. The new policy replaced the 2003 leniency policy and was

introduced to better detect and break up hardcore cartels. Generally, the revised policy offers immunity from prosecution by the ACCC, provided that: the person involved in the cartel was the first person to come forward with information in relation to the cartel; the person cooperates fully with the ACCC; and the ACCC did not have sufficient evidence to commence proceedings in respect of the cartel at the time of the person coming forward.

2.6 Legal framework

The 2003 *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review) was the most comprehensive review of the competition provisions of the TPA since 1993. The Dawson Review was announced in response to a new business environment, involving businesses dealing with less regulated markets and large businesses having greater market power.

The Dawson Review recommended the criminalization of hardcore cartel conduct to provide an effective deterrent on cartel behavior. The Australian government agreed to this recommendation and has proposed to introduce amendments to the TPA to criminalize hardcore cartel conduct by the end of 2008. The criminal cartel offense will prohibit a person from making, or giving effect to, an agreement between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the agreement is made or given effect to with the intention of obtaining a benefit.

Furthermore, in 2007, in response to the Dawson Review's recommendations, the Australian Government amended the TPA to improve its operation by providing for greater accountability, transparency, timeliness and clarity. These amendments included clarifying the misuse of market power provisions, providing additional guidance to courts when considering predatory pricing cases and reducing the regulatory burden on business by simplifying the processes for mergers assessment and collective bargaining.

The Government has also proposed to introduce, by the end of 2008, amendments to further clarify the misuse of market power provisions in the TPA. The reforms will, amongst other things, further strengthen the role of the ACCC by enabling it to fully investigate suspected breaches of the law by enhancing its information gathering powers, and providing small businesses with cheaper and more efficient judicial access by allowing misuse of market power cases to be heard in the Federal Magistrates Court, rather than the Federal Court.

3. Future challenges and lessons learned in creating an effective competition policy regime

Key lessons learned

Following the end of a decade of NCP reforms, the Government asked the Productivity Commission to conduct an inquiry into the impacts of the NCP. *The Review of National Competition Policy Reforms* (the Review) was released in 2005. The Review noted that while the NCP was an effective and integrated program, the implementation of the NCP was not without deficiencies. The Review also noted that legislative reviews of anticompetitive regulation were of variable quality and the public interest provisions were not always properly followed by governments. The Review found that, in some areas, more attention could have been given early on in the adjustment consequences of pro-competitive reforms. Moreover, it found that a backlash against NCP was greater than it might had been had state and territory governments been more active in selling the benefits of reforms.

Notwithstanding such problems, NCP brought substantial benefits to the Australian community. The Review concluded that the NCP contributed to: a productivity surge that had underpinned strong growth in average household incomes over the past decade; reduced prices of some goods and services; and an expanded range of products available to consumers. Although Australia achieved great success with the NCP reforms, state and territory governments agreed that there remained considerable scope for further reform to realize Australia's full potential.

Future challenges

The competition provisions of the TPA have helped shape economic activity in Australia since 1974. Further gains were achieved in 1995, following the extension of the competition provision to apply to all business activity in Australia. Given the ever-changing business environment, the challenge ahead is to ensure that reforms stay relevant and opportunities for further improvements are addressed.

In 2006, COAG agreed to another wave of reforms, building on the achievements of the NCP. In 2008, COAG further revitalized the National Reform Agenda (NRA) to focus on seven priority work streams, including business regulation and competition. The business regulation and competition work stream aims to reduce the costs of regulation to business associated with having three levels of government and deliver significant improvements in Australia's competition, productivity and international competitiveness.

In competition law reform, it will be important to ensure that competition policy and law continue to promote the competitive process, as opposed to focusing upon particular industry sectors or classes of competitors. It is important for the TPA to maintain a focus upon its objective to "enhance the welfare of Australians through the promotion of competition"—not the protection of particular competitors.

Finally, an ongoing challenge is to continue advocating the benefits of undertaking competition reforms, in terms of efficiency, productivity and the wellbeing of all Australians.

Canada: Developments in Competition Policy

1. Introduction: Key features of Canada's competition policy regime

In Canada, the protection and promotion of competitive markets, as well as the enabling of informed consumer choice, is the responsibility of an independent law enforcement agency called the Competition Bureau, which administers and enforces the *Competition Act* (1986)—Canada's primary competition law.[2] Unlike many jurisdictions that separate competition law from consumer protection, Canada's *Competition Act* contains specific provisions related to maintaining a fair marketplace for consumers and businesses.

The *Competition Act* aims to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;
- expand opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.[3]

The *Competition Act* applies to all sectors of the economy and to all marketplace participants irrespective of the nationality or origin of the product or service, including provincial and federal government corporations, in respect of their commercial activities in competition with other persons. It governs most business conduct in Canada; activities specifically exempted include collective bargaining, amateur sport, and regulated industries and activities subject to other legislation.

The *Competition Act* contains provisions addressing both criminal offenses, including conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices, as well as matters subject to civil review such as mergers, abuse of dominant position, refusal to deal, exclusive dealing and tied selling.

An independent adjudicative body called the Competition Tribunal hears and decides on all applications filed under the *Competition Act* that deal with deceptive market practices and restrictive trade practices.[4]

2. Developments supporting important elements of an effective competition policy regime

Over the last five years, Canada has introduced a number of changes to its competition regime that support the important elements of independence, transparency, accountability, awareness and enforcement.

2.1 Independence

The Competition Bureau is a unit of the federal Department of Industry and is led by a Commissioner of Competition (the "Commissioner"), who is an independent law enforcement official appointed by the Governor-in-Council.[5] Under the Competition Act, the Commissioner

[2] In addition to the *Competition Act*, Canada's competition policy regime includes separate legislation governing consumer packaging and labeling, textile labeling and precious metals marking.
[3] More information on the *Competition Act* can be obtained from the Competition Bureau's website: http://www.competitionbureau.gc.ca.
[4] Restrictive trade practices include: refusal to supply, consignment selling, exclusive dealing, tied selling and market restriction, abuse of dominant position, delivered pricing, foreign judgments and laws, foreign suppliers, specialization agreements and mergers.
[5] The Commissioner's duties are described in the *Competition Act*.

can launch inquiries, intervene as a competition advocate before federal and provincial bodies, challenge civil and merger matters before the Competition Tribunal and refer criminal matters to the Attorney General of Canada for prosecution.

Criminal prosecutions are conducted by the independent office of the Director of Public Prosecutions of the Public Prosecution Service of Canada (PPSC), which was created by the *Director of Public Prosecutions Act* on 12 December 2006, when Part 3 of the *Federal Accountability Act* came into force. It replaced the former Federal Prosecution Service of the Department of Justice. The PPSC is independent of the Department of Justice and reports to Parliament through the Attorney General of Canada.

The Competition Tribunal is a strictly adjudicative body that operates independently of any government department. It does not have investigative powers nor does it provide advice to government. It has no function other than that associated with the hearing of applications and issuance of orders. The Tribunal is composed of not more than six judicial members and not more than eight lay members, who are appointed by the Governor in Council.

2.2 Transparency

Transparency is a key operating principle of the Competition Bureau. Transparency of the enforcement and administration of the *Competition Act* in Canada has been achieved through a number of means, including:

- the publication of written advisory opinions, laws, regulations, procedures, administrative ruling of general application and judicial decisions;
- the availability of advanced rulings; and
- the public distribution of written materials including, pamphlets, information bulletins, enforcement guidelines and technical backgrounders.[6]

Since 2003, the Bureau has issued *Bank Merger Guidelines* (2003) and revised its general *Merger Enforcement Guidelines* (2004). The Bureau has also issued several information bulletins and draft information bulletins for consultation with stakeholders including:

- *Draft Bulletin on Corporate Compliance Programs* (consultation – 2008);
- *Draft Information Bulletin on Sentencing and Leniency in Cartel* Cases (consultation – 2008);
- *Bulletin on Communication of Confidential Information under the Competition Act* (2007);
- *Conformity Continuum Information Bulletin* (2007);
- *Immunity Program Information Bulletin* (2007);
- *Information Bulletin on Merger Remedies* (2006);
- *Technical Bulletin on Regulated Conduct* (2006);
- *Information Bulletin on Private Access to the Competition Tribunal* (2005); and
- *Information Bulletin on Section 11 of the Competition Act* (2005).

The Bureau has also issued 15 technical backgrounders on cases and industries it has examined since 2005.

The Competition Tribunal's recent decision summaries are made public and can be found on its website.[7]

2.3 Accountability

The Commissioner of Competition is accountable to the Parliament of Canada. The Commissioner prepares an annual report of all the activities of the Competition Bureau, which is

[6] These communications can be accessed on the Competition Bureau's website.
[7] For the Competition Tribunal's recent decision summaries, see http://www.ct-tc.gc.ca/english/View.asp?x=277

presented to Parliament by the Minister of Industry and is publicly available on the Bureau's website.

The Bureau has published a Fee and Service Standards Handbook. In June 2007, the Bureau published a *Merger Review Performance Report,* reporting on its compliance with its published service standards.

During the past five years the Bureau has held ongoing consultations to collect stakeholder feedback on a number of issues such as proposed amendments to the *Competition Act,* and draft guidelines and information bulletins (search and seizure, leniency, immunity, predatory pricing, etc.). It also participates in semi-annual meetings with the Canadian Bar Association.

2.4 Awareness

The Commissioner and senior officers of the Competition Bureau appear before Parliamentary Committees, participate at national and international conferences and meet national associations in order to explain the enforcement and administration of the *Competition Act* and its role in maintaining open and competitive markets.[8]

Sections 125 and 126 of the *Competition Act* provide a statutory basis for the Commissioner to engage in competition advocacy initiatives before federal and provincial boards, commissions or other tribunals. The Commissioner or the Commissioner's representatives appear before federal and provincial regulatory bodies in support of pro-competitive regulatory initiatives. Over the past five years, the Commissioner has made representations before the following bodies (with the subjects listed in brackets):

- the Canadian Radio and Telecommunications Commission (Regulation of wholesale services and definition of essential service; Forbearance from the regulation of retail local exchange services);
- the Government of Ontario (Regulation of Paralegals by the Law Society of Upper Canada; Regulation of dental hygienists);
- the Governments of Alberta, New Brunswick and Nova Scotia (Regulation of dental hygienists); and
- the Canadian International Trade Tribunal (Antidumping action in baby food).[9]

The Bureau has also undertaken specific marketplace studies to identify barriers to competition and identify potential pro-competitive regulatory reforms. The Bureau released two such market studies in 2007: a professions study and a pharmaceuticals study.

2.5 Enforcement

<u>Domestic Focus</u>

The Competition Bureau is the administrative and law enforcement body charged with the preservation of a competitive marketplace in Canada. It continually seeks ways of improving the enforcement of the *Competition Act*. For example, in 2007, the Bureau published a revised bulletin on confidentiality and a new information bulletin covering the immunity program under the *Competition Act.* Additionally, consistent with the Bureau's priority to enhance performance management and transparency, it published a post-merger review study in October 2007. In April 2008, the Bureau published a bulletin setting out its current policy on merger remedies.

The Bureau also continues to take action against domestic companies engaging in abuse of dominant position and exclusive dealing. For example, in the industry manufacturing cast iron pipe, fittings and mechanical joint couplings for drain, waste and vent applications, the Bureau appealed to the Federal Court of Appeal in respect of the Competition Tribunal's 2005 decision that Canada Pipe Company Ltd. had not abused its dominant position in Canada. On 23 June

[8] Much of this communication appears on the Competition Bureau's website.
[9] The Competition Bureau's regulatory interventions are available on its website.

2006, the Federal Court of Appeal allowed the Bureau's appeal and dismissed Canada Pipe's cross-appeal. The Bureau and Canada Pipe subsequently entered into a consent agreement, under which Canada Pipe agreed to implement a new rebate program that does not require participants to purchase cast iron drain, waste and vent products exclusively from Canada Pipe in order to qualify for discounts and rebates.

Attacking domestic cartels is an enforcement priority for the Bureau. Following a Bureau investigation into the domestic carbonless fine papers industry, three domestic companies were fined a total of C$37.5 million for their roles in a price-fixing cartel.

The Bureau also continues to aggressively pursue international cartel behavior. For example, a Bureau investigation into a global cartel in the rubber chemicals market to fix prices and share markets resulted in total fines of C$16.7 million.

International Cooperation

To foster greater cooperation among competition authorities around the world, which is a critical element of law enforcement, Competition Bureau officials have assumed leadership roles and actively participate in a number of international organizations. The Bureau contributes to the development of competition policy around the world in support of its domestic priorities in order to:

- promote cooperation among competition agencies for more effective enforcement of competition laws;
- promote convergence to ensure Canadians doing business abroad benefit from fair and modern competition laws in the countries in which they do business; and
- describe both the Canadian approach to competition policy and Canada's law enforcement successes.

The Bureau attaches significant importance to cooperation and coordination with foreign counterparts as a means to strengthen enforcement of the *Competition Act*. The Bureau has negotiated several cooperation agreements and arrangements with foreign agencies. In addition to existing cooperation agreements and arrangements with the United States, the European Union, Mexico and Chile, Canada has, over the past five years, entered into a cooperation agreement with Japan, and the Bureau has entered into cooperation arrangements with competition authorities in the United Kingdom, Korea and Brazil.

The Bureau coordinates and cooperates on investigations with foreign law enforcement agencies, including information sharing and coordinating the exercise of formal powers such as searches, document production orders and remedies.

The Bureau participates actively in initiatives to promote international cooperation and convergence of competition law enforcement. Two key international competition law fora are the International Competition Network (ICN) and the OECD Competition Committee—the primary international fora for substantive discussion of competition law enforcement and policy matters.

3. Lessons learned and future challenges in creating an effective competition policy regime

In addition to the benefits that competition provides to consumers, competition is increasingly recognized as a key driver of innovation, productivity and international competitiveness.

In July 2007, the government announced the creation of The Competition Policy Review Panel.[10] The panel has been mandated to review key elements of Canada's competition and investment policies to ensure that they are working effectively. The Panel is examining a range of issues, with an eye to ensuring that Canada's policies are modern and effective and reflect a

[10] See the Competition Policy Review Panel webpage at http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

competitive environment that is global in scope, and typified by fierce competition between national jurisdictions seeking to attract investment, people and economic opportunities. In October 2007, the Panel released its consultation paper, *Sharpening Canada's Competitive Edge.*[11] The paper outlines the changing international economic context and the main challenges facing Canada if it is to maintain its successful economic performance—namely, how best to create the domestic conditions to foster the development of Canadian-based global businesses; and how to best position Canada to be a world-leading destination for talent, capital and innovation. The Panel is expected to report back to the Minister of Industry on behalf of the Government by 30 June 2008.

The Competition Bureau is examining potential revisions to the conspiracy provisions of the *Competition Act*. Agreements between competitors can be anti-competitive, competitively neutral or pro-competitive. Section 45 of the *Act,* which makes it a criminal offense for anyone to conspire with anyone else to unduly lessen competition, does not adequately make this distinction. As a result, it does not capture certain types of anti-competitive agreements, while possibly inhibiting competitively neutral or pro-competitive agreements. The issue has been the subject of review by the Bureau, which had previously undertaken public consultations in 2003-2004, and had benefited from the advice of working groups of lawyers and economists through 2006. The work has been carried out with a view to determining, among other things, the sort of behavior the provisions of the *Act* should cover and whether the provisions should be criminal or civil.

The Bureau is currently working on adapting the Competition Assessment Toolkit of the Organization for Economic Cooperation and Development for the Government of Canada, developing training material and launching a pilot project. This toolkit incorporates the experience of leading jurisdictions in carrying out a competition assessment of government policy and the intention is for it to be easily applied during the policy and regulation development process with few administrative resources.

Over the next two years, the Bureau's enforcement challenges and priorities include: domestic cartels and bid-rigging; mass marketing fraud; the electronic marketplace—specifically the targeting of misleading and fraudulent health performance claims; and mergers and dominance—specifically, clarifying key issues related to the enforcement principles of the *Act.* In respect of advocacy, the Bureau's priority initiatives will include: promoting implementation of a competition assessment process within Government; reducing competitive restrictions in self-regulated professions; and creating greater awareness of misleading and anticompetitive claims related to health and the internet. Regarding management priorities, the Bureau will continue to deal with the challenge of capacity building through information gathering and management and talent management.

[11] *Sharpening Canada's Competitive Edge* can be found at: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html.

Chile: Developments in Competition Policy

1. Introduction: Key features of Chile's competition policy

Chile has a long tradition in competition enforcement. The first statute on competition and market access was enacted in 1959, although the current institutional framework was established in 1973 by Decree Law No. 211 (DL 211) as well as subsequent amendments approved during the past decade. Market efficiency has become the main concern of competition authorities.

A. Key features of the Chilean competition policy.

The history of competition law in Chile began in 1959 with the enactment of the first competition provisions (Law No. 13,305). These provisions were part of a miscellaneous economic and industrial statute, as a response to an international mission's recommendations to solve current macroeconomic imbalances. One of the statute's chapters created the "Antimonopoly Commission," entitled to punish harmful conduct and to control industrial and commercial activities. In 1963, Law No. 15,142 created the position of Fiscal Nacional Económico (National Economic Prosecutor), who on behalf of general interest investigates and prosecutes anticompetitive conduct. These entities, however, investigated few cases because of the planned economy, and nothing significant occurred regarding enforcement in the period between 1959 and 1973. At a time when many products and services were subject to government price fixing, and several markets were heavily influenced by government-owned or managed firms, competition policy or law played no major role.

Between 1973 and 2003, competition law started to be enforced with several different purposes — striking down privileges granted to or by the State, ensuring freedom to economic agents, encouraging fair competition, particularly in the industrial privatization and liberalization policies that took place during that period.

In 1973, Chile adopted a market economy, including privatization, price liberalization, unilateral tariffs reductions and an openness to foreign trade. Coupled with this policy initiative, the Military Government improved competition enforcement by means of Decree Law No. 211/1973, known as the Competition Law, it formed the first regulating body exclusively related to competition in Chile. The Fiscalía Nacional Económica (FNE, or National Economic Prosecution Bureau) was created for the technical support of the Antimonopoly Commission and the investigations aimed at improving the law's effectiveness.

Over the years, both the FNE and the Antitrust Commissions[12] were developed and became better established. The Decree Law No. 211 was amended several times, but it was not until 2004 that the major amendments were defined and the current decisional structure set up. These amendments were based on the new economic context, consisting of an increasing private stakeholding in public utilities, increasing numbers of mergers and business ventures, globalization and the increasing concentration of the markets.

The main changes introduced by law were the creation of the new Competition Court (Tribunal de Defensa de la Libre Competencia, TDLC). This concentrated the remedial and adjudicative powers into a single body (three lawyers and two economists) which is part of the judiciary.

Under the revamped system, the FNE, which retains its investigative powers to defend the public interest, is concerned with the promotion and defense of competition in the markets by the detection, investigation and prosecution of conducts in breach of the competition statute; it

[12] Before 2004 Chilean Antimonopoly system was constituted by a series of institutions: the agency or the FNE, a quasi-judicial body named 'Comisión Resolutiva' (or Resolutive Commission, also known as the antitrust commission) and regional preventative commissions, the 'Comisiones Preventivas' (jointly were known as the Commissions). The Commissions solve claims and consultations, respectively, on antitrust and unfair competition topics.

is empowered to submit complaints to the TDLC and the Supreme Court of Justice. The agency is also charged with advocacy. Thus these institutions are in charge of prevention and investigation (FNE), as well as sanction (TDLC).

B. Future challenges to enhancing competition policy (including future challenges to implementing or enhancing competition law)

In June 2006, the Government submitted to Congress a bill encompassing a number of amendments to the competition law, granting the FNE additional investigative powers and limited remedial powers (consent agreements for mergers and antitrust enforcement requiring judicial approval). As to the TDLC, the bill aimed at strengthening its independence and procedures, and raised the maximum fines. These amendments are summarized in the Box 1.

Box 1. Competition Law's Amendment: Main elements considered by the Bill

Currently, there is a bill to amend the Chilean Competition Law under discussion in the Senate. This bill considers the following main outcomes:

(i) Augmentation of statutory fines for infringement

- In the current statute, fines are up to US$15 million. The proposal is to increase this amount to US$22.5 million.

(ii) The setting of the possibility to grant immunity or leniency

- As in other countries, the setting of an immunity/leniency program requires a statutory modification. When the modification comes into force, the relevant agencies will need to review access to benefits in practice, to provide the best incentive.
- In its current redaction, the immunity/leniency provision states, as follows:

  "Article 39 Bis. One who executes a contemplated conduct in letter a) of Article 3rd will be able to obtain a fine reduction or a fine exemption once the same provides the FNE with records leading to prove such conduct and determining responsible parties.

  "The executor, in order to obtain some of these benefits, should accomplish with the following requirements:

  1. To provide precise, truthful and ascertainable records which represent an actual contribution for gathering sufficient evidence elements aiming at grounding a complaint before the Competition Tribunal;
  2. To refrain himself from disclosing the petition of these benefits until the complaint submission by the FNE or its filing order of such records, and
  3. To cease participating in the conduct immediately after the request of benefits filing, unless the FNE considers the executor's participation as essential for preserving the investigation effectiveness."

In order to obtain the fine exemption—in addition to the abovementioned requirements—the executor should be the first among the responsible persons for the charged conduct in the group. Otherwise, in order to obtain only a fine reduction, the executor should provide the FNE with further records contributing to prove the illicit. The maximum leniency in fine reduction cases should not exceed 50% of the FNE's requested major fine for further executors.

(iii) New investigative powers of FNE for cartel investigations

- The enforcement agency will have stronger powers for cartels detection and investigation, possibly including compulsory searches, raids and seizures and to wiretap and access communication records. In its current redaction, the new powers provisions state:

  "Art. 39. 2nd sec. The powers and duties of the National Economic Prosecutor shall be as follows (new "p" section): In serious and qualified investigating cases aimed at proving the described conducts in letter a) of Article 3rd, to petition, through a well based plea, an authorization from the Justice member of Court of Appeals corresponding to the instant turn, for the Chilean Police Corps or the Criminal Investigation Department, under the orders of the empowered FNE's official, to proceed as follows:

  p.1) To come into public or private areas and, if necessary, to make a search or to break off locks;

  p.2) To register and seize any sort of objects and documents allowing proof of infringement;

  p.3) To authorize the interception of any sort of communications, and

  p.4) To order any provider of communication services to supply with copies and records of broadcasted or received communications by it.

The exercise of powers set in the previous subsection should comply with the requirements and procedures established in articles 205, 207, 208, 210, 212 to 214, 216 to 219 and 211 to 225 of the Criminal Procedure Code."

(iv) Other new FNE powers

- FNE will have a new power to initiate non-adversarial procedures concerning future transactions, until now restrained to parties involved in the transaction;
- FNE will have a new power to initiate general market studies;
- FNE will be empowered to issue recommendations to parties under warning of initiating an adversarial procedure against the party that fail to follow them;
- Under the TDLC's approval, FNE will be able to settle controversies in an extrajudicial way;
- Under the TDLC's approval, FNE will be able to issue injunctions.

(v) Some changes in provisions describing infringements

- The idea is to generalize for all infringements that there is an alternative requirement: "the object or the effect" to harm competition; it is expected that it will be easier to prove an anticompetitive violation with this amendment;
- A second change would introduce the collective dominance infringement;
- The Executive Branch will soon include for discussion the abrogation of the last part of agreements' provision which requires, for that kind of infringement, that violators abuse of the power conferred by such agreements or practices.

(vi) New investigative powers of FNE for cartel investigations

- TDLC would impose corrective remedies ex-officio, i.e., without FNE or parties needing to plea for them.

(vii) Reforms concerning TDLC members' independency

- Several reforms under discussions are aimed at enhancing TDLC members' independency..

(viii) Procedural reforms

- Some procedural reforms are related to testimonial evidence (reducing the number of testimonies admitted and broadening the faculties of judges). The notice by certified letter will come into effect in a shorter period than it is now, and the means for recording hearings will be broader.

(ix) More autonomy for the National Economic Prosecutor (the enforcement agency chairman)

- The appointment of the chairman will be submitted to the highest standards for civil servants' nominations and the chairman's removal will be subject to regulation aimed at avoiding the political interference of government.

2. Main elements of an effective competition policy

2.1 Legal framework

In its first article Decree Law n° 211 (DL 211) establishes that its aim is "*to promote and defend free competition in markets,*" and in subsequent articles it defines that "*the anticompetitive illicit actions are any deed, act or contract that prevents, restricts or obstructs free competition, or that tends to produce these effects*" in a broad sense, including anticompetitive conduct such as collusive agreements, abuses of dominant position and predatory practices. Market concentration is not considered anticompetitive *per se*, and hence the law does not make pre-merger notifications mandatory—despite significant incentives for firms to do so—nor does it set limits to market power.

In other articles, the Law sets up the institutional framework and duties, defining enforcement and advocacy as the main roles of the competition authorities, the National Economic Prosecutor (who acts on behalf of general interest) and its bureau, the FNE (the investigative agency) and the Competition Court, the TDLC. The law also acknowledges an important role for the community, allowing not only public enforcement by FNE but allows for private enforcers as well, which can complain on their own directly to the Competition Tribunal.

The Chilean Competition Law applies broadly to all activities in the economy (goods, services, professional associations, etc.), considering public and private persons as targeted by law. There are non-statutory, judicial exemptions or exclusions for the law. The law also defines the administrative nature of sanctions to punish anticompetitive conduct: fines, corrective measures and injunctions. With 2004's amendment, the Law includes a substantial increase of the amount of fines, from a limit of approximately US$460,000 to US$11 million.

2.2 Enforcement

As mentioned previously, since 2004 the Competition System has comprised the Competition Tribunal and the Economic Prosecution Bureau, the FNE. Both competition authorities must enforce and advocate the competition law. On the one hand, and as a part of the Executive Branch, the promotion and defense of competition falls on the FNE. In its enforcement role, it is in charge of detecting, investigating (*ex officio* or following an accusation from any natural or legal person, public or private) and prosecuting infringements of the competition statute, submitting complaints to the Competition Tribunal and the Supreme Court of Justice, if necessary. The agency also serves as an expert reporter in cases not initially prosecuted by the agency.

Currently the FNE's investigative powers are limited, mainly based on documents voluntarily submitted and testimonies and expert reports. Individuals' imprisonment can be considered by the FNE as well, in case of proven obstruction in an investigation procedure. The FNE also deals with the prevention and promotion of market competition by advocacy-facing regulators and the community.

On the other hand, the TDLC is the decisional judicial body. Its powers include:

- Decision and remedial powers in cases of violations of Competition Law, by means of assessing the claims and resolving conflicts through adjudication and setting administrative sanctions and fines in contentious procedures, acting upon request based on private enforcers (private parties), public persons or the National Economic Prosecutor;
- To settle non-contentious issues that might imply an actual or potential violation of the competition law, by attending consultation procedures, specially related to mergers and acquisitions, or evaluating the effects on competition of future conducts or contracts, requested by private enforcers (private parties), public personas or the National Economic Prosecutor;
- To issue general rules or instructions, thus contributing to enhancing competition in markets (only exceptionally used power);
- To propose to the President of the Republic—or any other agency under the Executive Branch—amendments or abrogation of laws and regulations, and the enactment of regulations, in all competition issues.

2.3 Independence

With the amendment of the Law and the creation of the TDLC, in 2004 the Competition System became more independent. This was due not only to the separation of the investigative agency from the adjudicating body—thus eliminating any conflict of interests that might arise if the same institution is simultaneously judge and investigator, but also settled them in different powers of the State, distancing the decisional body from the government. This dual Competition System strengthens autonomy. The National Economic Prosecutor is still appointed by the President of the Republic[13]. For budget purposes, the Prosecutor's Bureau is part of the Ministry of Economic Affairs, but the Prosecutor is independent of the Ministry. The Prosecutor is directed by law to:

[13] Law 19,882 / 2004 rules the new policy of hiring civil servants, creating the High Management Public System. This law establishes that gradually the new chairmen and second hierarchical heads of public services and agencies will be hired by public contest. The Economic Prosecutor's Bureau is currently hiring its CEO in this way.

"*discharge its duties independently*," to "*defend the interests entrusted to him...based on his own discretion,"* and to represent "*the general economic interests of the community.*"[14] The Competition Tribunal's ministers are appointed for six years on a non-exclusive basis, following a public selection process where the President of the Republic participates in the decision-making, after a process of review conducted by the Supreme Court (for the lawyers therein) and the Central Bank (for the economists) strictly on merit. Finally, ministers cannot be removed unilaterally by the Supreme Court. This lack of absolute independency from government is compensated by a broad access to competition by both public and private persons.

2.4 Transparency

Both the TDLC and the FNE have made great efforts to increase the transparency of their decisions and activities, such as the following measures:

- **Access to Information**

  Both competition authorities have developed websites as their main tool to ensure community access to information:

  - By browsing the investigative agency website (www.fne.cl), the community can consult in detail all FNE activities, such as claims and technical reports submitted to the TDLC or the closing of causes. Additionally, this page includes information on the competition legal framework and legal decisions (by the Antimonopoly Commissions, TDLC and Supreme Court), on the Competition System's structure, rules affecting markets and the institutional annual report. The Economic Prosecutor's agenda and an electronic newsletter can also be seen on this website.
  - By browsing TDLC's website (www.tdlc.cl), the public can consult not only the sentence rulings of the TDLC but also review the current state and the electronic files of documents of any contentious and non-contentious causes being processed by the TDLC. The TDLC's annual reports are also published in this website.

- **Certainty about procedures**

  No rules on competition analysis (economic or legal) are considered by the competition statute, which is a general framework that defines the object and scope of the law. Its amendment in 2004 identified anticompetitive conduct (such as collusive agreements and abuses of dominant position), but this is not enough to grant legal certainty about the criteria and proceedings used by the prosecution Bureau. In this respect, in October 2006 the FNE issued a guideline on the analysis of horizontal mergers—**"Internal Guideline for the Analysis of Horizontal Concentration Operations."** The Guide was launched in May 2006 when the FNE uploaded a first draft of the document on its website so as to gather feedback. Five months later the FNE edited and disclosed its final version. This Guide is an internal working tool aimed at informing, orienting and giving certainty to firms, as well as to the community as a whole, concerning the FNE's main analytical and methodological approach when investigating horizontal concentration. It defines the latter and, among other concepts, how to determine relevant markets, entry barriers and entrance conditions, market participation, concentration levels, efficiency gains and so forth. In 2007 this Guide was selected among 80 participants in the contest on "Transparency, Access to Information and Probity in Public Administration" called by the government, and whose prize was the publication of the best initiatives on the matter.

- **Protection of confidential information**

  The Competition law guarantees the protection of any confidential information forwarded during an FNE's investigative procedure. Indeed, Art. 39 of DL 211 establishes that its professionals must act under a secrecy mandate. The confidentiality or restricted nature

[14] The Art.33 of DL 211 established that the FNE "*shall be a decentralized public service with legal status and a budget of its own, independent from any other agency or service…"*

of the information and documents once the investigation is concluded is defined by the TDLC on a case by case basis. In so doing it duly maintains an appropriate balance between the right to defense and the business' right to the confidentiality of strategic information.

2.5 Accountability

Two different approaches are possible, namely, the management of institutional resources and the merits review process, the latter as yet being less developed than the former.

- **Review of the management of institutional resources**

  The Public Sector's Budget Law establishes that fiscal annual contributions made by the Ministry of Finance by means of its Budget Office are the main source of financing of the Central Government,[15] and the decentralized public institutions, including the FNE. Accordingly, the FNE's budget is approved by law, known by all and sundry and posted on the Budget Office's Website (www.dipres.cl). In addition, in the Chilean system, the National Comptroller's Bureau is in charge of auditing all administrative process by any public institution, thus guaranteeing that all public procurement is in accordance to the law. Any private person has access to the National Comptroller's Bureau. Another relevant initiative is the "Transparent Government" portal, which allows public scrutiny of each public institution's spending. In this portal every agency discloses its legal framework, procurements and contracts, human resources and transfers. This information can be accessed by means of the Transparent Government's banner at the FNE's website.

- **About the merits review processes**

  As a first step to increasing accountability, both competition authorities provide access to information required to review the merits and due process in any cause. In the case of the competition agency, the information is published on its Website (whether a complaint leads to an investigation or is filed in an archive resolution).

  Another reassurance for the pubic opinion concerning due merit is the dual nature of the Chilean Competition System. The investigative and prosecution process is led by the FNE and the TDLC analyzes them on the basis of equality of parties in an adversarial system.[16] This means that the competition agency stands on an equal basis to counterpart (the potential lawbreaker) regarding the presumption of innocence. Both sides must defend their position through the submission of evidence to the TDLC, which must justify its final decision based upon the evidence and caring for the due process.

  Finally, the Competition System includes a higher body, the Supreme Court, to which parties can appeal the rulings of the Competition Tribunal, both regarding considerations of merit and in terms of compliance with due process.

2.6 Awareness

Unlike other agencies of the Executive Branch, the FNE is centralized, having no branches in other Chilean regions. To enhance regional community awareness, the FNE's structure includes a Regional Coordinator office, which receives and responds to queries arising in the regions, establishing information and contact networks with public authorities, academic, and well as business and private parties.

[15] Made up by all the centralized institutions (ministries), the autonomous public entities (National Congress, Judiciary, Controllership and others)

[16] In an adversarial system, the court has a passive role; during a controversial acquittal the responsibility falls on the parties to prove allegations supporting their claim for condemnation or acquittal.

FNE has also signed an Agreement for Inter-institutional Cooperation with the National Consumer Service (SERNAC) which oversees consumer protection through which the regional offices of that institution may receive submissions addressed to the FNE.

Additionally, the FNE publishes a periodic electronic newsletter, sent to more than 500 users, including lawyers, economists, entrepreneurs, public authorities, academics and members of Parliament. It discloses the status of FNE's activities and other relevant matters, such as the progress of the bill that amends the competition law. Finally, every October the FNE organizes a "Competition Day," a promotion activity consisting of a seminar on competition issues focused on public authorities, academic and public and private professionals working in this area.

As for the TDLC, its chief awareness activity is the public presentation of its Annual report, mainly oriented to public authorities and other members of the Judiciary.

3. Future challenges and lessons learned in creating an effective competition policy regime

Lessons learned

- **Transparency and Certainty**

  Increasing transparency by issuing guidelines can be a challenge at the outset. Some agents may feel that the competition agency is trying to impose its rules to the decisional body. This feedback was received after the publication of the first guideline on mergers and acquisitions. Over time, this concern has given way to a recognition of the usefulness and convenience of the guidelines as a way to give certainty.

- **Independency and Private enforcement's role**

  The existence of a decisional body which is part of the Judiciary together with the possibility of private enforcement (private agents can directly submit complaints to the Competition Tribunal) provides the system with the necessary independency from the Executive Branch. In this scenario, the competition agency represents public interest and decides whether or not to submit cases to the Tribunal without closing the door to the cases it does not consider, since particular agents can always take the initiative. This provides the competition agency with more flexibility in defining its priorities and to better focus on the strengths of the competition policy for a better use of its resources.

Future challenges

Even though Chile's competition authorities have played an important role in the creation of a fair competition culture within society, it is always necessary to strengthen the promotion and enforcement of free competition. The following issues are defined as priorities in this regard:

- **Advocacy on competition matters**

  Good advocacy can attain pro-competitive outcomes, avoiding not only the cost of litigating but also improving the efficiency in market (especially in regulated sectors). The latter justifies increasing FNE advocacy efforts to promote inter-institutional coordination and an ongoing review of sector regulations.

- **Strong investigative powers to deal with cartels and collusive agreements**

  Recent experience with cartels and other collusive agreements suggests that enforcement in this area will not easily be achieved without stronger investigative powers for the competition agency. Therefore, an important part of the competition agency's efforts are focused on acquiring such powers and in learning good practices from international experience, in order to succeed in future cartel investigations.

Hong Kong, China: Developments in Competition Policy

Recognising that competition is good for the economy, for business and for the wider community, the Government of the Hong Kong Special Administrative Region (the Government) has adopted a policy aimed at promoting competition in all sectors.

The Competition Policy Review Committee (COMPAG) was established in 1997. The policy statement issued by COMPAG in May 1998 defined the objective of the government's competition policy as:

"To enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare."

In the statement, the government called on the business sector voluntarily to cease or to refrain from introducing restrictive practices that impair economic efficiency or free trade, adding that it would take administrative or legal steps to remove such practices as necessary.

In 2000 and 2001, legislative proposals were passed to prohibit certain types of anti-competitive conduct in the telecommunications and broadcasting markets. The laws reflected the need to ensure that new and existing licensees in the telecommunications and broadcasting sectors would be able to compete on a level playing field in markets that were undergoing a process of deregulation.

To ensure that our competition policy continues to meet the needs of the economy, in June 2005, the COMPAG appointed the Competition Policy Review Committee (CPRC) to review the effectiveness of this policy. Following a one-year study, the CPRC recommended that Hong Kong, China should introduce a cross-sector competition law and establish an independent Competition Commission to implement the law.

In November 2006, the government conducted public consultation on the way forward for competition policy in Hong Kong, China. Feedback showed that the community generally believed that introducing a cross-sector competition law would help maintain a free and competitive environment. However, there were concerns within the business sector that such a law might adversely affect normal business operations.

In view of the strong level of support within the broad community, the government is committed to introducing a cross-sector competition law, and aims to submit a draft Competition Bill to the legislature in the 2008–09 legislative year. Noting the concerns of the business sector, and to give the community an opportunity to understand clearly the likely extent and effect of the proposed legislation, the government will publish a paper that will set out in detail the provisions of the Bill before introducing the draft law into the Legislative Council.

Indonesia: Developments in Competition Policy

1. Introduction: Key features of the Indonesia competition policy regime

Indonesia is still recovering from a decade-earlier financial crisis that affected the entire region. That crisis exposed a structural fragility in the economy mainly related to the weakness of Indonesian business competitiveness. Ineffective policies as well as the absence of supervisory authority over business activities harmful to the public interest were to blame. This experience encouraged Indonesia to implement competition policy reform through Law No. 5/1999 with the aim of strengthening Indonesia's economic structure.

Before 1999, competition policies were included in various sectoral policies. The establishment of Law No. 5/1999 was the initial step in the implementation of a broader competition policy, one that aims to guard public interest, and developing national economic efficiency; create conducive business environment through promoting fair competition, that will assure equal playing field for large, medium and small enterprises; as well as creating efficiency and affectivity in business.

In order to supervise the implementation of the new policy, Indonesia has established an independent commission, the Commission for the Supervision of Business Competition (hereafter referred to as the "Commission"). It is entrusted with the power to enforce competition law and minimize government policies which may have negative effects on the market and market competition.

2. Developments supporting an effective competition policy

The establishment of an Indonesian competition law and an implementing institution are the cornerstones of competition policy in Indonesia. Indonesia is promoting a more vigorous competition policy regime following the acknowledgment that incumbent firms had too often gained too much advantage from their substantial market positions, with little or no offsetting benefits. Indonesia's competition law and competition advocacy will take into account both private anticompetitive practices and government measures or instruments that influence competition in markets. All assessments are based on the criteria of the actual and potential distortions of competitive process and resource allocation. In Indonesia, as in other developing countries, restricting anticompetitive practices has become a policy priority after measures to promote the private sector yielded adverse side effects.

2.1 Independence

Independent authority in implementing competition policy will be the main factor in ensuring a healthy business environment. The government expects the Commission to be independent and separate from the government, but still under supervision of the President and the House of Representatives. However the Commission has experienced structural difficulty in maintaining its independence, stemming from its weak institutional status and constrained budget.

2.2 Transparency

The principle of transparency is now an international commitment by the Indonesian government and this includes competition policy and law enforcement, as mentioned in the APEC Individual Action Plan. There are many ways in which the Commission ensures transparency, including complete public access to the Commission's decisions, investigations and legal procedures.

As an independent supervisory agency, the Commission requires transparency in all of its roles. Non-confidential information can be easily accessed by all relevant parties, while confidentiality

is also enforced with sanctions applying to any members who disclose confidential information. The dissemination of sensitive information is selective and prudent.

Indonesian competition law guarantees access to the Commission; any and all parties or individuals may submit their reports on competition cases to the Commission. Reports submitted will be followed up without any penalty, moreover should a report not meet submission requirements the Commission will help the public to amend the submission accordingly.

2.3 Accountability

Since the Commission's establishment, its performance has improved as measured by an increasing number of reports (approximately 761 public reports). Not all reports are related to the alleged unfair business competition. Some concern government policies and are not under the Commission's jurisdiction.

In relation to the execution of the Commission's decision, Indonesian civil proceeding law is followed by the submission of the request for execution to the District Courts, which will decide the case. The accountability of the Commission has been seen to improve as evidenced by the increasing number of affirmed decisions by the Supreme Court and the income received from fines imposed in competition cases.

The Commission has also improved its advocacy in competition policy through the quality and quantity of its recommendations, demonstrating the increasing effectiveness of the Commission as well as the growing recognition of the Commission's role in regulating fair business practices in order to maintain a competitive and efficient economy. Nevertheless, contradictions remain: the Commission's institutional status remains weak and in general government economic policies are still not aligned with competition policy.

2.4 Awareness

Competition advocacy is a means for competition agencies to improve public awareness of the importance of fair competition for sustainable economic development. The Commission has taken a strong lead in public advocacy, raising competition policy awareness, making increasing numbers of recommendations on competition policy to the government. Public awareness has increased in several areas, namely transportation, education, banking and agricultural commodities.

Awareness has improved through the establishment of increasing numbers of policy consultancies and the Commission has become increasingly adept at communicating with key stakeholders, such as journalists, academicians, judges and business associations at both the central and regional level.

2.5 Enforcement

According to Indonesian competition law, the Commission is the only institution with the authority to enforce competition issues. However, the Commission cannot act unilaterally and must coordinate with other regulatory bodies and keep in harmony with the laws governing related sectors.

The Commission's decision is not final and the reported party has recourse to the district court and/or the Supreme Court. The Commission has been trying to develop cooperation with these legal institutions. The police also play a significant role in enforcing competition law as the Commission has no powers of arrest. Nevertheless, the Commission can request support from the National Police.

In order to ensure fair legal treatment, according to the competition law, business players may submit objections to District Court within 14 days from the date of the Commission's decision. Furthermore, to ensure certainty in the objection process, the competition law requires the

District Court to examine any objections within 14 days and make a decision within 30 days of the day of examination. Parties that object to the District Court's decision may submit an application to the Supreme Court. If there are no objections, the Commission's decision is final and legally binding. However, disagreement in the interpretation of competition law among judicial institutions still occurs. The Commission has no authority to enforce other related parties to disclose information and has no executorial authorities.

2.6 Legal framework

Law No. 5/1999 regulates various activities that may impede fair competition. As such, the law is a reference for enterprises when conducting their business. It regulates fair business practices and prohibits monopolistic practices by identifying business conduct that harms competition through prohibited agreements, prohibited conduct, unfair business practices and the abuse of dominant position. Apart from this law, the Commission also refers to the guidelines written in Commission Regulation No. 1/2006 concerning The Mechanism of Handling Cases. The Supreme Court has enacted Supreme Court Regulation No. 3/2005 concerning The Procedures of Submission for Objections toward KPPU's Decisions. Furthermore, the Commission has guidelines on Tender Conspiracy, one of the major competition issues in Indonesia.

3. Lessons learned in creating an effective competition policy regime

Effective competition policy will depend on active and fair competition law and policy enforcement. Therefore a transparent, sound legal system is a prerequisite. For Indonesia, first-generation reform that lay the basis for macroeconomic stability and development of institutional infrastructure is a top priority. Challenges remain as competition policy is relatively new to Indonesia. Competition policy and law sometimes clash with other policies but more than seven years since its establishment, Indonesian competition law and policy has recorded great strides in supporting fair competition. Public awareness of competition policy has improved through the capacity development and institutional building.

Important lessons learned

Firstly, competition policy needs collaboration between relevant institutions. One method of collaboration is through "joint activities" in order to introduce and to promote competition policy and law to the Supreme Court or other institutions. Good relationships with Supreme Court judges may help the Commission in introducing competition law at the District Court level. The Commission also works to convince the Supreme Court of the importance of legal framework to enforce competition law, especially as it relates to the procedure of objection submission. It has encouraged the Supreme Court to enact Regulations No. 3/2005 concerning "The Procedures of Submission for Objections" toward KPPU's Decisions.

Secondly, competition advocacy is a must. As mentioned above, the Commission's efforts are not limited to changing the anti-competition behavior in the market and have gone beyond the advocacy role to improving government regulations that impede competition and create market distortion. Through intensive advocacy and by continuously maintaining its relationship with the government, the Commission has opened the door for consultation between KPPU and government on various issues.

Thirdly, participation in international forums is important. Currently this Commission is developing cooperation and sustainable aid arrangements with international organizations such as APEC, OECD, ICN, World Bank, ADB, AANZ and UNCTAD. This Commission also maintains fruitful bilateral relationship with Germany, Korea, Japan, Chinese Taipei, the US and Australia. The Commission's participation in these fora will facilitate a business competition discourse between members. The contribution of these organizations helps them with capacity building, in line with their program objectives to develop its human resources.

Indonesia has realized that competition policy requires all elements of government for its implementation, both at the executive and judicative levels. To create harmony between the institutions is not an easy task for Indonesia. After seven years performing its role in law enforcement and as a supervisory agency for competition law and policy, the Commission still faces many challenges, including human resources development and institutional development.

Japan: Developments in Competition Policy

1. Introduction: Key features of the Japan Competition Policy Regime

Japan Fair Trade Commission (JFTC) has strictly enforced Japan's Antimonopoly Act to maintain fair and free competition in the market and has strived to enhance compliance with the Antimonopoly Act, advocating that there can be no economic growth without competition.

The Japanese competition law known as the Antimonopoly Act (AMA; official name: Act Concerning the Prohibition of Private Monopolization and the Maintenance of Fair Trade) was enacted in July 1947 as a part of measures to establish the economic foundation for a democratic society. It aims to contribute toward the democratic and sound development of the national economy and to secure public benefit by promoting fair and free competition through the prohibition of improper trade restriction (such as private monopolizations, cartels and bid rigging) and unfair trade practices.

The JFTC is an independent administrative commission (administrative agency according to the council system) that enforces the AMA and its related laws. The JFTC supervises the movements of the market, economy and business activities in order to prevent or detect acts contravening the AMA, and strictly regulates and takes measures against illegal acts, if any.

To promote fair and free competition in the market, the JFTC implements two laws that are complementary to the AMA. One law is the Subcontracts Act established in 1956 taking into consideration the peculiarity of subcontract transactions in Japan, which aims to ensure fair transactions between the main subcontracting firm and subcontractors by eliminating unfair trade practices by the subcontracting firm using its dominant bargaining position. The other law is the Premiums and Representations Act enacted in 1962, which aims to protect the interests of consumers in general by preventing the inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions involving a commodity or service.

In recent years, the JFTC has been engaged in making substantial amendments to the AMA, vigorous enforcement against hard-core cartels, including international cartels, active involvement in various international forums to establish close relationships with foreign competition authorities, and so on.

The AMA has been strengthened and amended repeatedly according to changes in the economy and its industrial structure after the post-war period of high economic growth. The amendments to the AMA in April 2005, which took effect in January 2006, introduced significant increases in surcharge rates, the application of 50% higher rates to repeat offenders, the assignment of criminal investigative powers to the JFTC, the introduction of a leniency system, and the revision of hearing procedures. The JFTC has fully utilized these new systems and, in particular, based on information submitted by leniency applicants, legal measures have been taken regarding 22 cases (as of the end of March 2008) including one international cartel case (the marine hose case) in which dawn raids were coordinated with several foreign authorities concerned with competition. There have been 179 leniency applications (as of the end of March 2008) since the introduction of the leniency system in January 2006. The new systems are functioning very well.

The amendments have resulted in the introduction of a new approach to Japanese competition law enforcement, and the first challenge for the JFTC is to appropriately enforce these new systems so as to prevent violations of the AMA to the fullest extent possible. In addition, the amendments require greater compliance efforts on the part of corporations. The JFTC is monitoring the status of compliance on the part of companies and is encouraging them to step up their efforts for better compliance.

In addition to this, the JFTC has conducted investigations on and consideration of problems regarding government regulations from the viewpoint of competition policy by making public the results and recommendations based on its consideration of these problems and has made requests for improvements to the concerned parties in order to promote regulatory reform in Japan.

The JFTC has promoted progress in making the economic system free, fair and open internationally, based on the principles of self-responsibility and market principles through the implementation of competition policies and laws.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

Since the AMA is a substantial component of the basic rules for economic activity, the AMA needs to be enforced continuously and consistently by a neutral and fair organization unaffected by political influence. It is stipulated in Article 28 of the AMA that the chairperson and commissioners of the JFTC should apply their authority independently. Moreover, with regard to the guarantee of the status of the chairperson and commissioners of the JFTC, it is stipulated in Article 31 of the AMA that the chairperson and commissioner may not, against their will, be dismissed while performing their duties in office, except in the cases stipulated in the same article. The independence of the JFTC has been sufficiently assured by these stipulations.

2.2 Transparency

The JFTC conducts various activities to ensure transparency in order to increase predictability for businesses and raise public understanding of the implementation of competition policies and laws. To give an actual example, the JFTC has been publishing amendments to the laws and regulations of the AMA as well as its decisions on administrative measures such as cease-and-desist orders against violations, etc., through official gazettes, press releases, its website and various brochures, etc. In addition, the JFTC has been publishing every year various reports on summaries of cases of violation of the laws and the prior consultations handled by the JFTC. Moreover, the JFTC places considerable importance on ensuring the transparency of its processes by making public any drafts of revisions to the AMA, related regulations and various guidelines, and when the JFTC is preparing them it holds hearings for public comment in advance.

Furthermore, as for transparency with respect to law enforcement procedures, the JFTC has provided suspected firms with opportunities to present their views on the contents of orders and to submit evidence before issuing cease-and-desist orders to such firms in accordance with the provisions of the AMA. If the firms are dissatisfied with the orders for cease-and-desist measures, they can ask the JFTC to conduct hearing procedures in addition to appealing against decisions of the hearings to the Tokyo High Court, based on the provisions of the AMA.

2.3 Accountability

In order to fulfill its obligation to ensure accountability, the JFTC annually reports through the Prime Minister to the Diet on the enforcement of the AMA based on Article 44 (1) of the law. In addition, as mentioned above, the JFTC has been publishing amendments to the AMA and guidelines in conjunction with hearings to receive public comments in advance, as well as taking all legal measures, such as issuing cease-and-desist orders. As part of its activities to ensure accountability, the JFTC conducts a policy assessment every year based on the Government Policy Evaluations Act as a contribution to the promotion of an effective and efficient government administration, thus further assuring JFTC's accountability and improving the public trust in JFTC.

2.4 Awareness

Under Japan's competition policy, various activities have been conducted to improve public awareness, including disseminating knowledge on the AMA among businesses and consumers. The JFTC is trying to improve its publications so that they are easy to understand in order to more widely disseminate information on its activities and policy measures as well as on the interpretation and implementation of the AMA and related laws and ordinances. As one of its main public relations activities, the Secretary General of the JFTC gives weekly interviews and makes public any legal measures taken by the JFTC, case examples of prior consultations on mergers and acquisitions, various guidelines on the interpretation of the AMA and related laws, and the reports of surveys on market conditions through various media such as government publicity, press releases and websites.

In addition, the JFTC takes into consideration a wide range of views and requests from the public through the establishment of various networks of intellectuals concerned and by holding meetings throughout Japan, and refers to their opinions when formulating policy measures. The JFTC holds meetings with the Commissioners of the JFTC in various areas to call on intellectuals in these local areas to deepen their understanding and raise public awareness concerning competition policy. Such meetings also serve to help the JFTC to gain a greater understanding of the actual economic conditions in each area and enable it to more effectively and precisely implement the AMA. At the same time, the JFTC distributes various brochures to businesses and consumers to help increase their understanding of the AMA and the JFTC.

2.5 Enforcement

The key activity for the development of competition policy is strict enforcement to deal with violations of the AMA. This is not only necessary in order to eliminate the anticompetitive conditions caused by such violations, but is crucial from the viewpoint of ensuring compliance with the AMA as a part of the basic rules for business activities and to deter future violations. Over the last decade, the JFTC has taken legal measures against 263 cases of violation of the law and issued surcharge payment orders amounting to about 78.1 billion yen.

The leniency program, which was newly introduced when the AMA was amended in 2005, has functioned smoothly and effectively. The number of applications to the leniency program since its introduction in January 2006 was 179, as of March 2007. The use of the leniency program has led to many legal measures and cases where surcharge payments were exempted or reduced. It can be said that the leniency program has steadily begun to be used by businesses for the promotion of compliance. In the last decade, the JFTC has also filed eight criminal indictments.

2.6 Legal framework

The AMA has been strengthened and amended repeatedly according to changes in Japan's economy and industrial structure. In recent years, the main amendments to the AMA have been as follows.

With the creation of a corporate division system, the AMA was revised in 2001 to incorporate provisions for these divisions, either through joint establishment or through acquisitions, that are similar to those for mergers and acquisitions. The 2002 amendment of the AMA included elimination of the regulation on the maximum amount of shareholding by large firms, and the improvement of the procedures for serving documents, as well as an increase in the maximum fine applicable to corporations. In addition, the amendments to the AMA made in April 2005 included the introduction of a revision of the surcharge system, the introduction of a leniency program, the introduction of compulsory measures for criminal investigations, the revision of hearing procedures, and so on.

3. Future challenges and lessons learned in creating an effective competition policy regime

The recent implementation of competition policy by the JFTC corresponds to the following policy measures described in the "Grand Design for Competition Policy," which clarifies the JFTC's future operations, placing the priority for the basis of its work on: (1) strengthening the JFTC's institutions, (2) improvement of public awareness and (3) promotion of international cooperation.

1. Prompt and effective enforcement
   - Stringent action against hard-core cartels and bid rigging
   - Stringent action against acts that deter new entrants to the market
   - Improvement of merger reviews

2. Building a competitive society based on rules
   - Promotion of the appropriate provision of information to consumers as market participants
   - Encouraging fair trade practices

3. Proactive creation of competitive environments
   - Response to regulatory reform
   - Promotion of policy measures to prevent bid rigging
   - Promotion of policy measures to increase compliance by businesses

For the further revision of the AMA, the JFTC is considering the concrete direction for amendments to the AMA paying close attention to the recommendations made public in June 2007 by the "Advisory Panel on Basic Issues Regarding the AMA," which was established under the Chief Cabinet Secretary in July 2005 and consists of 20 experts from academia, the business community and consumers' associations. In addition to these recommendations, the JFTC studied various issues that needed to be considered for the promotion of free and fair competition in the Japanese economy.

As a result of these activities, a bill for the amendment of the AMA was submitted in March 2008 to the Diet by the Cabinet. The major points of the bill are as follows.

(Revision of surcharge payment orders)
- Introduction of surcharges to be imposed on enterprises that engage in exclusionary types of private monopolization, particular types of unfair trade practices and misleading representations.
- Increasing by 50% the surcharge rates imposed on enterprises that have played a leading role in cartels, bid rigging, etc.

(Revision of the leniency program)
- Review of the leniency program including an increase in the number of leniency applicants from a maximum of three to a maximum of five, etc.

(Review of cease-and-desist orders)
- Introduction of provisions that allow the JFTC to issue administrative orders against those enterprises that succeed the offender's business by means of a de-merger, business transfer, etc.
- Extension of the statute of limitations for administrative orders from the current three years to five years.

(Notification and reporting to the JFTC in relation to business combinations)
- Introduction of a pre-notification system on business combinations by acquiring shares (currently an ex-post reporting system), similar to the notification system for other types of business combinations such as mergers.
- Revision of the notification standards, including changing the notification threshold from "Total Assets" to "Total Sales Revenues," etc.

Korea: Development in Competition Policy

1. Introduction

Korea has a 27-year history of competition law enforcement having first enacted the Monopoly Regulation and Fair Trade Act (MRFTA) as a fundamental law of the market economy on 31 December 1980. The MRFTA regulates monopolies, oligopolies, mergers, cartels, unfair trade practices and the conduct of trade associations.

The Korea Fair Trade Commission (KFTC) is mainly in charge of competition and consumer policy enforcement. It started as the Fair Trade Division of the Inflation Policy Bureau under the Economic Planning Board (EPB) in February 1976. When the EPB was dissolved in 1994 the KFTC became an independent central-administrative agency. In 1996, the KFTC was upgraded to ministerial status, and became what it is today.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

The KFTC is exclusively mandated to deal with competition issues. The KFTC consists of a seven-member committee (decision-making body) and a Secretariat (working body). To ensure KFTC's independence, the MRFTA legally guarantees the terms of office of Committee members including Chairman. The term is three years, and reappointment is possible for one time only.

In December 2005, the KFTC instituted a sweeping reorganization, introducing a core function-oriented structure to the agency. This change enabled the headquarters to focus its capability on competition policy, cartels and self-initiated investigations. The Seoul office was established to exclusively handle complaints about competition law violations filed in Seoul and the Metropolitan area.

2.2 Transparency

The KFTC routinely publicized statutory amendments, decisions on violation cases, and staff activities through the media and its website, and it publishes a White Paper annually.

In 2004, the KFTC introduced the Advisory Opinion Program, designed to reduce uncertainties in business transactions. Under the Program, the KFTC has the responsibility to respond within 30 days if a business requests the KFTC to determine whether a potential conduct is in violation of the MRFTA. Additionally, upon an examinee's request, the KFTC shall allow the examinee to read and copy all documentary evidence held in its report. In 2005, the KFTC enhanced transparency in its handling of cases by establishing guidelines for operating corrective measures. The KFTC maintains guidelines that stipulate respective purposes, principles, methods, standards, and examples to be applied by the committee, depending on the types of measures.

2.3 Accountability

In 2004, Korea eliminated a provision which allowed victims of a violation to file a damage suit only after the corrective measures were confirmed. This change allowed victims to directly file a suit against violators, and the accountability of the KFTC was enhanced.

Korea also introduced a new damage compensation system, under which the court can autonomously decide the amount of damages based on oral proceedings and evidence investigation, in circumstances in which damage is identified, but not able to be quantified.

2.4 Awareness

Since its inauguration, the KFTC has consistently implemented a Compliance Program (CP) to promote a competition culture. By utilizing CPs, enterprises can assess their business behavior by voluntarily reviewing whether they have violated the MRFTA, thereby avoiding violations before being subject to investigation or regulation.

In addition, to promote a competition culture in emerging countries and publicize the importance of competition law and policy, the KFTC holds the International Workshop on Competition Policy annually (since 1996). Since 2002, working-level staff of the KFTC has annually participated in training programs on competition policy for government officials from developing countries under the auspices of the Korea International Cooperation Agency (KOICA).

In 2004, recognizing that Korea was an ideal location for a technical assistance program in Asia, for their economic growth and competition policy development, the OECD established an OECD-KOREA Regional Center for Competition to provide educational training and workshops on competition law to non-OECD economies in Asia as part of its technical assistance program.

2.5 Enforcement

Recently, the main goal of the KFTC has been to ensure free competition by regulating anti-competitive practices such as cartels, mergers and abuse of market dominance, while in the past it centered on establishing a fair trade order through prohibitions of unfair trade practices. In the last three years, the KFTC detected 27 cartels and imposed corrective orders and fines totaling US$626 million. Additionally, the KFTC was notified of 2,151 anti-competitive mergers, 14 of which the KFTC took corrective measures against. Also, the KFTC uncovered 38 cases of abuse of market dominance in the last three years, imposing fines totaling US$56.6 million.

2.6 Legal framework

2.6.1 Restriction of Anti-competitive Mergers

Korea prohibits anti-competitive mergers. While companies are obligated to notify authorities of a merger, a provision newly established in 2005 exempts companies from notification if the total assets or turnover of the acquired company is less than US$3 million. This measure was implemented to ease the procedural burden on businesses and to ensure a more effective merger review.

In 2007, Korea made two changes to its anti-competitive merger system. First, instead of the Concentration Ratio (CRk), Korea adopted the Herfindahl-Hirschman Index (HHI) as a market concentration indicator to better reflect the market competition structure. Second, Korea eliminated the market concentration component in determining anti-competitiveness of mergers.

2.6.2 Prohibition of Cartels

Cartels are prohibited in principle in Korea. Under the 1996 Leniency Program, a cartel that reports itself voluntarily to authorities and meets the requirement for leniency can be given a fine reduction at the authorities' discretion. The program was revised in 2005, and according to the revision, a cartel that meets the requirements is automatically given a reduction in fines in proportion to the imposed amount. This change has enhanced predictability, increasing the number of leniency applications.

2.6.3 Prohibition of Unfair Trade Practices

The MRFTA regulates behaviors that would hamper not only free competition but also fair competition. Through a 2007 amendment, Korea introduced a system, through which parties in dispute can reach a settlement prior to investigation by the authorities. This system is applicable for cases involving unfair trade practice disputes that are more private in nature. Therefore, when a company suffering loss caused by unfair trade practices applies for a settlement procedure of the KFTC, the KFTC refers the case to an independent dispute settlement agency. When a settlement is reached, no corrective measures can be imposed. In January 2008, the Korea Fair Trade Mediation Agency (KFTMA) was established to handle dispute settlement.

2.6.4 Restriction on Concentration of Economic Power

A company belonging to a business group, whose total assets, financial structure, number of affiliates and corporate ownership falls below the standard stipulated by the MRFTA is subject to the Ceiling on Total Amount of Shareholding in Other Domestic Companies, and it is prohibited from acquiring or owning another domestic company in excess of an amount obtained by multiplying its net asset amount by 25% (shareholding ceiling amount).

2.6.5 Sanctions against Violators

In addition to imposing fines, Korea orders violators to cease and rectify their violation, and takes necessary corrective measures. Through a 2004 amendment, Korea raised the fine threshold from 5% to 10% of the relevant turnover in order to reinforce the deterrence against cartels. Further, Korea introduced a reward program for informants of legal violations so as to promote fair competition among enterprises and deter unfair trade practices.

3. Future challenges and lessons learned in creating an effective competition policy regime

In an effort to advance its case-handling procedure based on law enforcement experience, the KFTC is considering an introduction of a consent order system since 2005 and, to that end, is in the process of consultation with relevant ministries.

Since competition cases are ever more various and complex, the necessity of economic analysis is becoming greater. In 2005, an Economic Analysis Team was created to demarcate markets, assess anti-competitiveness, analyze consumer damage and validate economic analysis reports submitted by examinees. To improve the effectiveness of the competition policy regime, the KFTC is planning to reinforce its economic analysis staff and tap into outside experts.

Mexico: Developments in Competition Policy

1. Introduction: Key features of the Mexican competition policy regime.

In 1993, the Federal Competition Commission (CFC or the Commission) was created as a technically autonomous entity with budgetary links to the Ministry of Economy (SE). The CFC is the institution in charge of enforcing the Federal Law on Economic Competition (LFCE) and overseeing the implementation of competition policy. The Commission is responsible for protecting the process of competition and free market access by preventing and eliminating monopolistic practices and other restrictions on the efficient functioning of markets, in order to contribute to the welfare of society.

The Plenum is the Commission's decision-making body and is made up of the President of the Commission and four Commissioners. The decisions of the Plenum are reached by a majority vote. The President of the Commission coordinates the work of the CFC, presides over the Plenum's meetings, issues and publishes an annual report on the performance of the Commission and represents the CFC publicly.

In June 29 2006, after more than a year of analysis and discussion, the LFCE was amended as a result of a unanimous congressional vote. This new law has provided the Commission with stronger operative tools to combat anticompetitive behavior and to promote competition advocacy. Furthermore, in October 2007, a new LFCE by-law was issued in order to clarify the procedures related to these new statutory powers.

The CFC is in constant coordination with other public authorities in order to ensure the full application of the LFCE and competition principles. In particular, the Commission works jointly with the Office of the Federal Attorney for Consumer Protection (PROFECO) to guarantee consumer rights.

In 2008, the Commission signed a cooperation agreement with PROFECO which will help both institutions to detect monopolistic practices and strengthen the promotion of competition advocacy and consumer protection. This institutional agreement includes reciprocal training activities between both agencies and also considers the promotion of competition/consumer culture inside the country. These activities are part of a program between the Commission and the Inter American Development Bank, which is aimed at ensuring market access for small and medium size enterprises through competition policy.

2. Elements that promote an effective competition policy regime

2.1 Independence

In accordance with the competition law, the Commission is autonomous in issuing its resolutions and LCFE resolutions are binding on all sectors of economic activity in Mexico. The Commission is currently linked to the SE for budgetary purposes, which means that the CFC presents its budget requests to the SE, and that Ministry negotiates the budget with the Ministry of Finance for presentation to Congress. However, the CFC is technically independent and solely responsible for its resolutions.

The Commissioners, including the President of the CFC, are appointed for 10 years by the President of Mexico. However, due to the newly implemented changes to the LFCE, the next President of the Federal Competition Commission will be appointed for six years, and will serve as Commissioner for the remaining four years.

2.2 Transparency

The CFC is a government agency subject to the Federal Law of Transparency and Public Access to Governmental Information (LFTAIP). This law guarantees access to the information that is created or possessed by the Executive, Legislative and Judicial branches, and the state governments. Governmental information referred to under this law is considered public, with specific exceptions and reservations, and private parties can access it in accordance with the LFTAIP.

As mentioned above, the LFCE was reformed to strengthen the institutional powers of the CFC in order to increase the Commission's regulatory effectiveness and increase legal certainty and transparency.

2.3 Accountability

Every year the President of the Commission presents an annual report to the Congress and the Executive branch on the Commission's performance. This report reviews the accomplishments and challenges of that specific year, and is divided into three chapters that include quantitative results of the proceedings carried out by the authority, the most relevant cases resolved, and the Commission's activities in the international arena. It also includes a statistical appendix regarding the actions of the Commission and detailed information about investigations, fines, monopolistic practices, and mergers and acquisitions in a sectoral breakdown. With these elements, the authority can identify challenges and areas where improvements can be made and can compare its performance against that of previous years.

The activities of the Commission related to the exercise of the federal budget are subject to auditing by the Ministry of Public Function and The Federal Audit Office. The former acts as an internal controller from the Executive branch, and the latter is a technical entity of the Legislative branch in charge of conducting external fiscal oversight. In addition, the LFCE allows for economic agents to appeal CFC resolutions before the Commission, and the Commission's resolutions may be appealed before Judicial Tribunals.

As a complementary effort in order to enhance transparency and accountability, the Commission has developed merger guidelines with respect to the agency's standards for analyzing mergers, and is currently working on a unilateral conduct manual that will increase clarity with respect to market definition and market power issues in non-merger cases.

2.4 Advocacy & Outreach

Competition advocacy and outreach efforts communicate the benefits that competition brings to consumers and promote the legal framework for the defense of their rights. The LFCE explicitly vests the CFC with authority to engage in various advocacy activities. The Commission is empowered to address the competitive effects of proposed changes to federal programs and policies and to comment on the competition implications of proposed laws and regulations.

The CFC regularly issues opinions on some of the key sectors of the Mexican economy, which have been instrumental in influencing the design of public policies and ensuring that these incorporate competition principles. Recent changes to the LFCE empower the Commission to issue binding opinions. To date, no binding opinions have been issued, but we continue to be very active in issuing non-binding opinions.

In order to strengthen advocacy and outreach activities, a Directorate for Institutional Relations and International Affairs was created in 2007. This division strives to establish closer relationships with public entities and regulators, business associations, state and local governments, the academic community and the judicial branch.

Moreover, the CFC is part of the International Competition Network (ICN) where the President of the Commission serves as Vice Chair of International Coordination. The main objective of this Vice Chair is to strengthen the ties between the ICN and international and regional

organizations in order to promote greater competition advocacy. On a regular basis, the Commission makes contributions to different OECD working groups and is an active participant in the meetings organized by its Competition Committee.

2.5 Enforcement

The CFC is the only authority in charge of designing and implementing competition policy in Mexico, which means that the Commission has sole responsibility for enforcement of the LFCE. Under Article 30, the LFCE establishes that law enforcement or other proceedings before the CFC begin either in response to a complaint, or "ex officio," at the Commission's own initiative. Complaints regarding absolute monopolistic practices (horizontal agreements and cartels) may be filed by any person, while complaints on relative monopolistic practices (abuse of dominant positions and anticompetitive unilateral conducts) and mergers are accepted only from an affected party.

The latest amendments to the LFCE have reinforced the CFC's enforcement capacities, by establishing a leniency program aimed at detecting and fighting collusive agreements that fix prices, segment markets or facilitate bid rigging. The leniency program allows for a reduction of sanctions to the economic agents involved in a collusive agreement. The LFCE establishes that only the first economic agent linked to an absolute monopolistic practice that can provide useful intelligence to prove the existence of such a practice, may benefit from a 100% reduction of the fines. In addition, by strengthening the statutory powers of the CFC, it is now possible to conduct on-site inspections with judicial authorization.

2.6 Legal framework

The LFCE was reformed with the purpose of providing the CFC with more appropriate operative tools to fight anticompetitive conduct and protect the competition process. The amendments strengthen enforcement powers and advocacy efforts as described above. In addition, the new law also strengthens and simplifies the CFC's procedures relating to efficiencies, merger notifications and relative monopolistic practices.

The new LFCE adds five types of conduct that can be considered relative monopolistic practices: a) predatory pricing, b) fidelity rebates and loyalty discounts, c) cross-subsidization, d) price discrimination, and e) raising rivals' costs. These practices are considered illegal when the agent has substantial market power in the relevant market and unduly displaced other agents, impeded their access to the market, or established exclusive advantages in favor of one or more persons.

3. Future challenges

Since its creation, the CFC has faced several challenges to the introduction of broader competition throughout the Mexican economy. Over the last two years, the Commission has acquired greater powers through legal reforms, and through its advocacy efforts (i.e. sectoral opinions, seminars and workshops, and working with Congress and Media, among others) which have allowed it to raise the profile of competition principles on the national agenda. The internal restructuring which led to the creation of a Directorate for Institutional Relations and International Affairs, and a Directorate for Cartels is allowing us to strengthen our advocacy and outreach efforts, and provides more resources for fighting cartels. In addition, the CFC's legal division was separated into two different areas, a Directorate for Legal Affairs, which is in charge of addressing the internal legal work of the Commission; and a Directorate for Contentious Affairs, which is in charge of defending Commission rulings that are appealed before Mexican tribunals.

One of the most complex tasks for the Commission is the interaction with the judiciary in the handling of case resolutions. In order to tackle this challenge, the CFC is currently working with judges and magistrates in a program to exchange information and experiences regarding competition law and policy.

Among the main challenges going forward is the lack of criminal prosecution for certain offenses, and a regime of fines which is still below international standards. Another challenge is the promotion of a "culture of competition," to raise awareness regarding the benefits of a strong competition policy to the general population. Without a doubt, much remains to be done. However, today we have better legal instruments and a better organizational structure to enable the CFC to improve its performance, strengthen competition policy, and ensure that the defense of competition principles is considered as an essential tool for aiding the efficient functioning of markets and the attainment of greater consumer welfare.

New Zealand: Developments in Competition Policy

1. Introduction: Key features of the New Zealand competition policy regime

The prerequisites for implementing competition policy and law are sound institutions and a thriving competition culture. New Zealand has well developed institutions, including the courts and the Commerce Commission (NZCC), independent entities responsible for enforcing and adjudicating on competition law. New Zealand has a small and open economy where the importance of competition and trade in promoting economic growth is generally recognized.

New Zealand's size and location have a significant impact on its competition policy regime. New Zealand is a small economy, characterized by a small and geographically dispersed population and relative isolation from other economies. Consequently, New Zealand markets are characterized by comparatively high levels of concentration so competition policy (and its enforcement) has been tailored to suit New Zealand's specific needs.

New Zealand's primary competition law is the Commerce Act 1986. The Act contains three classes of prohibitions relating to anticompetitive agreements, unilateral abuses of market power, and anticompetitive mergers. It also provides for the NZCC, on a case-by-case basis, to specifically authorize agreements and business acquisitions that may breach the Act but could have important public benefits. The NZCC can also grant a clearance for a business acquisition when it considers the merger will not substantially lessen competition.[17] Another element of the Commerce Act is to provide for the regulatory control of goods or services where competition is limited and control would benefit acquirers. Part 4A of the Act includes specific provisions for targeted control of large electricity lines businesses.

There is specific competition legislation for the electricity industry (the Electricity Industry Reform Act 1998 and Part 4A of the Commerce Act), the telecommunications industry (the Telecommunications Act 2001), and the dairy industry (the Dairy Industry Restructuring Act 2001). However, the general competition law set out in the Commerce Act applies to all industries, including those with industry-specific competition legislation, and both the public and private sectors. The legislation is non-discriminatory, aimed at protecting the competitive process, not competitors.

New Zealand has split responsibility for competition policy and operations. Competition policy advice is primarily undertaken by the Ministry of Economic Development. The NZCC is the primary competition authority in New Zealand responsible for operational aspects. It is an industry specific regulator as well as the generic competition authority and is responsible for adjudication and enforcement work. Adjudication relates to the assessment of clearance and authorization applications. In terms of enforcement, the Commerce Act provides for both private and public enforcement actions. The courts may impose penalties, damages and orders in respect of breaches of the Act. The NZCC has a number of enforcement options available to it when, over the course of an investigation, it establishes that there has been a breach, or likely breach of the Commerce Act. These options include issuing a compliance advice or warning letter, entering into a settlement, deciding to prosecute, or taking no enforcement action.

[17] The effect of a clearance or authorization is to immunize the merger or conduct from court proceedings. These processes contribute to economic growth by providing firms with the confidence they need to consummate a merger or engage in conduct that is good for New Zealand society. The concept of authorization of mergers is particularly important in small economies like New Zealand because scale issues are likely to be more significant. However, scale can also have the opposite effect. In large economies, the anticompetitive effects of the merger may be eroded over time through market entry. In a small economy there is a greater risk that a merger will entrench monopolistic elements into a market. The authorization process reflects this situation as it allows the competing arguments to be assessed case by case.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

New Zealand continues to place a high level of importance on maintaining the independence of the regulator—a principle that has been central to New Zealand's competition policy regime since it was introduced. The NZCC operates independently of the Government. Commissioners are appointed for a term and can only be removed from office on limited grounds by the Governor General. The NZCC is required to have regard to the economic policies of the Government where they have been formally transmitted to the NZCC, however these government policy statements cannot override the statutory requirement for the Commission to act independently. This independence was explicitly recognized by an amendment to section 8 of the Commerce Act in 2004.

2.2 Transparency

New Zealand's competition policy is consistent with the APEC competition and regulatory reform principles of promoting transparency. Section 25 of the Commerce Act requires the NZCC to disseminate information relating to its own functions and powers under the Act, as well as the provisions of the Act itself. The NZCC is also subject to the Official Information Act 1982 and Privacy Act 1993, which allow members of the pubic to gain access to official information and individuals to access private information.

While there is no statutory requirement for the NZCC to publish written reasons of its decisions, it has an internal policy of doing so. As well as making the reasons for its decisions transparent, this also provides guidance to business. The NZCC's enforcement criteria for assisting its decision-making in prioritizing enforcement activities are publicly available and can be accessed on the NZCC's website. Court judgments on Commerce Act enforcement proceedings or appeals against NZCC decisions are publicly available and recently were made available online on the Ministry of Justice website.

2.3 Accountability

Many measures to enhance transparency, such as the publication of reasons for the NZCC's decisions, also work to enhance accountability.

The Government carried out a substantial review of Crown entity governance arrangements in 2004. These reforms clarified the NZCC's accountability to the Minister of Commerce for the efficient and effective use of public resources. New measures included a requirement for the NZCC to prepare annual Statements of Intent on the focus of the NZCC's work and desired outcomes looking forward three years.

Furthermore, appeals of the NZCC's determinations can be made to the High Court and its decisions are subject to judicial review. The High Court is responsible for hearing all claims for relief in respect of breaches of the Commerce Act. The activities of the NZCC are also subject to investigation by the Office of the Ombudsmen and the Office of the Auditor-General.

2.4 Awareness

New Zealand's competition framework is well established and there is a high level of support for the fundamental tenets of the current regime. A number of factors help promote awareness within New Zealand. Effective enforcement by the NZCC helps promote the integrity of the framework as well as aiding general compliance. The public release of decisions improves the legal profession's understanding of the application of the law to the benefit of clients. The NZCC's website also provides key information to businesses and consumers such as updates on its activities, a variety of guidelines and speeches given by Commissioners.

New Zealand works to promote awareness of competition internationally. It regularly attends and contributes papers to OECD working groups and supports the observership status of non-member countries to the Competition Committee. The NZCC is an active member of the International Competition Network. In recent years, New Zealand has included competition chapters in all its free trade agreements which have involved cooperation provisions to assist the sharing of knowledge and experiences in the competition policy area. New Zealand has also been coordinating and liaising with APEC member countries to develop a set of model measures for competition policy chapters in free trade agreements.

New Zealand does not have a specific advocate to promote competition policy, but relies on a competition culture which makes all parts of the system accountable for achieving competition policy outcomes. However, both the Ministry of Economic Development and the Treasury have an advocacy role as part of providing advice to government on policy and regulatory proposals. The NZCC also has a role in promoting the benefits of competition and effective enforcement of competition law.

2.5 Enforcement

As mentioned above, the NZCC is the primary competition authority in New Zealand and is responsible for enforcement work. In order to select cases that it feels will have the most significant impact, the NZCC uses enforcement criteria which include assessing the extent of the detriment, the seriousness of the conduct and the public interest. The NZCC's enforcement activities have increased significantly in recent years. This has required increased funding through a dedicated litigation fund.

An important development aiding an increase in cartel enforcement has been the introduction of a leniency policy. This policy targets whistle blowers by offering immunity from NZCC initiated proceedings to the first person involved in a cartel that comes forward with information about the cartel and cooperates fully with the NZCC. The leniency policy has enabled the NZCC to detect cartels that it might not otherwise have become aware of. In addition, the cooperation of the leniency applicant has assisted the NZCC in gathering evidence as part of its investigation of the other alleged cartel parties. The NZCC has filed proceedings in the court on three occasions as a result of a leniency application, and further proceedings are pending.

The NZCC has also introduced a cooperation policy which has a broader application than the leniency policy, applying to all the Acts administered by the NZCC. The effect of the cooperation policy is that the NZCC will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and cooperation. This policy has been particularly beneficial in enabling the NZCC to restore competition in markets without incurring the full cost of court proceedings. In addition, in the same manner as a leniency applicant, the cooperating party may assist the NZCC in obtaining evidence to investigate other alleged cartel parties.

2.6 Legal framework

The purpose of the Commerce Act 1986 is to "promote competition for the long-term benefit of consumers." The statement of purpose was introduced in 2001 to clarify that competition is not an end in itself, but a means of promoting efficiency, which in turn enhances consumer welfare. As such, the purpose is sufficiently flexible and indeed in practice has provided for the consideration of productive, allocative and dynamic (or innovation) efficiencies.[18]

To remain effective, it is important that the competition laws remain up to date and relevant. The Government therefore regularly reviews its laws and regulations to ensure they are operating effectively. The last comprehensive review resulting in key changes to the Commerce Act occurred in 2001. These changes included the broadening of the competition thresholds relating

[18] Also of importance is the Fair Trading Act 1986. The Fair Trading act was developed with the Commerce Act to encourage competition and protect consumers from misleading and deceptive conduct and unfair trading practices.

to unilateral market power and anticompetitive mergers, as well as introducing new penalties for breaches of the Commerce Act.

In 2002, the NZCC was given the power to issue cease-and-desist orders to restrain anticompetitive conduct or to require a person to restore competition or the potential for competition in a market. Two Cease and Desist Commissioners are appointed and their role is quasi-judicial. They are appointed for the sole purpose of hearing and determining applications and are able to make orders to restrain anticompetitive conduct or to require a person to do something to restore competition or the potential for competition in a market. A key objective of the inclusion of these new provisions regarding cease-and-desist orders and Commissioners was to provide for more timely and effective enforcement of the Commerce Act as there was uncertainty as to whether the High Court could respond quickly to this type of proceeding.

A review of the regulatory control and clearance and authorization provisions in the Commerce Act is currently underway.

3 Future challenges and lessons learned in creating an effective competition policy regime

Competition policy in a small economy

It has been necessary to tailor competition policy and law to meet New Zealand's own specific needs and conditions. The main challenges relate to New Zealand's small economy. Markets are highly concentrated and, in some cases, may have oligopolistic characteristics or, due to economies of scale, tend to monopoly. Consequently, in applying competition policy and law there are dangers in applying rules of thumb relating to market structure. Competition assessments in concentrated markets require complex analysis of barriers to entry and the potential for dynamic competition. Another challenge is that, in some markets, firms may struggle to achieve minimum efficient scale when catering for domestic demand. Consequently in small economies, there may be more instances where it is desirable to make trade-offs between market power and firm efficiency considerations.

Providing for effective competition laws and well resourced institutions

Given the need for complex analysis of arrangements, it is necessary that we have well resourced institutions (including policy, judicial and enforcement bodies) of sufficient scale to apply that policy and law. However, New Zealand faces challenges given the significant costs involved and specialist resources required. These concerns are addressed through drawing on overseas experience and case law as much as possible, and targeting the use of resources where they can have greatest impact. The Commerce Act is closely based on the equivalent Australian Trade Practices Act, and New Zealand courts have been willing to refer with favor to Australian courts' decisions where relevant.

The NZCC is the generic competition and fair trading regulator. When the New Zealand Government introduces industry-specific regulation, it considers the optimal institutional arrangements to support that industry-specific regulation. If economic or competition expertise is relevant, the Government has tended to allocate those regulatory functions to the NZCC, although the specific arrangements within the NZCC may differ in each case.

Again the decision to allocate industry-specific regulatory functions to the NZCC largely reflects New Zealand's small size. It recognizes the NZCC's expertise in this area and builds on its core capability, and it also recognizes the importance of the interface between industry-specific regulation and generic competition law. Including the regulatory responsibilities in the one institution seeks to manage this interface, minimize the risk of industry-capture, and enable the competition regulator to apply the full range of tools to address competition problems.

Cooperation with overseas jurisdictions

New Zealand's economy is dependent on trade. Increasingly, putatively anticompetitive conduct that may be said to harm New Zealand markets has an international dimension, with the conduct either occurring offshore or the participants to the anticompetitive arrangements being overseas companies. This raises complex jurisdictional issues. This is especially true in the context of New Zealand's close economic relationship with Australia. The NZCC is addressing these challenges through increased cooperation with overseas competition agencies. Legislation to allow the NZCC to share information with overseas competition authorities is currently being developed.

Increasing complexity of competition law

The current wording of s36 (unilateral behavior) was introduced in 2001. Since then only two cases have been taken by the NZCC under Section 36. The case law in this area is still relatively undeveloped with the most recent case being the Carter Holt Harvey case on predatory pricing decided by the Privy Council in 2004.[19] Therefore, a future challenge is to develop a better understanding of the application of competition law relating to unilateral behavior. For instance, it is difficult to describe it in a way that does not, of itself, inhibit competition. This failure to adequately describe unilateral behavior in a manner that resonates with the courts results in considerable uncertainty about what sort of behavior is actually prohibited.

The new merger threshold of "substantially lessening competition" has also increased the complexity of the competition analysis as this has resulted in a shift from a structural focus to more weight being put on market conduct and performance. The NZCC is required to consider both unilateral and coordinated effects of mergers. Increasingly this has required a complex economic analysis of existing and potential competition, taking into account dynamic effects. The NZCC is increasingly using explicit formal economic modeling to inform this analysis. This has raised challenges in presenting complex economic analysis in proceedings before the Court. In New Zealand, the High Court is supplemented by lay members with expertise in economics to assist the judge in analyzing economic evidence.

[19] *Carter Holt Harvey v. CC (2004),* Privy Council and *Telecom v. CC (2001)* Court of Appeal

Peru: Developments in Competition Policy

1. Introduction: Key features of the Peruvian competition policy regime

Peru's economic development accelerated in the 1990s with the implementation of market liberalization and regulation processes, with the aggressive promotion of private investment and the implementation of competition policy. Before this decade, the Peruvian economy was a small and highly protected economy with few producers, limited technological development, subsidized processes and low value-added production.

Peru implemented a competition policy regime through Legislative Decree Nº 701 – Law to eliminate monopolistic, restrictive and control practices that impede competition. This legislation establishes ex-post control for dominant position abuses and collusive practices. The aim is to eradicate monopolistic practices, controls and restraints on competition in the production and marketing of goods and in the provision of services, so that businesses can flourish while strengthening consumer welfare.

The law applies to all persons and entities under public or private law undertaking economic activities. It also applies to all persons who represent corporations, organizations and institutions, when they take part in prohibited behavior.

In June 2008, a new competition law, Legislative Decree Nº 1034, was approved. This new law clarifies anticompetitive conduct, strengthens the authorities' investigative powers and assures its independence.

Legislative Decree Nº 1034 includes two types of prohibitions relating to anticompetitive agreements and unilateral abuse of market power:

- Acts or behaviors involving economic activities that constitute abuse of a dominant position that limit, restrain, or distort competition in a manner that injures the common economic interest (consumer welfare); and,
- Agreements or other practices that restrain or can restrain competition.

The law does not have any provision for mergers that may produce anticompetitive effects and generally Peruvian law does not provide for pre-merger notification, except in the Electrical Sector (Law Nº 26876, *Antimonopoly and Antioligopoly of the Electrical Sector Law)*. Nevertheless, governmental authorities do follow-up on mergers especially in sensitive economic sectors.

In the beginning, the Peruvian competition law established mild sanctions which did not affect competitors' behavior. After a law modification in June 2008, the sanctions were raised to US$1 million but never exceeding 12% of a firm's sales or gross income for the previous year.

Since its establishment in 1992, Indecopi (National Institute for the Defense of Competition and the Protection of Intellectual Property) has enforced the competition law; and is empowered to investigate, examine and apply administrative sanctions to economic agents.

Another agency responsible for the application of competition laws is the Peruvian Telecommunications Regulatory Agency – OSIPTEL, which covers the telecommunications industry only. In general terms, this agency is in charge of applying antitrust and unfair competition law, competition advocacy, removing entry barriers that restrict competition, regulatory proposals that increase and to promote competition conditions and evaluating license transfers and concessions (often in the context of the merger of operators).[20]

[20] Even though there is not an explicit merger control policy applied to the telecommunications markets, the current legal framework establishes that any transfer of licenses and concessions among telecommunication

OSIPTEL acts through claims mechanisms, regulatory procedures and investment promotion measures. OSIPTEL is conscious of the importance of its role in the Peruvian economy, with the objective of generating conditions that favour competition and eliminating barriers that restrict it. OSIPTEL constantly monitors market conditions and practices in order to sanction anticompetitive conduct, in particular, the abuse of dominant position and the formation of cartels.

Being part of the Andean Community, Peru is also party to Decision 608 (2005) which establishes a joint investigation procedure for anticompetitive practices that affect two or more Member Countries under the guidance of the General Secretariat of the Andean Community.

On 4 April 2007, Law Nº 28996 (*"Elimination of Additional Costs, Obstacles and Restrictions for Private Investment Law"*) was issued. Through this law, the Elimination of Bureaucratic Barriers Commission of Indecopi has the authority to eliminate bureaucratic barriers established through legal regulations of lesser rank than a law, like Supreme Decrees, Ministry Resolutions,[21] Municipal or Regional Laws issued by public authorities.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

Indecopi is a governmental entity with technical, economic, administrative and budgetary autonomy. The decisions issued by its Defense of Free Competition Commission , and its appellate body, the Defense of Competition Chamber of the Tribunal of Indecopi, are not influenced by political agents or the government itself.

Since its creation, Indecopi's Tribunal and Commission members have enjoyed lengthy term appointments (seven years on average). They are independent in their decisions, which are all based on technical opinions. Appointments are apolitical, based on qualifications and professional experience alone.

The independence of the decisions of the Tribunal and Commission results in impartial, fair and consistent application of Peru's antitrust law.

2.2 Transparency

Transparency is one of APEC's important principles, as enshrined in APEC's 1995 Osaka Action Agenda. Peruvian Legislation is consistent with this principle, contained not only in Indecopi's Functional Law but also in Law Nº 27806 –Transparency Law –principal objective of which is to promote transparency in the actions of governmental entities and to regulate the right of individuals to have access to public information.

To ensure that enforcement complies with the standards of transparency and non-discrimination, Indecopi's Tribunal has enacted guidelines for accessing non-confidential information, ensuring that the confidentiality of the information does not limit or restrict the parties' due process rights.

While a case is in the investigation stage, all parties can access the file and read the information contained therein. After a decision is issued, the file is publicly accessible and can be read, transcribed or photocopied, except for confidential information.

Furthermore, guidelines have been adopted by the Defense of Free Competition Commission and Defense of Competition Chamber to assure predictability. Indecopi's Tribunal has issued

operators should be evaluated under the scope of its competitive effects on the industry depending on the results of this evaluation, a transfer could be approved, conditioned or potentially denied.

[21] Laws issued by Ministres (State Secretariat).

several Precedents of Mandatory Compliance. In this vein, consistent jurisprudence plays an important role.

One of the objectives established by the Defense of Competition Chamber in the current year is to publish all of its jurisprudence from 2006 onward, as well as competition-related reports and working papers.

Indecopi is also promoting free competition and market access through seminars and capacity-building programs.

In important cases, public explanation of Indecopi's decisions is a priority. These announcements are posted on Indecopi's website in the form of press releases. Precedents of Mandatory Compliance issued by Indecopi's Tribunal are published in the national gazette "El Peruano," and those with new criteria have always had media exposition and publicity, so that the public can be aware of them.

2.3 Accountability

Indecopi submits periodical reports relative to its performance and results to the Presidency of the Council of Ministers.

Parties involved in a procedure can file a claim with the Superior Court of the Judicial System in order to question the decision issued by Indecopi, within three months of the day after receiving that decision.

Indecopi's resolutions have had a high validation rate with the Judiciary (92% on average).

2.4 Awareness

The Peruvian community currently has a reasonable level of awareness of and support for the competition framework. This has been achieved by continuous competition advocacy activities and promotion of competition benefits, i.e. the use of the media for reporting on investigations of highly sensitive sectors, case solving by the competition agency, reports on the agency, and coordination of seminars and other events directed to economic and competition law faculty.

The publication of competition-related reports and working papers allows society to know more about the work of Indecopi (through studies and papers produced by the Economics Studies Management of Indecopi) and the decisions issued by the Defense of Competition Chamber and the main criteria used in each case.

Through the support of international cooperation, Indecopi has focused in the past years on disseminating information on the advantages of competition and participating in various seminars and workshops as well as training courses. Activities oriented to raise public awareness of competition policy will be maintained as one of Indecopi's main objectives for the present and future years.

Peru also works to promote awareness of competition internationally. In the last two years, Peru has been negotiating trade agreements with other countries and in the last year has signed a trade agreement with the US. In most of these agreements, competition chapters have been included.

2.5 Enforcement

One of Indecopi's five institutional objectives is to promote the smooth functioning of the market through the remedying of anticompetitive conduct and the elimination of bureaucratic barriers to market access. In recent years, more financial resources have been provided to the Defense of Free Competition and the Elimination of Bureaucratic Barriers Commissions.

The Defense of Free Competition Commission can initiate investigations in response to complaints from businesses, customers, or consumers about alleged violations of the Competition Law (Legislative Decree Nº 1034). It can also open an investigation on its own initiative for a matter that involves the public interest. The Defense of Free Competition Commission can request documents and information from the relevant parties and has the authority to perform on-site inspections and to obtain statements from respondents and related third parties.

Another tool established in the Peruvian Competition Law to improve cartel reduction is the leniency program and commitments, which aid in identifying otherwise undetected cartels.

Investigations have been initiated by the Commission in markets such as air and sea storage, vehicle insurance, sea pilots, public transportation, the railways, the administration of pension and retirement plans and bleach. The Commission has analyzed electricity generation, transmission and distribution markets.

The Defense of Free Competition Commission initiates new investigations for possible infringement of competition law. A market investigation was initiated in 2008 with the cooperation of the Peruvian Regulatory Agency for Energy, Electricity and Mining (OSINERGMIN). The investigation concerns possible collusive practices or abuse of dominant position in the liquefied petroleum gas (LPG) market.

The Defense of Competition Chamber is looking to sign cooperation agreements with other competition agencies. These include capacity-building activities for Indecopi officials.

In the case of the Elimination of Bureaucratic Barriers Commission, the objectives are: to promote simplification and transparency in municipalities, to facilitate interaction between entrepreneurs and public institutions to simplify administrative processes and municipal red tape, and to create information mechanisms that will help eliminate bureaucratic barriers. The Elimination of Bureaucratic Barriers Commission has filed 190 applications related to different public institutions for the abolition of bureaucratic barriers; 22% of these applications were successful. For the rest of the cases, the affected parties had to file complaints with the judiciary.

2.6 Legal framework

Peru's legal framework for supporting free and fair competition:

- Legislative Decree Nº 1034 – Competition law.
- Law Nº 26876 – Antimonopoly and antioligopoly in the Electrical Sector Law oriented to mergers
- Decision 608 (2005) of the Andean Community
- Supreme Decree 26096 013-93-TCC – Law of the Telecommunications Sector.
- Supreme Decree 020-2007-MTC (July 2007) – Regulations concerning the Law of the Telecommunications Sector.
- Legislative Decree 702 (November 1991), covering the regulation of the Telecommunications Sector
- Law Nº 28996 – Elimination of additional costs, obstacles and restrictions for private investment law dealing with market access

Precedents of Mandatory Compliance and Guidelines from the Defense of Free Competition Commission and the Defense of Competition Chamber are also of obligatory compliance.

3. Future challenges and lessons learned in creating an effective competition policy regime

In the more than 15 years since its establishment, Indecopi has made great strides in improving the enforcement of competition policy and law. However there are some outstanding challenges.

One such challenge is the difficulty of creating an effective competition policy regime in highly concentrated market sectors with oligopolistic characteristics. The application of competition policy and law will help, as will the gradual elimination of barriers to market access. Resource limitation is another challenge. The international cooperation among competition agencies is crucial in building the capacity to undertake investigations. But most important is high-quality training for the staff in charge of investigations.

The participation of Peru in international forums is necessary for the maintenance of quality standards in investigations. Currently, Indecopi is developing cooperation and sustainable aid with international organizations such as APEC, OECD, ICN, World Bank and UNCTAD.

In June 2008, Peru approved a new competition law that replaced Legislative Decree 701. The main contributions of the new law are the clarification of the use of the *per se* rule to cases of collusive practices, the division between vertical and horizontal agreements, and the enhancement of investigative powers, as well as some procedural improvements and time frames for investigations.

Competition advocacy is one of Indecopi's main short-term objectives. For that purpose, several activities will continue to be held, some with the support and cooperation of international entities and competition agencies from other countries.

Philippines: Developments in Competition Policy

1. Introduction: key features of the Philippines competition policy regime

The Philippines has a wide range of laws and statutes that deal with the various aspects of competition law such as monopolies and combinations in restraint of trade, restrictive business practices, price control measures and consumer protection. In fact, the concept of anti-trust regulation or competition policy is not new to the Philippines. Old anti-trust provisions of US laws (e.g., Sherman and Clayton Acts) found their way into the Philippine Constitution, the Revised Penal Code and the Civil Code.

The Philippine Constitution prohibits and regulates monopolies, combinations in restraint of trade and other unfair trade practices. Under the Constitution, monopolies are not illegal in themselves as opposed to combinations in restraint of trade and other unfair competition practices that are prohibited without exception. But since the Constitution does not define what would constitute unlawful monopolies, or combinations in restraint of trade or unfair competition practices, separate legislation/or case laws are the basis for making such definitions.

The Revised Penal Code defines and penalizes anticompetitive behavior that is criminal in nature. The Civil Code of the Philippines allows the collection of damages arising from unfair competition as well as abuse of dominant positions by a monopolist. The Act to Prohibit Monopolies and Combinations in Restraint of Trade allows treble damages for civil liability arising from anticompetitive behavior.

There are also special laws and statutes enacted to specifically address unfair competition practices. These include:

a. The Corporation of the Philippines (1980) - covering rules on mergers, consolidations and acquisitions. The law, however, does not address competition issues such as the possible abuse of dominant positions arising from mergers and acquisitions.

b. The Revised Securities Act (1982) - prohibiting and penalizing the manipulation of security prices and insider trading.

c. The Price Act (1992) - defining and identifying illegal acts of price manipulation such as hoarding, profiteering and cartels. Through price controls and mandated ceiling mechanisms, the Act also aims to stabilize prices of basic commodities and prescribes measures against abusive price increases during emergencies and other critical situations.

d. The Consumer Act of the Philippines (1992) - prescribing conduct for business and industry. It sets penalties for deceptive, unfair and unconscionable sales practices to protect and promote the interest of consumers. It also covers consumer product quality and safety standards.

e. The Intellectual Property Code of the Philippines (1997) - providing for the protection of patents, trademarks and copyrights and the corresponding penalties for infringement.

f. The Downstream Oil Industry Deregulation Act of 1998 - liberalizing and deregulating the downstream oil industry to ensure a truly competitive market, encourage entry of new players to the industry. It introduced measures to achieve these objectives, notably the provision of anti-trust safeguards meant to ensure fair competition and prevent cartels.

g. The Anti-Dumping Act of 1999 - providing for the protection of Filipino enterprises against unfair competition and trade practices.

h. The Electric Power Industry Reform Act of 2001 - providing for the restructuring of the electric power industry, including the privatization of the assets of the National Power Corporation, the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities.

2. Developments supporting important elements of an effective competition policy

2.1 Independence

Regulatory agencies in the Philippines are generally not statutorily independent, but are attached to cabinet departments or the Office of the President. Departments exercise direct control and administrative supervision such as that between the Department of Trade and Industry (DTI) and its bureaus; but this does not extend to the control of the regulatory or adjudicatory powers of the boards and commission such as between the Department of Finance and the Securities Exchange Commission (SEC). The Philippines continues to implement regulatory and legal reforms to promote the independence of the regulator, and separate operator and regulator functions.

2.2 Transparency

The Philippine Constitution recognizes the right of the people to information on matters of public concern, subject to limitations provided by the law. Agencies are required to develop regulations through a public consultation process, often involving public hearings. In most cases, this ensures some transparency in the process of developing regulations. A law, rule or regulation may only take effect after publication in the Official Gazette, or in certain cases two newspapers of general circulation. The Corporation Code, Securities Regulation Code and other related laws also follow the same publication requirements on corporate actions that are imbued with public interest or may affect certain sectors of the public.

Government agencies are also mandated to establish and utilize information systems that will inform the public of their policies, rules and procedures; work programs, projects and performance targets; performance reports; and all other documents as may be classified as public information. A significant development toward better transparency is the Government's thrust toward e-governance and further utilization of information and communication technology. This allows the public better access to government information through the enhanced web-presence of government agencies where one can readily access policy decisions, resolutions, laws, rules, procedures, orders and notices of hearing.

2.3 Awareness

Roundtable discussions, seminars, workshops and policy dialogues, participated in by the Government, academe, the consumer groups and the legislature are conducted to foster understanding of competition policies/laws and promote a culture of competition. Government agencies such as the Tariff Commission have also included competition policy in their advocacy program. The Philippines has been participating in various international fora to exchange information and learn about best practices on competition policy from other countries.

2.4 Legal framework and enforcement

The Philippines does not have a comprehensive competition law nor a central authority or body to enforce it. Competition related laws are implemented by different government agencies. These include, among others, the DTI and its bureaus for consumer welfare and protection of intellectual property rights; the Department of Energy and the Energy Regulatory Commission for oil and power; the SEC for stock and non-stock corporations, all forms of securities, brokers and dealers, financing companies and investment houses; and the Department of Transportation and Communications and its attached agencies, namely, the Maritime Industry Authority, the Philippine Ports Authority, the Civil Aeronautics Board and the National Telecommunications Commission, for transportation and telecommunications.

3. Future challenges and lessons learned in creating an effective competition policy regime

The Philippines believes that an uncompetitive economic environment should not diminish the benefits of liberalization in trade and investment. Studies show that present laws have proven inadequate or ineffective to prevent anticompetitive structures and behavior in the market due to lack of enforcement. Despite their considerable number of laws and their varied nature, competition has neither been fully established in all sectors of the economy nor has existing competition been enhanced in other sectors. Since each law is meant to address specific situations, there runs the risk of one law negating the positive effects of another.

It is observed that these laws have been hardly used or implemented as may be seen in the lack of cases litigated in court against anticompetitive behavior. Since most punishments are penal in nature, guilt must be proven beyond reasonable doubt and hence, the amount of evidence required so that the case may prosper is tremendous. Fines imposable for breaches of the laws are minimal. For instance, under Article 186, fines range from two hundred pesos (P200) to six thousand pesos (P6,000) only. Moreover, there is a lack of jurisprudence and judicial experience in hearing competition cases.

In addition, the handful of jurisprudence in competition-related cases raises the question whether there is sufficient awareness in the domestic market on the remedies available to address unfair competition and uncompetitive behavior and if existing laws effectively prevent market failure leading to uncompetitive behavior and unfair competition. The added challenge of cross-border competition brought on by increasing globalization also brings to fore the question whether existing laws and capabilities of the agencies and bodies enforcing competition are sufficient to address market failures that result in uncompetitive behavior.

Another reason cited is the lack of a central enforcement agency. Currently, enforcement is spread through several agencies tasked with both the regulation and promotion of competition in different economic sectors. With so many enforcement agencies, responsibility is too diffused and accountability for the implementation of the laws is difficult to locate or fix. The danger of “regulatory capture” is seen as inevitable. There is also a lack of expertise in the appreciation and implementation of competition laws.

Realizing the deficiencies of the existing legal and regulatory systems for enforcing competition, the Philippine Government through the legislature has been attempting to pass new anti-trust or competition legislation since the early 1980s. It may also be mentioned that the Medium-Term Philippine Development Plan for 2004–10 provides for the adoption of a competition law/policy as a way to create a competitive environment conducive to the development of micro, small and medium enterprises. The numerous draft bills have been quite varied, having been adopted from various existing anti-trust and competition laws around the world. So far, eight bills have been filed in the Lower House and three bills in the Senate during the 13th Congress. Bills seeking to increase the penalties under the Revised Penal Code; and penalize monopolies, cartels, unfair trade practices, and combinations or conspiracies in restraint of trade and all forms of artificial machinations that will injure, destroy or prevent free market competition; have been filed in the Senate and in the Lower House recently. As the economy continues to be dominated by groups and businesses with substantial market power and political influences, an effective competition policy framework would be needed.

Singapore: Developments in Competition Policy

1. Introduction: Key features of the Singapore competition policy regime

Competition is a key tenet of Singapore's economic strategy. It helps create a level playing field and promotes healthy competition in which businesses can thrive. This was one of the key recommendations of the Economic Review Committee, which was set up to review Singapore's economic development strategy with inputs from the government, labour movement and the private sector. Competition spurs businesses to be more efficient, innovative and responsive to consumer needs. As a result, consumers enjoy more choices, lower prices and better products and services.

Where appropriate, Singapore has opened sectors of the economy to market competition. Singapore's competition policy is primarily enforced through the legal framework of the Competition Act. The Competition Act adopts international best practices, whilst taking into account the specific economic characteristics and circumstances of Singapore, in particular, the fact that Singapore is a small open economy.

There are three main prohibitions under the Competition Act. First, Section 34 prohibits agreements which prevent, restrict or distort competition to a significant extent in Singapore. These include price-fixing, colluding on tenders or division of markets. Second, Section 47 of the Competition Act prohibits businesses from abusing their market dominance. Third, Section 54 prohibits mergers and acquisitions that result in a substantial lessening of competition in Singapore.

The Competition Act applies to all undertakings, i.e. all natural or legal persons capable of commercial or economic activity. This is regardless of whether they are foreign-owned, Singapore-owned or owned by the Government or its statutory boards. Undertakings could be individuals operating as sole traders, businesses, companies, firms, partnerships, societies, cooperatives, business chambers, trade associations or even non-profit organizations.

While there is presently no statutory framework in relation to the regular review of the Competition Act, the Competition Commission of Singapore (CCS) continuously reviews international best practices to assess if its processes are current and to adapt to the changes within the operating environment to ensure that it remains efficient and effective in its work.

There is specific competition legislation (for example, the Gas Act, the Electricity Act, the Postal Services Act, the Telecommunications Act and the Media Development Authority Act) for sectors such as the gas, electricity, postal services, telecommunications and media. As such, these sectors have been excluded from the Competition Act and are subject to the regulatory and competition framework administered by their sector-specific regulators. These sectors were excluded because they are in transition from a previously monopolistic situation to a more competitive environment, and more active market regulation and intervention is needed. Moreover, there are considerable technical matters affecting competition in these areas. The sectoral regulators, with their industry knowledge and expertise, are in a better position to handle competition issues in these sectors. Nonetheless, the CCS does deal with cross-sectoral competition issues in consultation with the sectoral regulators.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

Independence is important to the CCS, as it takes on the roles of investigator, adjudicator and enforcer. The CCS decides on its cases independently. Appeals from the CCS' decisions are made to the Competition Appeal Board, an independent specialist tribunal comprising lawyers, economists, accountants and representatives from the banking and business sectors. Merger parties may apply to the Minister for Trade and Industry for exemption of their merger, where they are of the view that the merger should be exempted on the ground of any public interest consideration, e.g. national security or defense.

2.2 Transparency

The CCS works with its stakeholders, including business and professional associations to solicit feedback on legislation, regulations and initiatives. The Competition Bill and the subsequent 2007 amendments to the Competition Act were only finalized for submission to Parliament after extensive public consultation and industry feedback. There was also public consultation in 2006 before the CCS issued a recommendation to the Minister for Trade and Industry on a Block Exemption Order for certain liner shipping agreements. The CCS guidelines on how it intends to interpret and give effect to the provisions of the Competition Act are put out for public consultation before issue. Subject to confidentiality of information and where appropriate, the CCS often seeks third-party views or even consults the public in respect of the cases it undertakes.

Details of the notifications for decision received by the CCS, and public versions of CCS' decisions in respect of these notifications or infringement decisions are available on the public register on the CCS website.

The involvement of CCS' stakeholders and the publication of CCS' decisions garner support for CCS' work and educate the public on the administration of competition law.

2.3 Accountability

If the CCS proposes to make an infringement decision, it is required to give notice of the same to the infringing parties and give them a reasonable opportunity to make representations and inspect the CCS' file. Any infringement decision has to be published. Appeals can be made to the Competition Appeal Board. Further appeals on points of law and the amount of financial penalty to the High Court and the Court of Appeal are also possible. In addition, CCS' decisions are subject to judicial review.

The Annual Report, Audited Financial Statements and Auditor's Report are presented to Parliament at the end of each financial year.

These requirements ensure public and financial accountability as well as rigor of analysis and investigation procedures.

2.4 Awareness

The CCS has issued a series of 12 guidelines to help businesses understand how the CCS interprets and enforces the three main prohibitions of the Competition Act. These guidelines, which provide transparency and clarity to businesses on how the CCS will interpret and implement the competition law regime, were finalized only after public consultation and industry briefings. To disseminate information and create awareness on the CCS' work, CCS' website provides a one-stop access to information on the Competition Act. All our guidelines, forms, all public feedback submissions and a list of frequently asked questions and answers are available. The CCS also has a compendium of guidelines and brochures on competition law which it distributes to its stakeholders.

In addition, the CCS collaborates with its stakeholders such as business chambers, trade and professional associations and universities to organize regular competition law briefings, conferences involving overseas competition authorities and expert consultants to share their wealth of experiences with participants. For instance, following its first infringement decision on a bid-rigging case, which was issued in January 2008, the CCS organized a seminar in March 2008 for procurement officers from both the public and private sectors, to raise awareness on the "ills" of and how to detect a cartel. CCS officers participate actively as speakers or panelists at seminars and conferences. These initiatives reduce uncertainties and compliance costs for businesses. Going forward, the CCS will adopt a more targeted approach and focus its outreach activities in sectors where anti-competitive activities are more likely, based on the experience in other countries. Such outreach activities may also provide the CCS with quality leads and complaints of potential anti-competitive activities in these sectors.

The CCS has launched a Distinguished Speaker Series in 2008, with an inaugural lecture by Mr. Peter Freeman, Chairman of the UK Competition Commission. The Distinguished Speaker Series is intended to raise awareness of competition law and its benefits to stakeholders and the general public.

2.5 Enforcement

The Competition Act gives the CCS powers of investigation which it can exercise where there are reasonable grounds to suspect an infringement.

The CCS has a range of investigative powers, which are:

- The power to require production of relevant documents or information under section 63 of the Competition Act;
- The power to enter business premises to require the production of relevant documents or information without a warrant under section 64 of the Competition Act; and
- The power to apply to the court for a warrant to enter and search business premises for the relevant documents or information under section 65 of the Competition Act.

The CCS is also empowered under the Competition Act to impose a financial penalty and require the infringing party to carry out structural or behavioral remedies. Structural or behavioral remedies are calibrated based on the redress needed to stop the anti-competitive activity in question.

In enforcing the Competition Act, the CCS is mindful of regulatory and business compliance costs. Instead of attempting to catch all forms of anti-competitive activities, the CCS focuses on activities that have an appreciable adverse effect on competition in Singapore. In assessing whether an anti-competitive agreement infringes the Competition Act, the CCS will take into account whether it promotes innovation, productivity or longer-term economic efficiency. If those benefits outweigh the likely anti-competitive harm (i.e. there is a net economic benefit to Singapore), the CCS will assess that the agreement does not infringe the Competition Act.

3. Future challenges and lessons learned in creating an effective competition policy regime

Since the CCS was set up in 2005, it has focused its efforts on three key areas: capacity building, outreach and enforcement. Going forward, it will continue to build on these efforts.

Capacity Building

As a young competition authority, the CCS recognizes the importance of investing in capacity and capability building, and its officers regularly attend training, both locally and overseas. CCS management and officers also regularly attend international competition law and policy

conferences and workshops to keep abreast of international developments and build up their networks. The development of staff expertise will continue to be a priority area for the CCS.

Outreach

Outreach is another key challenge for the CCS. In the first two years since it was set up, the CCS focused on outreach to the small and medium enterprises and trade associations, in addition to general outreach, to raise their awareness on the do's and don'ts under the Competition Act. The CCS has also since expanded its outreach efforts to demand-side entities, including procurement officers and the general public. The CCS feels that it is important to educate the public on the CCS' role and the benefits of competition, and hopes that by increasing the level of awareness of competition law among buyers, they will become more vigilant and alert to potentially anti-competitive activities.

Enforcement

Instead of attempting to catch all forms of anti-competitive activities, the CCS' principal focus will be on those that have an appreciable adverse effect on competition in Singapore. To aid its cartel enforcement, the CCS has a leniency program which offers immunity or a reduction in financial penalty to undertakings involved which come forward with information on the cartel and cooperates fully with the CCS. Since the section 34 prohibition on agreements that distort competition came into force on 1 January 2006, the CCS has issued its first infringement decision against six pest control companies for bid-rigging arrangements. The CCS will also build on its enforcement experience, and seek to improve its internal procedures, so as to achieve greater efficiency.

Chinese Taipei: Developments in Competition Policy

1. Introduction: key features of the Chinese Taipei competition policy regime

The competition law in Chinese Taipei was an important element of the program of economic reforms that moved the economy from its centrally directed emphasis on manufacturing and exports to a market-driven emphasis on services and high technology.

In the 1980s, the economic policy of Chinese Taipei shifted gradually from a planned economy to a more market-oriented stance. "Liberalization, Internationalisation, and Institutionalization" became the guiding principles for future economic development. Subsequently, the enactment of the Fair Trade Act in 1992 indicated that economic development had become more competitive.

Chinese Taipei's competition law, the Fair Trade Act (FTA), covers a wide range of antitrust as well as unfair competition concerns. The antitrust section of the Act regulates monopolies, mergers, concerted actions and vertical restraints. The Act in general permits the existence of monopolies, as long as they do not abuse their market power. Mergers or acquisition involving parties reaching a certain sales volume or market share must be brought to the attention of the Commission for review. The Act in principle forbids concerted actions but allows for exceptions that require the Commission's prior approval. The Act bans resale price maintenance but requires the Commission to apply a rule of reason principle to other vertical restraints.

The unfair competition section of the Act regulates those practices likely to impede fair competition: passing-offs and counterfeiting; false and deceptive advertising; commercial disparagement; multi-level sales and any other practices which are deceptive or grossly unfair.

The FTA has undergone three amendments respectively in 1999, 2000 and 2002, but its competition policy goals have remained unchanged.

The Fair Trade Commission (CTFTC), established on January 27, 1992, is a ministerial level independent agency for proposing competition policy and the enforcement of the FTA. Its decisions are not subject to revision or reversal based on effects on other policy interests.

Other laws that cover specific competition legislations include: the Banking Act, the Financial Holding Company Act, the Financial Institutions Merger Act and the Insurance Act, which are enforced by the Financial Supervisory Commission (FSC); and the Telecommunication Act enforced by the National Communication Commission (NCC).

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

The CTFTC consists of nine fulltime Commissioners, including the Chairman and Vice-Chairman. They are appointed for three-year, renewable terms. Pursuant to Article 28 of the FTA: "The Fair Trade Commission shall carry out its duties independently in accordance with the law and may dispose of the cases in respect of fair trade in the name of the Commission." The Commission is thus by law an independent agency and it may dispose of cases in the name of the Commission to prevent any individual Commissioner from any undue political pressure.

This independency is recited in Article 13 of the Organic Statute of the Fair Trade Commission: "Commissioners of the Commission shall be beyond party affiliations and shall act independently in performing their duties under the law." Also, according to Article 11 of the

Organic Statute, "The number of Commissioners with the same political party shall not be more than one-half of the total number of Commissioners." This helps ensure that decision-making procedures in the Commission are independent of policymakers.

Currently, the Chairman of CTFTC, who has ministerial status, attends regular Cabinet meetings to present the Commission's views on matters affecting competition and regulation. In the future, in coordination with governmental organization restructuring, the CTFTC will be outside the Cabinet with four other independent agencies. The Chairman will no longer be required to participate in Cabinet meetings to ensure policymaking and the implementation of the FTA shall not be subject to the scrutiny of the Cabinet or other governmental agencies.

On the question of litigation procedures, after governmental restructuring, if there is dissatisfaction with the disposition of the CTFTC, the parties should directly invoke in administrative litigation with the Administrative court, and forgo the currently required petition to the Appeal and Petition Committee under the Cabinet.

2.2 Transparency

The CTFTC keeps transparency in the operations of routine administrative matters, public explanation of the FTA, and the case decisions of the enforcement.

To ensure that enforcement complies with the standards of transparency, predictability, non-discrimination, accountability and expediency in administrative procedures, the CTFTC has enacted relevant regulations for each stage of the proceedings, including statements, consultation meetings, public hearings, disposition periods, access to materials and files, administrative settlements and announcement of decisions.

For case investigation, the FTA provides the right for a party or a related person to apply to read, transcribe, photocopy or photograph relevant materials or files in order to claim or defend his or her legal rights and interests. To this effect, the qualifications of the applicant, the time, the method and scope of access and other information are required, and this is outlined in the "Regulation Governing Access to Materials and Files of the Fair Trade Commission."

Public explanation of the FTA and the Commissioners' decisions is a high priority. Announcements of case decisions involving the FTA are posted on the CTFTC's website and are issued in the form of press releases immediately after the Commissioners' meeting. Relevant information is transmitted and published on the Cabinet's integrated gazette on a daily basis.

2.3 Accountability

The CTFTC's measures in enhancing transparency and predictability also improve accountability. The enactment of rules for each stage of proceedings, disposition periods, and publications of relevant guidelines or statements aimed at a specific trade practice or guidance on a particular industry, all help to enhance accountability.

Furthermore, should the parties be dissatisfied with the decision of the CTFTC, they have the right to petition to the Appeal and Petition Committee under the Cabinet within 30 days of receiving the disposition letter or the day after the decision. If they are still dissatisfied with the decision of the Committee, they can bring the suit to the administrative court within two months of the day after receiving the disposition letter for judiciary review.

2.4 Awareness

Considering that prevention is more effective than cure, the CTFTC always embraces a policy whereby education is preferable to punishment. Since its establishment, the Commission has constantly sought to disseminate information on the advantages of competition among undertakings, industrial associations, university students and the public by participating in various symposia, seminars and workshops as well as training courses. Furthermore, the

CTFTC has set up a service center and a Competition Policy Information and Research Center to provide the public with inquiry and consultation services regarding any information and materials related to the FTA. The Commission also promotes competition through the media and its own website on CTFTC's activities, rules and guidelines, decisions of the Commission, special report on the Commission and the Chairperson, etc.

In 2007, moreover, the Commission scheduled a three-year plan to examine government regulations as a whole that may be harmful to competition for the purpose of infusing the concept of competition into other regulated agencies and building a more active competition culture.

The CTFTC also hosts an international conference on competition law and policy every three years, inviting internationally famous scholars and officials from competition authorities to discuss competition issues. The next international conference will be held in 2009. In addition, CTFTC actively participates in international competition organization fora, such as OECD Competition Committee, International Competition Network (ICN) and APEC, to keep abreast of international development trends.

2.5 Enforcement

The CTFTC can initiate investigations in response to complaints from enterprises, customers, or consumers about alleged violations of the FTA. It can open an investigation *ex officio* for a matter that involves the "public interest". In addition, the Commission decides about some restrictive agreements in response to applications by the parties for approved exemptions.

The CTFTC's principal tool to investigate and obtain evidence or information is requiring submission of documents and information by the parties, third parties, and other individuals and agencies. The Commission has powers to perform on-site inspections of respondent enterprises and to obtain statements from respondents and related third parties.

The CTFTC may enter an administrative settlement, rather than impose sanctions, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, and in order to achieve its administrative objectives and resolve a dispute.

Criminal prosecution is possible, but only for failure to comply with CTFTC's cease-and-desist orders for monopolization, concerted action, vertical restraint, or passing-off cases. The FTA provides several kinds of privately-initiated relief. Private litigants can sue in court to obtain a cease-and-desist order or preventive injunction against the threat of a violation and to recover damages. Depending on the nature of the violation, the court may award multiple damages for intentional violations, up to treble damages.

2.6 Legal framework

The purpose of the FTA is to "maintain trading order, protect consumers' interest, ensure fair competition and promote economic stability and prosperity." (FTA, Article 1) This policy goal remains unchanged after three amendments.

The term "competition" is defined as rivalry for transaction opportunities by offering better prices or superior quantities, quality, service and other condition. Consumers' interests are protected to the extent that consumers have an opportunity to deal in open and free markets benefiting from increased efficiency and innovation. Economic stability and prosperity are set as the ultimate objectives of the competition policy. This suggests that considerations of overall economic performance would be likely to determine a decision in a particular case.

The FTA was amended in 1999, 2000 and 2002 respectively, to improve efficiency and strengthen enforcement. Amendments in 1999 replaced criminal penalties for monopolization and concerted action with administrative fines, and eliminated the register of dominant

enterprises. Amendments in 2000 dealt with administrative practices. Amendments in 2002 revised the merger notification system and improved procedural transparency.

3. Future challenges and lessons learned in creating an effective competition policy regime

3.1 Future amendment of the FTA

The CTFTC is currently proposing an amendment draft to add a leniency program in the FTA to reduce the cost of investigation and deterring illegal concerted actions. Also, the CTFTC is considering changing the current merger review threshold from the market share test and turnover to only turnover because of possible ambiguity of market definition.

Another focus of the new amendment would be to grant search and seizure powers to the CTFTC to enable it to more effectively crack down on large-scale international, or technological, or secret anti-competitive conduct. International experience has shown the importance of the enforcement agency possessing the authority to conduct searches and seize items when handling anti-trust and cartel cases.

Furthermore, with a view to reinforcing transparency and predictability in terms of enforcing the FTA, the CTFTC has referred to past experience in implementing the law and has established different administrative liabilities according to the extent of the damage resulting from different infringements. Besides, in considering the seriousness of anti-competitive conduct, e.g., the abuse of monopoly power, cartels and other anti-competitive restrictions, the CTFTC plans to raise the minimum and maximum administrative penalties in this revision. The amendment therefore constitutes a meaningful deterrent to illegal activity.

3.2 International cooperation

Since its establishment, the CTFTC has performed its part to facilitate closer international cooperation on competition issues. As mentioned above, the Commission has actively attended international conferences held by the APEC forum, the OECD and the ICN.

Furthermore, based on its accumulation of experience on the enforcement of the competition law, the CTFTC initiated and joined several technical assistance activities from 1999, which included offering internships, conducting training courses either singly or jointly with international competition authorities, as well as providing reference materials on competition law and competition issues.

Also, based on its experiences in investigation of some international cartel cases, such as the cement cartel, the Commission found that these cases often involve international enterprises and it is difficult to investigate these undertakings located overseas. The CTFTC is now trying to seek international cooperation on the enforcement of competition law through discussions in international competition forum and bilateral consultations.

3.3 Continuing deregulations

Since its establishment, the CTFTC has continuously advised the responsible government agencies about the formulation and development of competition laws and consulted with government agencies so that they might revise or repeal existing laws to ensure that they are compatible with the spirit of a market economy.

In 1996 the CTFTC set up a “Deregulation Task Force,” to come up with reform plans for the Cabinet. In manufacturing, the Task Force identified five markets for

reform and opening to imports: sugar, petroleum products, telecommunications, liquefied petroleum gas and gravel. In services, the Task Force identified eight markets for reform to remove entry barriers or improve regulation: consumer cooperatives, telecommunications, cable television, customs clearance information, courier services, warehouses of export processing zones, government procurement of freight services and electronic information related to securities trading.

In July 2001, to ensure an environment of fair competition, the CTFTC in coordination with the Cabinet, enacted the "Green Silicon Island Vision and Promotion Strategy" and established a Committee for the review of its enforcement. Commissioners of the CTFTC provided guidance and consulted with the relevant government agencies. Consultation in connection with this project led to reforms relating to insurance, attorney's fees and movie theaters.

Though the CTFTC has successfully consulted with regulatory sectors and pushed for government deregulations in some markets, the Commission still faces resistances from some regulatory agencies. To achieve a free and fair market economy, the CTFTC is now trying to introduce the "Competition Assessment Toolkit" by OECD for further deregulation of unnecessary government regulations.

Thailand: Developments in Competition Policy

1. Introduction: Key features of Thailand's competition policy regime

Thailand's competition policy aims to promote economic restructuring, and enhance efficiency and fairness over the long term. To the Royal Thai Government this is more than a trade issue. The Government's comprehensive competition policy comprises:

1) promoting free and fair trade competition;
2) promoting entrepreneurship through capability building and other business initiatives;
3) protecting long-term consumer interests; and
4) enhancing the trade regime and the country's competitiveness.

The scope of the competition policy encompasses four components: tax, investment, law and regulations, and state enterprise. In respect of the tax regime, if there are significant differences in the tax burden, this may result in bias and discrimination among producers or traders. To attract foreign direct investment (FDI), the investment privileges granted to large MNCs should not harm the competitiveness of SMEs. Consequently, the government needs to design appropriate and effective tools to help close the gap between SMEs and large enterprises in areas such as access to finance. In terms of law and regulations, the Trade Competition Act 1999 aims to provide a favorable climate for fair and healthy competition. (State enterprises are exempted from the law despite the government's privatization policy.)

The prime objectives of the Trade Competition Act are: 1) preventing anticompetition practices; 2) supporting free trade; 3) reducing trade restrictions; 4) reforming monopolistic practices in the government; 5) setting up rules and regulations based on the principle of a level playing field; 6) encouraging entrepreneurs in ethical business practices; 7) promoting consumer protection; and 8) promoting public awareness.

The main point of concern is the potential for monopolistic practices to emerge in certain business sectors which may result in abuse of market domination, the distortion of market mechanisms and ultimately unfair competition. The Notification on the Criteria of Dominant Position 2007 is enacted under the Trade Competition Act 1999 to regulate market leaders' adverse influence. At present, the Trade Competition Act 1999 is being reviewed with a view to include state enterprises.

Future challenges to enhancing competition policy in Thailand

Challenges to enhancing competition policy include regulatory reform to regulate restricted competition and set conditional framework to support trade development. This regulatory framework would include greater transparency as it relates to the Trade Competition Act and Foreign Business Act and also fairer trade practices under laws such as the Wholesale and Retail Trade Act.

Another challenge is to review and amend the competition law in light of the changing economic environment, for example, the penalties imposed and the possible inclusion of state enterprises.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

(1) Competition Authority

The Thai Trade Competition Commission is the competition authority that regulates the Thai Competition Law. The Commission is under the auspices of the Ministry of Commerce and chaired by the Commerce Minister. The secretariat to the Commission is the Office of Trade Competition Commission which comes under the Department of Internal Trade. In this connection, the Commission has a specialized subcommittee and an inquiry subcommittee to support the aims of the Competition Commission. The Appellant Committee and the court provide a "check and balance" to the power of the Competition Commission. However, the decision-making of the Competition Commission remains independent.

(2) Sector Regulator

Thailand has policies which formulate and supervise the competition, consistent with the competition law, for certain sectors, i.e. the National Telecommunications Commission whose responsibilities include setting policy and formulating the Master Plan on Telecommunications Development, setting standards for telecommunications services and required technical specifications, permitting and regulating the use of spectrum for telecommunications services, for example.

2.2 Transparency

The public can access information about the competition law and the Competition Authority through the website of the Competition Commission, the Center of Information of the Office of Trade Competition Commission (OTCC), and the Competition Knowledge Center of the Office of Trade Competition Commission.

Confidential information is protected by the Competition Law (article 53) and Thailand's Freedom of Information Law of 1997, and the Trade Secret Act of 2002.

The Office of Thai Trade Competition Commission has provided three feedback channels for the public: 1) a hotline service "1569," 2) a special P.O. Box "Complaint Center 1569 (P.O. Box 156 Nonthaburi 11000), and 3) the website "http://1569.dit.go.th/".

For more information concerning the Trade Competition Act, persons can refer to the Office of the Competition Commission, Department of Internal Trade, Ministry of Commerce, 44/100 Thanon Nonthaburi 1, Bangkrasor, Amphor Muang, Nonthaburi 11000, Thailand. Tel. 662-547-5403, 662-507-5882, Fax. 662-507-5753, 662-547-5434, website: http://www.dit.go.th.

2.3 Accountability

Accountability is provided by the Commission's requirement to specify reasons for granting the order or rejecting permission both in questions of fact and in questions of law. The orders should contain the signatures of the members considering the application. In addition, the Right to Hearing Article under the Administrative Procedure of 1996 is applied to enhance accountability. The activities of the Competition Commission are subject to investigation by The Ombudsmen of Thailand, the Office of the Auditor-General of Thailand, and Office of the National Counter Corruption Commission. The Court of Justice and the Administrative Court will be responsible for judicial review of the Trade Competition Commission's decisions.

The Trade Competition Act and other regulations and measures will be considered through a fact-finding process regarding unfair trade competition (compared to related foreign laws),

hearings from stakeholders, and necessary checklist prior to submitting to the Cabinet for approval of conducting law enactment.

2.4 Awareness

The Competition Policy does not only support free and fair trade but also promotes the people's understanding of the law, trade policy and consumer protection. Awareness is achieved though activities such as Competition advocacy (see website: http://www.dit.go.th), information dissemination in the mass media, and in publications such as brochures, booklets, books, newsletters, television and radio broadcasting programs, all of which help civil society become more aware of the benefits of fair trade. In this way, civil society is mobilized to participate in, and supervise, market behavior to protect consumer interests.

The website and the web board of the Office of Trade Competition Commission provide two-way communication and key information to stakeholders on laws and regulations, guidelines and updates on its activities. In addition, there are regular public relations outreach programs to promote awareness.

2.5 Enforcement

One major achievement in enforcement of the Competition Act has been the setting of the "Criteria for Market Domination." This assists in the monitoring of the large-scale enterprises. The criteria track market share and the amount of turnover.

Then there is the introduction of the "Guidelines Concerning Trade Practices Between Modern Trade and Suppliers Under Section 29 of the Trade Competition Act." These provide norms and standards for trade practices in the retail industry. Its five guiding principles, which are well recognized worldwide, are that there shall be no coercion, no discrimination, clear criteria, prior agreement and fair competition.

Furthermore, the Competition Commission has also improved the "Rules on the Acceptance of Complaints and Inspections" to strengthen implementation of the law.

2.6 Legal framework

The Competition Act of 1999 is the basic law to implement trade competition policy. The law prohibits business conduct that restricts or reduces competition addressing activities such as monopolies, mergers, collusive actions and unfair trade practices. The Act does not apply to: 1) central administration, provincial administration or local administration; 2) state enterprises; and 3) farmers' groups, cooperatives or cooperative societies.

Under the Act, the Ministry of Commerce has already developed the followings: the Competition Commission's Notification on the Criteria of Dominant Position; the Competition Commission's Rules on the Acceptance of Complaints and Inspections; and the Competition Commission's Guidelines Concerning Unfair Trade Practices between Wholesalers/Retailers and Suppliers.

3. Future challenges and lessons learned in creating an effective competition policy regime

Lessons learned regarding Competition Policy reflect some infrastructural constraints and weaknesses, including 1) a shortage of personnel and limited funding, 2) a lack of investigation experiences and capability, 3) weak efficacy of the Office of Trade Competition, 4) a lack of public awareness about the Competition Policy and the Law, 5) the imbalanced trade structure among suppliers, distributors and consumers, and 6) the competition regime's susceptibilty to political intervention.

One major challenge to effectively implementing Competition Policy is the ongoing globalization process and the concomitant free movements of capital, goods and services, people and

information technology. Furthermore, rapid change in and increasing complexity of the trading rules and regulations, including economic integration and bilateral, regional, multilateral free trade agreements are becoming more evident. These factors make the implementation of the Competition Policy more complicated.

In conclusion, to meet the coming challenges and improve effective implementation of competition law it will be necessary to: 1) preserve the independence of the Competition Authority, 2) include state enterprises in the competition law, and 3) build up expertise in terms of technical knowledge and practical know-how.

United States: Developments in Competition Policy

1. Introduction: Key features of the United States' competition policy regime

The objective of the United States' antitrust laws is the promotion of competition and consumer welfare. As explained in a leading antitrust treatise:

> Today, it seems clear that the general goal of the antitrust laws is to promote "competition" as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation-producing new processes or new or improved products.[22]

Antitrust law in the United States prohibits businesses from engaging in anticompetitive conduct that harms consumers through a reduction in output of goods and services, product quality, innovation or consumer choice and/or through higher prices. Antitrust law is enforced at the federal (national) level by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). There are three principal federal antitrust laws discussed below. The U.S. antitrust laws and the enforcement agencies do not consider non-competition goals. It is believed that societal goals such as industrial policy or employment are best addressed by means other than competition law. The FTC and DOJ do not discriminate in their enforcement activities and policies on the basis of nationality of the parties. Foreign firms and individuals have access to the U.S. enforcement agencies to present evidence of alleged anticompetitive conduct in violation of the antitrust laws and to the courts to seek redress for alleged injuries resulting from such violations.

The U.S. antitrust agencies play an important role as advocates of competitive outcomes in the regulatory reform process, providing expert advice to other government entities and the courts on issues affecting competition. The movement toward deregulation in many industry sectors over the past decades has led regulatory agencies to emphasize competition analysis and respect for market forces. The federal antitrust agencies have worked closely with sectoral regulatory agencies to help them appreciate the potential benefits of competition.

Each of the 50 states has also enacted some form of antitrust law enforced by the state attorney general through the state court. State attorneys general may sue to enforce federal antitrust laws when an antitrust violation causes injury to the state itself or to its citizens. Private enforcement also plays an important role in the United States. Private parties who have been injured by allegedly anticompetitive conduct can challenge such conduct and obtain relief under relevant state and federal antitrust statutes in the appropriate courts.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

The "independence" of the federal antitrust agencies is demonstrated through fair, impartial and consistent application of the antitrust law based on sound economic and legal principles.

The DOJ, a prosecutorial agency within the Executive Branch, enforces federal antitrust laws through criminal prosecutions and civil lawsuits brought in the federal courts. The DOJ must prove to a judge or jury that the facts and the law justify the relief it seeks in all of its enforcement actions.

[22] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application 100a (2d ed. 1998-2006).

The FTC is an independent agency within the Executive Branch. The FTC is comprised of five Commissioners appointed by the President with the advice and consent of the Senate for seven-year staggered terms. The President may remove a Commissioner only for "inefficiency, neglect of duty, or malfeasance," which has never occurred.[23] No more than three of the five Commissioners can be of the same political party. The FTC enforces federal antitrust laws principally through administrative proceedings, although it can seek interim relief in federal courts for time sensitive matters such as mergers. The FTC brings its enforcement cases before independent administrative law judges whose decisions are subject to review by the Commission, acting in an adjudicative capacity.

2.2. Transparency

Transparency is essential to the sound application of antitrust law and to maintaining its effectiveness and credibility. There is a vast amount of information available to the public about the U.S. antitrust laws and procedures that is published by government agencies, academic journals and private publishers. Federal statutes, including the antitrust laws, are published in the U.S. Code and regulations, e.g., rules relating to pre-merger notification, are set forth in Title 16 of the Code of Federal Regulations. The administrative procedures employed by the FTC are published in Title 16 of the Code of Federal Regulations, and those of the federal courts in the Federal Rules of civil and criminal procedures. Judicial and administrative opinions are also published.

The FTC and DOJ make public, through their websites, press releases and official publications, information about their enforcement activities and the rationale for the agencies' actions. Both agencies have adopted and published enforcement guidelines, including in 2006 a commentary on the guidelines for horizontal mergers that further elaborates the agencies' analytical approach.

In the past few years, the DOJ and the FTC began to issue statements outlining the reasons for closing certain individual investigations that have not resulted in a challenge. These statements are issued on a case-by-case basis, as deemed appropriate, and published through press releases and on the agencies' websites. The FTC publishes proposed consent orders with accompanying explanations; the proposed order is subject to a public comment period (in practice 30 days) after which the Commission decides whether to make it final. In recent years, the FTC improved its published explanation of proposed consent orders by outlining its analytical approach and applicable enforcement standards. Civil consent decrees entered into by DOJ are by statute subject to a 60-day public notice and comment period and a judicial finding that the proposed consent decree is in the public interest.

2.3 Accountability

The DOJ and FTC, as all agencies of the federal government, submit annual Performance and Accountability Reports, as mandated by the Government Performance and Results Act of 1993, which are published on each agency's website. The goals of this Act include improving the confidence of Americans in the federal government, focusing on the actual results of government activity and services, supporting congressional oversight and decision-making, and improving the managerial and internal workings of agencies within the federal government.

Both agencies are also subject to Congressional oversight as part of the Congressional budget authorization and appropriations procedures and *ad hoc* Congressional inquiries concerning the agencies' policies and programs. Each agency prepares and submits testimony in support of its budget request that summarizes the major activities over the past fiscal year and describes some of the planned initiatives for the next one. In addition, each agency responds to *ad hoc* Congressional inquiries. Officials of each agency testify regularly before the Congressional committees that exercise oversight responsibility.

[23] In a single instance, in 1933, an attempt by a President to remove a Commissioner without cause was reversed by the Supreme Court.

The public hearings, workshops and reports described in Chapter 8 of the U.S. IAP are also important means of informing the federal agencies of the strengths and weaknesses of their enforcement policies and procedures and identifying areas for improvement.

2.4 Awareness

Both the FTC and DOJ engage in efforts to educate businesses and the general public on the important role of competition in providing the most valuable mix of price, choice and innovation. Officials of each agency frequently speak to businesses and consumers on competition issues. Agency officials also submit articles on various competition issues to business, legal and consumer publications.

In 2007, the FTC launched an outreach campaign, targeting new audiences, with the message that antitrust enforcement helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as encouraging more choices in the marketplace. Also in 2007, the FTC launched industry-specific websites concerning oil and gas, health care, real estate and technology that serve as a one-stop shop for consumers and businesses who want to know what the agency is doing to promote competition in these important business sectors. DOJ also maintains a web page for real estate issues, as well as one to assist business with antitrust compliance and one to apprise the victims of antitrust crimes about their rights.

The agencies rely on competition advocacy as an essential activity in increasing public awareness of competition principles. The FTC and DOJ are active in submitting comments opposing government restrictions on competition that may harm consumer welfare and advising legislatures and other government policymakers to incorporate sound competition principles into their analyses. Over the past few years, the agencies have persuaded regulators to adopt polices that do not unnecessarily restrict competition, for example, in the areas of gasoline sales, real estate brokerage, real estate legal services, attorney advertising and pharmacy benefit management.

2.5 Enforcement

As noted above, the federal antitrust laws are enforced principally through proceedings brought in the federal courts, either by the DOJ, by private parties, or by attorneys general of the various states. In the United States, hard core cartel violations, e.g., price-fixing, bid rigging, output restrictions, and customer and market allocation agreements, are prosecuted criminally, all other potential violations of the federal antitrust laws are handled through civil law suits in the federal courts or, in the case of the FTC, principally through its administrative proceedings. Only the DOJ has the authority to bring federal criminal prosecutions. The FTC conducts its own internal administrative proceedings to adjudicate violations of the antitrust laws; in those cases as well, the FTC must go before the federal courts if it wishes to obtain preliminary injunctive relief or disgorgement, or to obtain civil penalties for violations of its remedial orders. Final FTC decisions can be appealed to the federal courts. DOJ cannot impose sanctions or remedies under federal competition law, whether criminal or civil, against any person on its own authority. When it seeks the imposition of a sanction or remedy, DOJ must file a lawsuit in federal court. The courts play a major role in the enforcement and interpretation of the U.S. antitrust laws, although the vast majority of enforcement actions brought by the DOJ and the FTC are settled prior to contested judicial or administrative proceedings.

Merger review accounts for the majority of the FTC's antitrust enforcement. In the non-merger enforcement area, the agency assesses anticompetitive conduct focusing on competitor collaboration and exclusionary conduct. To effectively manage its limited resources, the FTC addresses anticompetitive mergers and conduct in industries that most directly impact consumers, such as health care, energy, retail goods, technology and real estate. The FTC also engages in continuing efforts to improve the efficiency of its enforcement procedures. For example, in February 2006, the FTC announced a series of substantial reforms to the agency's

merger review process in investigations in which requests for additional information or "second requests" are issued.

Over the last several years, DOJ has established a hierarchy of antitrust enforcement that places criminal cartel prosecutions as the top priority, followed by merger review and then single firm conduct or monopolization issues. This ranking is important to ensure that enforcement resources are directed to their most effective use. These issues are followed by the promotion of sound international antitrust cooperation and the maintenance of an effective program of competition advocacy.

DOJ's focus on cartel enforcement was aided in 2004, when the Criminal Penalty Enhancement and Reform Act of 2004 was signed into law. This Act increased maximum Sherman Act fines for corporations and individuals to US$100 million and US$1 million, respectively, and the maximum jail term to 10 years. Total prison sentences more than doubled the previous record—to 31,391 jail days—in the most recent fiscal year. DOJ also continues to handle a large volume of merger investigations and challenges, and, as discussed below, remains engaged on the complex issue of unilateral conduct.

2.6 Legal framework

The core federal antitrust laws are the Sherman Act (1890), the Clayton Act (1914) and the Federal Trade Commission Act (1914). These laws have been amended numerous times since their enactment.

a) Sherman Act (15 U.S.C. __ 1-2)

Section 1 prohibits contracts and conspiracies in restraint of trade. It focuses on establishing the existence of an anticompetitive agreement. Section 2 prohibits monopolization of, or attempts or conspiracies to monopolize, trade. The "monopolizing" offense has two elements: (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [24] The "attempt to monopolize" offense requires that the firm be (1) "engaged in predatory or anticompetitive conduct" with (2) "a specific intent to monopolize" and that (3) "dangerously threatens" to monopolize.[25]

b) Clayton Act (15 U.S.C. __ 12-27)

Early enforcement of the Sherman Act did not make sufficiently clear what constituted unlawful conduct, giving rise to concerns about effective antitrust enforcement, business' need for guidance, and increased consistency and predictability in the law. The Clayton Act balances additional guidance with flexibility to respond to changing business practices over time.

The Clayton Act, among its other provisions, prohibits anticompetitive mergers and acquisitions of assets and stock, certain specified practices involving price discrimination and product promotion, anticompetitive tying and exclusive dealing contracts, and interlocking directorates. Recognizing the difficulty of antitrust agencies undoing anticompetitive mergers after they have occurred, the Clayton Act, as amended by the Hart-Scott Rodino Antitrust Improvements Act of 1976, also requires firms to notify to the DOJ and the FTC proposed mergers or acquisitions exceeding certain size-of-party and size-of-transaction thresholds, prevents consummation of the proposed transaction before the end of a prescribed waiting period, and authorizes the agencies to stay the waiting period until the companies provide certain additional information about the proposed transaction.

[24] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).
[25] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455, 459 (1993).

c) Federal Trade Commission Act (15 U.S.C. __ 45)

This Act created the FTC and authorizes the agency to prevent firms from engaging in "unfair methods of competition." The U.S. Supreme Court ruled that "unfair methods of competition" encompass those practices that violate the Sherman and Clayton Acts and reaches conduct that is contrary to the basic policy of the Sherman Act without directly violating that Act, or that constitutes an incipient violation of that Act—so long as the application of the FTC Act does not conflict with the policies embodied in the Sherman Act.

3. Future challenges and lessons learned in creating an effective competition policy regime

The United States has had more than 100 years of experience in creating an effective competition policy regime. Looking back only as far as the 1960s, there has been significant evolution in U.S. antitrust enforcement. The most significant such development has been a change away from a populist approach (i.e., "Big is bad.") driven by concern about economic concentration as such—a structural approach—to one driven by maximizing economic efficiency and consumer welfare.

While U.S. antitrust enforcement has evolved significantly over the last several decades, substantial challenges still remain. Unilateral conduct, and the standards that should be used to determine when it is unlawful, are some of the most important topics in competition law today. Separating desirable, vigorous competition from exclusionary conduct is extremely complex. The FTC and DOJ have been addressing these challenging issues and between June 2006 and May 2007 held a series of hearings regarding single-firm conduct, to examine whether and when specific types of single-firm conduct are pro-competitive or benign, and when they may harm competition and consumer welfare. The hearing topics included predatory pricing, predatory buying, refusals to deal, international issues, empirical studies, business history and business strategy. The staffs of both agencies are drafting a report summarizing their findings with a view to clarifying this important area of antitrust law.

The evolution of antitrust policy includes the recognition of the critical importance of dynamic efficiencies and innovation incentives--including intellectual property rights. In the past, U.S. antitrust law had been viewed as a tool for constraining the exercise of intellectual property rights. Over the past several decades, antitrust enforcers and the courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation. In 2002, the DOJ and FTC held hearings on the interface of antitrust and intellectual property law, which resulted in two reports. The second report issued in 2007 concluded that, properly understood, the intellectual property and antitrust laws work in tandem to promote consumer welfare and innovation and reaffirmed general principles of the 1995 FTC-DOJ Guidelines for the Licensing of Intellectual Property. The agencies will continue their efforts to develop sound enforcement policy in this area.

An overarching and continuing challenge is to pursue the rational development and application of the U.S. antitrust laws, which requires the agencies' understanding of the current state of the marketplace, including emerging trends. To develop an understanding of marketplace developments, the FTC and DOJ seek input from outside the agencies, for example, through public workshops, conferences and hearings. Some recent agency efforts in this regard include the 2003 DOJ-FTC hearings on issues relating to competition law and policy in the health care industry; a 2005 FTC-DOJ workshop on "Competition Policy and the Real Estate Industry;" the 2007 FTC conference on "Energy Markets in the 21st Century: Competition Policy in Perspective;" the 2007 DOJ symposium on the telecommunications industry: "Voice, Video and Broadband: The Changing Landscape and Its Impact on Consumers;" and the 2008 FTC Workshop on "Innovations in Health Care Delivery." The agencies will continue external consultations to ensure rational antitrust enforcement, including an upcoming DOJ workshop on airline competition.

In addition, FTC Chairman William E. Kovacic recently announced a project of agency self-assessment with a view to improving the institutional mechanism through which the FTC executes its responsibilities. The focus will be on identifying the directions for institutional improvements that will serve the agency well in 2014—the year of the FTC's centennial—and beyond. In the coming months, the agency will announce a specific framework for this initiative.

On the international level, the DOJ and FTC routinely cooperate with foreign competition agencies on cross-border cases and engage in efforts to converge toward consistent competition policies based on sound economic principles. While this development is a very positive one, developing procedures for effective coordination and approaches toward convergence requires continuing efforts on the part of both U.S. and foreign enforcers. The FTC and DOJ will continue to work to promote international cooperation and convergence bilaterally and in multilateral competition organizations, including APEC, the International Competition Network, OECD and UNCTAD.

Viet Nam: Development in Competition Policy

1. Introduction: Key features of Viet Nam's competition policy regime

Since the opening up of the economy, together with positive outcomes, anti-competitive and unfair competition among enterprises have also become rampant, threatening the legitimate rights and interests of business and consumers alike, and hampering the business environment. In this context, the Competition Law was enacted and came into effect in July 2005. Implementation of the law has been administered by Vietnam Competition Administration Department (VCAD) of the Ministry of Industry and Trade of Vietnam.

The Law applies to all business and professional and trade associations in Viet Nam; FDI enterprises registered in Viet Nam; public utilities and state monopoly enterprises; and state administrative bodies. It has superseding power over other enacted laws regarding restrictive business practices and unfair trade practices.

The Law prohibits five broad types of anticompetitive practices:

- agreements that substantially restrict competition;
- abuse of dominant or monopoly position;
- concentration of economic power that restricts competition;
- acts of unfair competition; and
- anti-competitive behavior or decisions by officials or State administrative agencies, taking advantage of their authority.

There is specific competition legislation for the electricity industry, telecommunications, pharmaceutics, banking and credit institutions. These sectors are also controlled by sector regulations. However, the general competition law applies to all industries and sectors, including those with industry-specific competition legislation, and both the public and private sectors. The legislation is non-discriminatory.

Two State authorities have been established for the law implementation—the VCAD (with investigative powers) belonging to Ministry of Industry and Trade of Vietnam, and the Vietnam Competition Council (VCC) with adjudicative powers.

2. Developments supporting important elements of an effective competition policy regime

2.1 Independence

The Government of Vietnam has established two Competition Regulatory Bodies: the VCAD and the VCC.

The VCAD was established under the Ministry of Trade (now the Ministry of Industry and Trade). Its function is to assist the Minister of Industry and Trade in implementing state management in the area of competition and consumer protection.

The VCC has been established as an independent law enforcement agency. Its members (around 11-15) have been appointed by the Prime Minister, at the recommendation of the Minister of Trade. VCC is responsible for handling and deciding on competition restricting acts.

However, according to Article 80 of the Competition Law, VCAD and VCC work independently and only abide by law.

2.2 Transparency

The Law specified the procedures for conducting investigations and hearings, the rights and obligations of the parties, and incurred penalties. Organizations and individuals can lodge a complaint against anti-competitive behavior with the Competition Administration Agency (Article 58.1). To ensure that all legal process are transparent, Article 104 of the Law requires that hearings shall be held in public, except where information related to national or business secrets may be disclosed. Evidence must be publicly announced and used equally.

2.3 Accountability

The Competition Law and relevant Decree stipulate measures to enhance accountability. According to the Law and related regulations, the council dealing with competition cases shall be responsible to provide a written explanation to the applicant and to any person with interest and obligations that are related to execution of the decision dealing with the respective competition case. The decision made by the council dealing with the case must be explained based on the minutes of the hearing and the minutes of the open debates.

In case of disagreement with the decision of the Competition Council or the Ministry of Trade, the involved parties can initiate administrative lawsuits against part or the whole of the contents of such decisions at the competent provincial/municipal People's Courts.

2.4 Awareness

After the law was passed, low awareness among the business community caused problems. Businesses were unaware that they had infringed the Competition Law, or were unaware that they were victims of infringement. VCAD's challenge is to raise public awareness by the use of road shows and other publicity means. To improve the awareness of the public, the business community and stakeholders, VCAD uses various instruments such as propagation, education and dissemination of the Competition Law and policy through workshops, seminars and training courses. These programs have been conducted throughout Vietnam, at both provincial and central levels. Legislation and policies relating to competition were disseminated through TV, books and other mass media.

There was also difficulty arising from the low awareness of various sectoral regulators about the overlap of jurisdiction of the VCAD concerning competition-related complaints. Regarding this matter, VCAD coordinates closely with these sectoral regulators. It has reached an understanding with some sectoral regulators (telecommunications, electricity and banking) that have concurrent powers to oversee competition matters in their sectors.

VCAD has its own website which provides key information to businesses, consumers and interested persons such as the Competition Law and related regulatory documents, guidelines, activities of VCAD and other related information.

2.5 Enforcement

As mentioned above, there are two state authorities established to implement the Competition Law—the VCAD (with investigative powers), belong to Ministry of Industry and Trade of Vietnam and the VCC (with adjudicative powers).

VCAD is the only institution with the authority to investigate and make decisions on the merit of a complaint. Investigation can be conducted when VCAD receives report/evidence from an involved party. VCAD could also, if it detects any sign of violation of the Competition Law, launch an investigation on its own initiative. For complaints relating to competition restricting acts, the VCAD has 180 days to investigate, after which it will submit its investigation report to the VCC for a decision. However, VCC's decisions are not final. The involved parties may submit an objection to the Provincial/Municipal People's Courts. The decision can be appealed to the Minister of Trade, after which further appeals can be made to any provincial courts.

2.6 Legal framework

The Competition Law was adopted on 3 December 2004 and entered into force on 1 July 2005. The Competition Law was promulgated to achieve the following objectives:

- controlling competition restricting acts (restrictive agreements, abuse of dominance and concentration) that would likely result in competition restriction, particularly in the context of market opening up and global economic integration;
- protecting from unfair competition actions the legitimate rights of enterprises to do business; and
- creating and sustaining a fair competitive environment.

The Law applies to all enterprises, whether State-owned, private, State-controlled, equitized or foreign-invested, and to trade associations (Article 2). It recognizes enterprises' freedom to compete and protects the right to business competition. The Law prohibits anti-competitive acts and unfair competition. It also prohibits State management agencies from performing certain acts, such as forcing enterprises, organizations or individuals to buy or sell goods or provide services to designated enterprises (except for areas where the State holds monopoly or in emergency cases); discriminating between enterprises; forcing enterprises or trade associations to align with one another with a view to precluding, restricting, or preventing other enterprises from competing in the market; and performing any other act preventing the lawful business activities of enterprises.

3. Future challenges and lessons learned in creating an effective competition policy regime

Challenges

It will be a continuing challenge to educate the sectoral regulators to consider the impact of their policies and activities on competition in the market, and to prioritize the interest of the overall economy rather than the interests of a particular sector.

While VCAD has reached an understanding with some sectoral regulators that have concurrent powers to oversee competition matters in their sectors, the coordination of the enforcement actions of VCAD and the other sectoral regulators remains one of the key challenges in moving forward.

Lesson learned

Cross-Border Collaboration

It is natural for young competition authorities, such as VCAD, to focus on building up its internal capacity and establishing its credibility through effective enforcement rather than on international collaboration. As such, to encourage the establishment of cross-border cooperation, it is imperative to establish a set of key milestones to guide the competition authorities toward achieving the longer term goal of cross-border cooperation.

Interface between Sectoral Regulation and General Competition Law

To avoid conflict between sectoral regulators and the competition authorities as well as confusion within the industry, it is important to ensure that there is clarity in terms of the roles and responsibilities of each agency. This will avoid scarce resources being spent through duplicating investigation into the same cases. It will also get rid of situations whereby different standards are applied by different agencies based on their respective set of laws, resulting in different decisions depending on which agency handles the matter.

Responsive Legal Framework

The Competition Law has to be tailored to the local legal and economic context of a particular country. While the legislators can adopt common legal principles from other jurisdictions, it would be almost impossible to develop a set of perfect Competition Laws from scratch, particularly when a country does not have the necessary experience. As such, a legal framework that is responsive to the needs of the competition authority, including allowing competition rules to be amended within a reasonable timeframe as well as relevant competition authorities certain autonomy to issue administrative guidelines, is likely to enhance the effectiveness of the agency.

Increase Awareness of Competition Law among Different Stakeholders

It is imperative for competition authorities to undertake public education when the Competition Law is first put in place. This is to ensure that the public understands the purpose and scope of the Competition Law, and supports enforcement. It will also encourage businesses to review their business practices and encourage the Competition Law compliance. Further, it will equip them to monitor and provide feedback if they come across any anti-competitive activities.

Increase Government Awareness of Competition Law

Besides the public and businesses, increasing awareness of the Competition Law amongst government agencies is also critical, particularly when government policies and activities have extensive impact on the economy. Government agencies should be encouraged to consider the competitive effects when drafting new policies as well as reviewing their existing policies to see whether they have impeded market competition in any way, including putting in place market structures that lead to the creation of monopolistic powers.

Abbreviations and Acronyms

APEC	Asia-Pacific Economic Cooperation
CPDG	Competition Policy and Deregulation Group
CTI	Committee on Trade and Investment
EC	Economic Committee
FNE	National Economic Prosecutor's Office
GDP	Gross Domestic Product
HDI	Human Development Index
ICN	International Competition Network
IEPR	Individual Economy Policy Report
LAISR 2010	Leaders' Agenda to Implement Structural Reform toward 2010
M&A	Merger and Acquisitions
MRFTA	Monopoly Regulation and Fair Trade Act
PPP	Purchasing Power Parity
SELI	Strengthening Economic Legal Infrastructure
TDLC	Tribunal de Defensa de la Libre Competencia
UNDP	United Nations Development Program
WB	World Bank
	Australia
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
COAG	Council of Australian Governments
FOI	Freedom of Information Act 1982
NCC	National Competition Council
NCP	National Competition Policy
TPA	Trade Practices Act 1974
	Canada
ICN	International Competition Network
PPSC	Public Prosecution Service of Canada
	Chile
FNE	Fiscalía Nacional Económica (National Economic Prosecution Bureau)
SERNAC	National Consumer Service
TDLC	Tribunal de Defensa de la Libre Competencia
	Hong Kong, China
COMPAG	Competition Policy Review Committee
	Japan
AMA	Antimonopoly Act (official name: Act Concerning the Prohibition of Private Monopolization and the Maintenance of Fair Trade)
JFTC	Japan Fair Trade Commission
	Korea
CP	Compliance Program
CRk	Concentration Ratio
EPB	Economic Planning Board
HHI	Herfindahl-Hirschman Index
KFTC	Korea Fair Trade Commission

KFTMA	Korea Fair Trade Mediation Agency
KOICA	Korea International Cooperation Agency
MRFTA	Monopoly Regulation and Fair Trade Act
	Mexico
CFC	Federal Competition Commission
ICN	International Competition Network
LFCE	Federal Law on Economic Competition
LFTAIP	Federal Law of Transparency and Public Access to Governmental Information
PROFECO	Office of the Federal Attorney for Consumer Protection
SE	Ministry of Economy
	New Zealand
NZCC	Commerce Commission
	Peru
Indecopi	National Institute for the Defense of Competition and the Protection of Intellectual Property
LPG	Liquefied Petroleum Gas
OSINERGMIN	Peruvian Regulatory Agency for Energy, Electricity and Mining
OSIPTEL	Peruvian Telecommunications Regulatory Agency
	Philippines
DTI	Department of Trade and Industry
SEC	Securities Exchange Commission
	Singapore
CCS	Competition Commission of Singapore
	Chinese Taipei
CTFTC	Fair Trade Commission
FSC	Financial Supervisory Commission
FTA	Fair Trade Act
ICN	International Competition Network
NCC	National Communication Commission
	Thailand
FDI	Foreign Direct Investment
OTCC	Office of Trade Competition Commission
	United States
DOJ	Department of Justice
FTC	Federal Trade Commission
	Viet Nam
VCAD	Vietnam Competition Administration Department
VCC	Vietnam Competition Council