Competition Policy and Consumer Protection in Malaysia

ERA CONSUMER MALAYSIA

A Publication by

Education and Research Association For Consumers, Malaysia

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Contents

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ERA CONSUMER is a voluntary, non-political and non-profit organization. ERA focuses on issues ranging from food security, human rights, environment and consumer rights to women's rights for a socially just and equitable society.

Foreword

Consumer protection laws both seek to protect and promote the welfare of consumers including as unfair trade practices including deceptive advertising and inaccurate labelling affect consumers. Competition policy achieves this indirectly through monitoring and maintaining competition in the market, while consumer protection law does so directly without reference to the effects on competition.

Competition in many economies in the developed and developing world has been stifled by high degrees of regulation and government ownership. The trend among governments now is toward opening up these markets, by allowing the private sector to compete in industries previously reserved for a government monopoly and by easing the requirements in permits and registrations. Regulatory reform is therefore the complement of competition policy, with the former broadening the scope of competition while the latter protects the public interest within the competitive market.

This publication by ERA Consumer seeks to enhance the debate between competition policy and consumer protection measures in Malaysia as it is still in the process of drafting a competition law.

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Promoting Competition Without Having A Competiton Law – A Malaysian Experience

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1. Introduction: The Malaysian Economy

Malaysia's economy since its independence in 1957 has been progressively open and market-oriented. Over the years there has been sustained growth and increasing diversification. Principally, the economy is based on export-led production of primary resource commodities and manufactured exports principally of electronic and electrical consumer goods. This economic growth has been sustained with international trade.

Malaysia, like the other countries of South-East and East Asia was also hit by the economic melt-down of 1998 which interrupted Malaysia's very impressive growth rate of the preceding decade of an average annual real GDP growth rate of about 8%. This has now been drastically reduced to an anticipated estimate of 0.2% on account of the continuing fall out of the 1998 crisis and the global economic crisis.

However the Malaysia economy remains fundamentally stable, and provided that it can maintain its competitiveness in international trade and exports with diversified market, the country should be able to achieve its projected developed status according to its VISION 2020.

2. Policies On Deregulation, Liberalisation And Privatization

Malaysia has no general Competition Law yet and although the intention to have such a Law first mooted by the Government in 1993 and at least six*

* *as of date of printing*

(6) drafts have been prepared by the relevant Ministry of Domestic And Consumer Affairs ("the Ministry") the proposed Bill has yet to be tabled in Parliament. Even so in the international arena, Malaysia needs to be an active player in international trade which is the basic of its economic progress. It is a signatory to the agreements made under the WORLD TRAGE Organisation (WTO) and is fully committed to the liberalization efforts to dismantle tariff and non-tariff restrictions on trade. Malaysia has also assumed regional obligations in initiatives undertaken by or under ASEAN (Association of South East Asian Nations) and APEC (Asia Pacific Economic Cooperation) amongst others. There is recognition that the nation must fully participate in and be an active player in the reality of economic globalisation ; which means inevitably an accelerated program of deregulation, liberalization and privatization.

In fact over the years there has been a conscious and deliberate policy to increase the number of players in the key sectors of the economy. For example, until very recently in the finance sector there were 27 Commercial Banks, 12 Finance Companies, 10 Merchant Banks and 51 Insurance Companies. In other sectors there are, for example, 6 Telecommunication Companies and 35,756 Construction Companies, just to give an illustration that economic growth has been led by increasing the number of competitors in the market place and not by a process of monopolization.

It is true however, that there is a tight regime of licensing for the operation of these economic activities. Further in some sectors, unrestrained competition as in the construction sector had led to serious dislocations arising from abandoned housing and construction projects by inexperienced and small players.

In other sectors, such as the finance industry there is a directive by the Central Bank for the sector to merge into 10 Banks (foreign banks are excluded from the directive). This is to increase the share capital, rationalize management and for protection of investors.

There is a similar directive of merger for insurance companies and the process has already commenced.

Privatisation

In addition, privatization of some public or state-owned enterprises in traditionally monopolistic sectors such as electricity, telecommunication, transport, postal services, sewerage disposal have been carried out. Over the last decade more than 400 entities or services have been privatized with the general aim of encouraging and increasing domestic and international trade, corporate expansion, greater private sector participation, increased competition and ultimately to promote sustained economic growth.

However, not all the privatization schemes and liberalization programs have been success stories and their impact on economic development and social and environmental cost has been the subject of much debate and controversy by consumer and civil groups. Some of these issues will be considered in this paper.

3. Privatisation In The Absence Of A Competition Law

Malaysia's experience in deregulation, liberalization and privatization over the past decade is unique in the sense that the expansion of the economic cake has been achieved without a focused Competition Policy or Competition Law.

The impact of this absence can be discussed in the context of our experience in privatization and its effects on consumers.

The first point is that it is generally acknowledged that privatization is an instrument for attracting investment and improving the output and efficiency of state-controlled or owned economy activities.

The second point is that if a state-owned monopoly is privatized in such a way that it becomes a private monopoly, then only the player is different but the game is the same.

The third point is that for consumers the critical issue is exactly how the privatization is undertaken and this is tied up with the issue of political patronage.

In a comprehensive paper titled "A Competition Policy For Malaysia" Tim Hazledine; published by the Malaysian Institute of Economic Research, the

writer states:

> *"... many companies were divested prior 1983 by transferring government shares in trust companies to Bumiputra. Two interesting features of this are the extent to which the issues have been underpriced judged by one expert to be the most extreme underpricing of any country and the tendency for the newly allocated shares to be instantly "flipped" to realize the profit implied by underpricing. This does rather suggest that a significant motive behind privatization is simply income redistribution. Be that as it may, privatization necessarily has microeconomic implications, which may be relevant to competition policy. Note that, although privatization may be seen as a move towards a more market-oriented economy, it does not guarantee* ***freer*** *markets, in the sense of being competitive. Just converting a public to a private monopoly may indeed worsen matters from the point of view of consumers, who now lose even the limited countervailing power they had as voters who could influence the government. Thus, privatization raises important issues for Competition Policy..."*

In fact many privatization schemes have ended in failure in the sense that they have not resulted in improved services, and competitive price for consumers but in fact have resulted in increasing burden to the consumer and taxpayer.

For example, the privatization of **sewerage services** to a private corporation resulted almost immediately in increased rates and indifferent services which led to serious and widespread public complaints and ultimately the management was taken over by the Government.

In the case of privatization of the **North-South Highway** which involved toll-collection by a corporation linked with the dominant political party, after about a decade of toll collection, the corporation's adventure into mega projects was recently abruptly halted when its huge debts were taken over by the Government.

In the case of privatization of the **Malaysian Airline System** (MAS) the Government in a very controversial deal, recently paid more than twice the current market price for the shares to retake control of the national carrier which had incurred massive losses.

In the case of privatization of the Light Rail Transit System, because feasible studies of passenger volume have not materialized, the corporations have given notice to surrender the enterprise to the Government and in the meantime the price of commuter travel has increased.

These expensive experiments lead to the disturbing conclusion that privatization born of political patronage and crony-system are a drain on the national purse and a burden to the consumer and taxpayer. Some have with good reason concluded that the privatization policy is premised on privatizing profits and nationalizing debts.

4. Abuse Of Dominant Position Of Market

A position paper by the Ministry disclose that Malaysia's Competition Policy will not be against monopolistic or dominant enterprises per se but would be watching out for the abuse of the monopolistic power dominant position.

As stated earlier, in the finance and insurance sector, the Central bank has issued directives for mergers to reduce the number of players.

The rationale is to have larger entities with increased capital base. This may also be for the local players to have workable economic engagement with MNC's. Any Competition Policy will also have to consider the impact of international cartels and MNCs and its effects on the local entities.

Since dominant enterprises are a fait accompli, the associated problem of Restrictive Business Practices (RBP's) will have to be continually monitored because often prices are not reduced though supply has increased, including through imports or reduction of duties on imported goods. This has been attributed to the restrictive business practices by dominant enterprises who control various sectors of the economy.

5. Safeguards Before A Competition Policy And A Competiticn Law

5.1 Consumer Protection

It is generally recognized that open competition does not guarantee consumer

access to goods and services, product safety, quality or sustainable environment and therefore regulatory reform is necessary to safeguard public interest.

Malaysia currently has about 30 laws to regulate the activities of enterprises and protect consumer interests. Recently a comprehensive **Consumer Protection Act 1999** has been enacted with the objective to provide for protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims. This is a positive development and can be viewed as putting in place statutory safeguards for consumers before a Competition Policy and a Competition Law is enacted.

5.2 Price Controls

Controls are maintained in respect of the price and supply of some essential good such as vegetable, oil, fuel, public utilities cement, motor vehicles, rice, flour, sugar, tobacco and chicken. The **Price Control Act of 1946** (revised 1973):-

(a) gives the government authority to set maximum prices,
(b) makes it an offence to sell without a licence, and
(c) makes it an offence to refuse to sell from stock.

The question at hand is the dynamics between price controls and competition and the need for consumer protection. It has been suggested that while during the earlier stages of the development process, price controls are helpful. As the Malaysian economy becomes more sophisticated, control may be redundant or may distort regional trade, especially in the light of AFTA (ASEAN Free Trade Agreement). This price control mechanism for essential goods can also be seen as a prior safeguard before a Competition Policy and Competition Law is formulated and enacted.

6. Piece-Meal Competition Policy

Some aspects of competition policy are currently in place but they are piece-meal and not comprehensive.

(1) The Eight-Malaysia Plan refers to Competition and Fair Trade Policy. It states that:-

> *"During the Plan period, efforts will be made to foster fair trade practices* that will contribute greater efficiency and competitiveness of the economy. In this context, a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power. The fair trade policy will, among others, prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers want. In addition, a national policy on distributive trade will be formulated to facilitate an orderly and healthy development of the sector".

Based on the above it is being suggested by some officials that the objective Statement for Competition Policy and Law should be:-

> "*To promote and maintain competition and fair trade practices which are* consistent with the growth and development needs of the economy".

The emphasis on the requirement for the policy to be *"consistent with the growth and development needs of the economy"* must also be seen in the context of the related argument that anti-competitive behaviour is justified if there is a *net social or public benefit.*

This must be seen in the overall context of the New Economic Policy (NEP) which is a policy of social engineering of affirmative action aimed at increasing the participation of the majority Bumiputra (Malays) in the business life of the country.

This explains Malaysia's cautious approach to a Competition Policy and a Competition Law.

(2) Communication and Multimedia Act 1998 (CMA 1998)

In 1998, the CMA 1998 was enacted specifying competition provisions for the communications and multimedia sector.

The CMA expressly prohibits:

(a) any conduct by a licensee who has the purpose of substantially lessening competition in the communications market.

(b) arrangements and practices such as rate fixing, market sharing and boycotts, and,

(c) mandatory tying or linking arrangements regarding the provision or supply of products and services.

(3) Energy Commission Act 2001 (ECA 2001)

The Energy Commission under the ECA has as one if its functions:-

> "to promote and safeguard competition and fair and efficient market conduct or, in absence of a competitive market, to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines".

(4) Mergers And Acquistions (M & A)

Mergers and acquisitions of enterprises are important in the context of a Competition Policy as they may lead to the creation of dominant firms and oligopolies. The current policy is by way of guidelines such as the Guideline of Regulation of Acquisitions, Mergers and Take-overs administered by the Foreign Investment Committee (FIC) and the Malaysian Code on Take-Overs and Mergers 1998 by the Securities Commission.

However these guidelines and the code do not consider the issue of the resulting concentration or monopolization of the industry or economic enterprise.

Thus it can be seen that although there is piece-meal legislation and some regulations in respect of competition and free trade, there is fragmented and uneven application of policy. There is currently no specific competition law which is administered by an independent competition authority.

7. Some Policies Based On Domestic Need And NEP

While there is a move towards a Competition Policy, there are also existing economic practices which have to be considered.

(1) Automobile Industry

To protect the local automobile industry, there are presently high tariffs and imported quotas and a licensing system on imported motor vehicles and motor vehicle parts. Malaysia has requested an extension of its commitments under the ASEAN Free Trade Area (AFTA) to reduce tariffs which was originally Scheduled for 2000.

(2) Foreign Equity

Foreign equity in joint venture corporations is subject to approvals by the Foreign Investment Committee and limited to 49% of the equity and other conditions usually involving a minimum of 30% Bumiputra participation.

(3) Land Purchases by Foreigners

There was until recently a standard levy of RM100, 000.00 for foreigners when they purchased land. This levy has now been removed. The purchases are however subject to approval by the Foreign Investment Committee.

(4) Professional Services

Foreign professional service providers are generally not allowed to practice in Malaysia. Foreign lawyers may not practice Malaysia Law or operate as foreign legal consultants. They cannot affiliate with local firms or use their international firm's name.

Foreign architects and engineers may seek only temporary registration. Foreign Accounting firms can provide accounting or taxation services in Malaysia only through a locally registered partnership and their maximum equity is 30 percent.

8. Competition Policy/ Law And Vision 2020

There can be little doubt that a vigorous and competitive market is indispensable for achieving developed status. To date all the economies that have become developed have relied predominantly on market forces.

It is also acknowledged that the current piece-meal legislation in Malaysia is inadequate to control anti-competitive behaviour or RBPs of enterprises including abuses of dominant position of market power by monopolistic or dominant corporations. The examples of privatization failures and the billions of Ringgit losses is a wake-up call that government shelter and preferential treatment cannot protect monopolies or dominant corporations which are otherwise non-competitive.

There is however in place a statutory regimen of consumer protection and regulatory measures that enables the introduction of a comprehensive Competition Policy and Law. This would bring the country in line with the community of about 80 countries which have the Law and lead the nation forward toward 2020.

Contours Of A National Competition Policy: A Development Perspective

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Competition policy is built on the conviction that competition drives firms to become efficient and to offer a greater choice of products and services at lower prices, aiding growth and development and bringing benefits to consumers. In a competitive market, firms face incentives to produce efficiently and to respond to consumers needs in terms of product range and specifications, and wealth and prosperity will be more equally shared between producers and consumers.

Worldwide, governments are increasingly turning to market-based solutions for their economies. However, markets, like governments, do not always operate perfectly. Competition policy is necessary to create and enhance the national competition culture and to shape competitive forces in the economy to ensure that they generate development and public welfare.

Competition policy is a broad notion. While competition law itself is a central element, policies of privatization, trade and foreign exchange liberalization, good regulation and deregulation policies are extremely important in energizing the economy through the forces of competition. Competition policy also has strong links with consumer policy.

For most developing countries, competition policy is seen as a means to stimulate development and it rests on the notion of the public interest. Of course, the public interest is difficult and controversial to assess but countries nevertheless try to achieve a balance between efficient markets and sustainable development. This is in contrast to countries like the US and Canada where the emphasis of the competition policy is on economy efficiency.

Where it is left up to the discretion of officials, the competition policy as a whole risks becoming captive to the political process and to influential interest groups. Public interest may sometimes be invoked to protect a specific interest group without justification for why this group's interests should take

precedence over others. It is vital for the competition policy to be fair and transparent if it is to retain the confidence of consumers and businesses and bring benefits to the economy. Without openness and consistency, a competition policy may run aground in the attempt to balance economic, social and political objectives.

Another challenge in competition policy is to weigh up the effects of a reduction in competition against efficiency gains from combining resources. Very few of the cases that a competition authority has to deal with will be clear-cut. From an economic point of view, each situation should be investigated thoroughly and on its own merits. But on the legal side, there is a need for a clear set of rules to deal with cases quickly and to foster certainly in the application of the national policy.

Another potential source of tension is between competition policy and other government policies. In the South, development objectives may conflict with engendering competition in certain sectors or in certain periods. Public interest may be best served if certain exceptions and exemptions are specified in the competition policy. Relationships between competition and other government policies will be discussed in more detail below.

This paper outlines the contours of a national competition policy. Countries at different levels of development and with different economic structures have different needs in terms of their competition policy. The contours given here may not all be relevant therefore, to every nation. On the contrary, when it comes to competition policy, one size certainly does not fit all! There is no replacement for extensive debate at the national level, drawing forth the views of all stakeholders, particularly consumers, to frame an effective competition policy.

The Contours

Law and Policy

The scope of competition policy is very broad, encompassing all government measure that directly affect the conduct and behaviour of enterprises and the structure of industry. Governments often do not have a coherent and explicit competition policy, which will instead be made up of separate but interconnected policies implemented by a range of government ministries

and agencies. A competition law forms one element of a competition policy, providing the legal back up to the policy. This first section examines various policies that form part of a national competition policy, while the subsequent section examines competition law.

Government policies

a. Deregulation and privatization

Consumer protection law and competition law both seek to protect and promote the welfare of consumers. Competition policy achieves this indirectly through monitoring and maintaining competition in the market, while consumer protection law does so directly without reference to the effects on competition. Consumers may be harmed by unfair trade practices including deceptive advertising, inaccurate labeling etc. Competition in many economies in the developed and developing world has been stifled by high degrees of regulation and government ownership.

The trend among governments now is toward opening up these markets, by allowing the private sector to compete in industries previously reserved for a government monopoly and by easing the requirements in permits and registrations. Regulatory reform is therefore the complement of competition policy, with the former broadening the scope of competition while the latter protects the public interest within the competitive market.

The Indian 'permit raj' is a prominent example of how high compliance costs and rigid bureaucracy can hold back businesses.

Deregulation and privatization together create new opportunities for entrepreneurship in the economy and should act as a sharp spur to productive and allocative efficiency in the economy.

Sector specific regulation aims to maintain competition in sectors which are either natural monopolies, in which case the regulator has an ongoing role, or in a newly privatized and restructured sector during the period in which competition becomes established. These regulators will be responsible for monitoring and setting prices and output but may also, depending on their specific legal remit, be responsible for maintaining competition in the industry. Specific sectors are discussed further below in relation to the scope of the competition law.

Overlapping jurisdiction between the regulatory and competition agencies could create problems, despite the fact that the fundamental objectives of the bodies are the same. For example, two bodies could investigate the same case and come to different conclusions on its competitive impact. The roles and responsibilities of the agencies therefore need to be clearly circumscribed.

b. Trade liberalization

Trade liberalization is intimately interconnected with competition in the economy. On the one hand, competition from foreign firms provides a vital spur to the efficiency of domestic firms. It has even been argued that a liberalized trading regime obviates the need for a national competition policy. However, there are a number of reasons why this is not the case, in particular:

1. Large parts of the economy are not in the traded sector. Trade liberalization only exerts competitive pressure on traded products so a national competition policy is still necessary to ensure the preservation of competition in non-traded sectors.
2. Domestic consumers need to be protected from abuse of dominance and restrictive trade practices by foreign firms operating in the domestic market. National competition laws are not concerned with effects on foreign markets, consumers cannot appeal to the laws of the transnational corporations' home countries to seek redress in these cases.
3. The liberalization of investment regimes has led to rapid restructuring of domestic industry as foreign firms have engaged in a flurry of mergers and acquisitions. While this is a part of a healthy competitive process, it further reinforces the need for a strong national competition law to assess the competitive impact.

On the other hand, it is argued that the vigorous application of competition policy damages the ability of domestic firms to compete in world markets, as they are unable to build up sufficient scale. A number of points can be made in response to this:

1. Firms protected from competition are unlikely to be as efficient as firms in a highly competitive market. There is a danger that firms protected by tariffs and quotas will not be efficient enough to compete

in world markets.

2. Competition policy should use multiple factors to determine whether a firm has a dominant market position rather than simply looking at the size. If a firm faces competition from foreign firms, then national competition law should not be a barrier to its expansion.
3. It is not necessary for firms to be large to compete effectively in international markets. Many small firms export successfully.

In general, therefore, trade liberalization policy and competition policy will enhance each other, generating benefits for consumers.

c. Consumer protection policy

In some countries, competition policy may contain a chapter devoted to consumer protection law, while in other countries consumer protection legislation may be entirely separate from restrictive business practices legislation. Tied-selling, the practice of selling a product on condition of the purchase of other products, is one area of direct overlap between unfair and restrictive business practices. Where consumer and competition law are separate, the applicability of the two laws should be carefully defined to avoid duplication or inconsistency.

Even where their legal basic is separate, it may be more efficient to implement the laws through a single agency. For economies with a small industrial base, a single agency can undertake the administration of the consumer law as well as the competition law. In Peru and Australia, to take two examples, these functions are carried out successfully by a single agency. In Peru, the agency also deals with intellectual property issues.

d. Intellectual Property Rights

The relationship between intellectual property rights (IPR) and competition throws up complications for competition policy. Intellectual property is included in most anti-trust laws and licensing agreements that are scrutinized in the same way as other potentially abusive agreements between firms, except that the legal exclusivity granted by the State to investors may justify some practices that would not otherwise be acceptable.

IPR give holders a temporary monopoly position in order to provide incentives for innovation. However, this does not justify the abuse of that position through anti-competitive practices. As in other areas, the competition authority will have to judge cases on their own merits, weighing up the effects on incentives against harm to the public interest caused by restricted competition. The competition authority may choose to impose compulsory licensing, licensing against the will of the right-holder, in order to protect competition.

In some countries, patents, trademarks and copyrights have given rise to competition problems and some competition laws contain specific provisions dealing with these issues as in the UK, Spain and the EU. The US has also adopted guidelines to assist those who need to predict whether the anti-trust enforcement agencies will find a certain practice anti-competitive.

A further set of considerations with regard to the inter-relationship between IPR and competition policy relates to the provisions of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). Two important provisions of the agreement are those that relate to parallel imports and compulsory licensing. Parallel imports refer to products that are licensed for production in one country and exported to a second country. Under TRIPs, IP rights are 'exhausted' once the right holder releases the IP. They therefore cannot restrict sales or export by the licensee.

Some companies have now begun to integrate provisions preventing parallel importing into their licensing agreements. It is not clear in international law whether this constitutes an anti-competitive practice. Most developing countries have an interest in allowing parallel imports and in order of their interests, specific provisions regarding parallel imports need to be written into the national competition law.

The second important provision of TRIPs allows for governments to enforce compulsory licensing under certain conditions, one of which is where the owner of the IP engages in anti-competitive practices. The agreement also allows for commodities produced under compulsory licenses, granted to remedy anti competition practice, to be exported. However, due administrative or judicial process must be followed, which requires national law, most likely competition law, to contain provisions for this.

e. Other policies

In the pursuit of other social and economic objectives, some government policies may restrict competition in the economy. Potential areas of tension include:

- Industrial policy and Government procurement. Some argue that any policies favouring particular sectors or clusters of businesses are necessarily antithetical to the principles of competition. However, according to a development understanding of competition policy, the government may be justified in targeting policies which will lead in the long-run to a more equitable distribution of the benefits of the market.

- Labour policy Legislation concerning the hiring and firing of workers exists to protect employment and to ensure certain standards in working conditions, but may also constitute a barrier to exit for firms. The government must weigh up the employment- protecting benefits of a restrictive labour policy.

- Taxation. Governments target groups for preferential treatment in taxation and to create certain incentives for businesses. Where this seeks to create a level-playing field for businesses which face disadvantages in the market, it is not necessarily in conflict with the principles of market competition.

  Policy-makers should consider carefully the impact on competition of other policies to ensure that the policies contribute towards the government's development goals rather than contradicting each other.

The 7-Up project is a comparative study of the competition regimes of seven developing countries of the Commonwealth. The countries include: India, Sri Lanka, Pakistan, Kenya, Tanzania, South Africa and Zambia. The mission statement of the project is "Shaping Competition Culture in Developing Countries." The study is being funded by the Department of International Development of the UK.

Competition Law

a. Scope of application

Competition laws do not apply to the sovereign practices of the state, and this exemption is clearly specified in most national laws. Local government, branches of government acting within their delegated power and natural persons compelled or supervised by the State are also exempted.

Initially, the primary objective of maintenance and promotion of effective competition was to counter private restrictions on competition; hence competition laws in most countries continue to prohibit price-fixing and abuse of dominant market position. However, during the past two decades or so, the role of competition policy has expanded to include lessening the adverse effects of government intervention in the marketplace.

In many countries, the competition law applies without discrimination to both public and private sector firms but firms supplying public services or functioning as monopolists are exempt from the law only within the limits of the mission attributed to them. However, monitoring public sector firms gives rise to complications for the authority. For example, a firm with a government monopoly in one product may use its position to compete unfairly with private sector firms in another product market that has been liberalised. Another danger in dealing with public sector businesses is that the process will become politicized.

In order to deal with restrictive practices and abuse of dominance by foreign firms operating within the domestic market, the competition law should clearly specify its extra-territorial reach. On the other hand, national competition policy would not normally apply to domestic firms forming cartels exclusively for exports.

For the purpose of dealing with cross-border competition concerns, the law should provide for extra-territorial jurisdiction and to give meaning to this jurisdiction, the government or the Authority should negotiate cooperation agreements with their counterparts in other countries.

b. Exceptions and exemptions

The special characteristics of certain sectors and the multiple economic objectives of governments justify general exemptions and special treatment for certain classes of actors or enterprises. Exclusions represent decisions by courts, legislature or the government to remove the subject from the jurisdiction of the competition law or the competition agency. Where there is an exclusion, there may be another law concerned with competition and regulation in that sector, Exemptions, including special rules or treatment, arise under the competition law itself and represent decisions by the enforcing body or others about how the law should be applied.

Sectors commonly subject to one or the other are: utilities(electricity, gas, water, telecoms); transport (rail, air travel, truck, ship), communications and broadcast, agriculture, professions, services, financial and insurance sectors. Some special characteristics of these sectors include:

- Utilities. Utility distribution networks and other aspects of utility supply may be natural monopolies. This means that the most efficient industrial structure for the sector is a single supplier and a structural approach is inappropriate. A regulator will normally monitor and set prices. Regulation of utilities is further complicated by a universal obligation to supply.

- Transport. The same considerations apply to transport as to utilities, and safety provides a further dimension for which the regulator will often be responsible.

- Finance. Instability in this sector leads to powerful reverberations throughout the economy and so it requires extensive regulation. Particularly where the financial sector is not yet well developed, it may not be appropriate to apply competition policy.

- Communications and broadcast are closely interconnected with social and political objectives which the Government may choose to give priority over efficiency issues.

Governments may also support strategic industries or clusters of firms to compensate for market failures or to further other policy objectives. The market

generally under-provides for investment in training and research and development, which justifies government subsidies, and the 'infant industry' argument justifies support to firms as they build up scale. To reduce the potential for conflict between industrial and competition policy, subsidies should be distributed to all firms in the sector and a high degree of openness and transparency in the objectives of the policy should be maintained.

Certain actors or groups of actors within the economy may be the targets of government policies. A broad conception of development includes sharing out the benefits of growth among the population and creating a level playing field for historically disadvantaged groups and regions.

Small businesses play a special role in employment creation and innovation in the economy. At the same time they face disadvantages in terms of economies of scope and scale in comparison to large firms. Many governments offer special treatment to small firms in financing, tax, employment etc. which could be considered 'unfair competition' under competition law if special exemptions are not specified in the law.

c. Agreements

A central purpose of a competition policy is to tackle agreements between firms that restrict competition. Agreements between competitors engaged in broadly similar activities are known as horizontal agreements, while agreements between firms at different stages in the production process are known as vertical agreements. Horizontal agreements are more likely to raise competition concerns, but they may not necessarily be harmful to competition. Joint activities that may beneficial include collaboration for research and development (R&D), joint development of a new production facility that a firm could not afford on its own, joint purchase of inputs to reduce costs, networks of suppliers, gathering operational information etc. These agreements can raise efficiency and ultimately benefit the consumer by making a wider range of commodities available at lower cost.

The competition law therefore has to distinguish between agreements with an ambiguous impact on market efficiency and agreements that are unequivocally harmful.

i. Cartels

Agreements which are inherently anti-competitive are known as cartel agreements. Cartels have negative efficiency and welfare effects and are therefore condemned strongly in most competition laws. Most competition policies will contain laws that specifically prohibit the following:

1. Agreements fixing prices or other terms of sale
2. Collusive tendering
3. Market or customer allocation
4. Restraints on production or sale
5. Concerted refusal to purchase or supply

They may also include a prohibition on collective denial of access to an arrangement or association which is crucial to competition.

Cartels may be prosecuted as crimes in most countries. In the US and EU, cartels are pursued vigorously and large fines may be imposed. In some countries, culpable individuals may also be fined. In the US, individuals may be sentenced to prison terms of up to three years for each offence. It is important that fines and other penalties are sufficiently severe to create a deterrent, particularly given the difficulties of detecting and proving the existence of a cartel.

Where no written agreement exists, as will often be the case, proof of collusion rests to a large extent on circumstantial evidence. It may be difficult to distinguish between rational behaviour by firms reacting to independent decisions of competing firms and cartel-like behaviour. Given the difficulties of gathering sufficient evidence, competition law should try to encourage 'whistle blowers'. Leniency for those giving evidence against members of their alleged cartel has resulted in a jump in the number of cases reported in several countries.

The use of straightforward rules such as *per se* prohibition, simplifies the judicial process and provides clear guidance for businesses. But it is important that the rules are not so broad that they stifle conduct that could enhance competition.

Some countries treat cartel agreements as illegal regardless of whether the set prices or output are reasonable or not. Under such an approach, the

prosecutor need only prove that an agreement was made and that it could be anti-competitive. It is not relevant whether the effect was in fact anti-competitive.

However, cartels are not always illegal per se, as in Canada, where the cartel must affect a large part of the market, or in Spain, Sweden and the UK where a rule-of-reason approach is adopted.

Agreements that may enhance competition should be carefully evaluated to determine their effects. An evaluation of five steps may be used:

1. Is the restraint inherently likely to restrict output and raise prices?
2. Is the restraint naked or is it obviously related to some pro-competitive integration of economic resources?
3. Will the restraint restrict output and raise prices, or otherwise create or facilitate the exercise of market power?
4. Is the restraint necessary to achieve asserted pre-competition goals?
5. Do the restraint's pro-competitive benefits outweigh its anti-competitive risks?

Cartels are notoriously hard to prove and for this reason, laws try to capture a broad range of potential forms of collusion. For example, the agreements may be written or oral, formal or informal, and may or may not be intended to be legally binding. The law of Spain covers multiple possibilities that go beyond agreements, namely, "collective decisions or recommendations, or concerted or consciously parallel practices."

ii. Vertical agreements

Some agreements between an upstream firm, such as a manufacturer or wholesaler and downstream firms, such as a retailer, may raise competition concerns. Attention has in practice focused on restrictive agreements in retail distribution. Examples of such agreements include:

1. Resale price maintenance whereby the retail price is fixed by the producer or a maximum or minimum price is imposed;
2. Exclusive distribution agreements whereby distributors are assigned exclusivity in a geographical area or over a particular type of customer

or product;

3. Exclusive dealing arrangement whereby downstream firms are prohibited from dealing with competing producers or distributors;
4. Tie-in sale agreements whereby downstream firms are required to purchase a certain range of products before being allowed to purchase a particular product. An extreme example of this is 'full-line forcing' in which the downstream firm is required to purchase the entire product range;
5. Quantity forcing whereby downstream firms are required to purchase a minimum quantity of the product.

Vertical agreements are most likely to have harmful effects in markets in which either the upstream or downstream firm holds a position of market power. They will therefore usually be covered by the provisions in the competition law that deals with the abuse of a dominant position.

d. Abuse of dominance

Competition law is also required to tackle acts or behaviour by firms that constitute abuse of market power. This may be one of the most challenging and difficult tasks for the competition agency, because business practices that could be abusive may also promote efficiency. Careful rule-of-reason analysis is therefore essential. The impact on competition will be a matter of judgment in the end, based on unobservable phenomena as well as statistical data.

To assess whether a firm has a dominant market share, it is first necessary to delineate the market, as in other types of competition investigations. Whether a firm holds a dominant position in the market that has been identified depends on two factors, market share and barriers to entry. The actual size of the firm is not in itself relevant to the evaluation. A handful of large firms in a market may be operating under fiercely competitive conditions if their market shares are equally balanced and barriers to entry are low enough that a new firm could enter the market rapidly if incumbents raised prices above the competitive level.

Countries may use a market share rule of thumb as a quick and efficient way to identify competition concerns. As it is unlikely that a firm with below 35 percent of market share has a dominant position, such cases can generally

be ignored by the competition authorities, while a firm with a market share of 65 percent or more is much more likely to hold a dominant position, if sufficient barriers to entry exist.

Sample definition of abuse of a dominant position of market power

Prohibition of acts or behaviour involving abuse or acquisition and abuse of a dominant position of market power:

i. Where an enterprise, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

ii. Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or likely to have adverse effects on trade or economic development.

Source: Model Law on Competition, UNCTAD, 2000

In recent years, competition authorities have tended to move away from a straight calculation of market share and instead have made a more detailed and differentiated assessment based on barriers to entry. Barriers to entry refer to how easy it would be for a new firm to enter the market for production or distribution of a commodity in the event that incumbent firms were maintaining artificially high prices in the market.

The ability of a firm to deter entry through behavioural tactics as well as through market structure is increasingly recognised. Thus the competition authority should investigate alleged cases of abuse of dominance even in industries without obvious structural barriers.

Usually, a competition law will only provide some illustrative examples of 'abuse of dominance' practices. These lists are not intended to be exhaustive so much as suggestive and will leave scope for the competition authority to look at the specific features of each case.

Practices include:

1. *Excessive prices.* Prices in a market may be high for a number of reasons including surges in demand or high unit costs, so a competition investigation should be concerned with the reasons for the high prices rather than the level of prices itself. It is also difficult for a government agency to determine a firm's costs, especially where the firm produces several products. Direct regulation of prices distorts these incentives and should therefore be avoided where possible.

2. *Predatory pricing.* This is the practice of a dominant firm selling its products at prices below cost to drive out rival firms or to prevent other firms from entering the market. This is a short-term strategy in which the firm expects profits in the future to outweigh the costs of lowering prices now. The consumer suffers because in the long-run output will be lower and prices will be higher.

3. *Discriminatory pricing.* This is the practice of charging different prices to different customers in the absence of cost differences in supplying them. It is a key strategy for a firm to maximise profits. Price discrimination is not necessarily harmful to the consumer: it may allow more customers to be supplied than would otherwise be the case, and discount schemes that raise the cost of switching supplies may in many cases be beneficial to consumers. However, price discrimination can injure direct competitors or competitors of the favoured customer and should therefore be analysed by the competition authorities.

4. *Refusal to deal/supply.* Competition law does not generally require firms to deal with competitors and firms may have legitimate health, safety or quality reasons for refusing to deal with other firms. A refusal to deal is often used by a firm to enforce other anti-competitive practices such as resale price maintenance or selective distribution arrangements.

5. *Conditions of resale.* These may include fixing the resale price of goods, known as resale price maintenance, which is specifically proscribed in many countries, and maximum and recommended prices which may be allowed. In the US, resale price maintenance is illegal

where there is direct or indirect pressure for compliance. Dominant suppliers may also make supply dependent on the acceptance of restrictions on the distribution of rival goods, in a practice known as 'exclusive dealing arrangements. "They may also impose restrictions on where, to whom and in what form goods are sold on. These practices are not unequivocally harmful to competition, as they may lead to similar efficiency gains to vertical integration, but nevertheless, cases of this kind need to be examined on their own merits.

6. *Raising rivals' costs.* Likely cases arise where on or a few dominant firms try to raise the costs of smaller firms, for example by supporting higher wages across the industry, engaging the small firm in litigation, or raising spending on advertising.

7. *Tying sales.* This is the sale of one produce on condition that the buyer purchase another product or products. Tying is often motivated by the firm's desire to maintain or increase its reputation for quality or product liability. The gains to the consumer from this must be carefully balanced against any anti-competition effects that the tie-in may also have.

These activities demonstrate the existence of market power. In most cases, criminal remedies will not be appropriate to deal with abuse of market power except in extreme cases. The most effective long-term solution may involve restructuring in the sector.

Barriers to entry in competition law and policy

- Structural barriers to entry arise from basic industry characteristics such as technology, cost and demand. The widest definitions suggest that barriers to entry arise from product differentiation (branding and advertising), absolute cost advantages of incumbent (access to technology, physical and know-how) and economies of scale (at the most extreme, natural monopolies such as utility distribution networks). Sunk costs, which must be borne by new entrants, have already been covered by incumbents have a double effect as they also increase the cost of exit.
- Strategic barriers refer to the behaviour of incumbents. In particular,

incumbents may act so as to heighten structural barriers or threaten to retaliate against entrants if they do enter. This could include pre-emptive behaviour such as over-investment by incumbents raising the spectra of a price war if a new firm tried to enter the market. Governments may also act as a barrier to entry through licensing and other regulations.

Source: Model Law on Competition, UNCTAD, 2000

e. Mergers and acquisitions

The rationale for merger control in a competition law is simple: it is far better to prevent the acquisition of market power than it is to attempt to control or to break up the market power once it exists. For this reason, most competition laws have some provisions that allow for pre-merger scrutiny. Most mergers pose little or no threat to competition in the market. However, some mergers significantly raise the risk of abuse by concentrating economic power within an industry.

Usually the mergers considered by competition authorities will be horizontal mergers between firms that are actual or potential competitors. The two firms will be involved in the same stage of production of the same commodity in a particular geographical market although vertical mergers – between firms at different stages of the production process for the same commodity – may occasionally have an impact in competition in one or other market.

The positive effects of mergers in increased productive efficiency, economies of scale etc. are significant, and flexible industrial structure reflects dynamism in the economy. Mergers should therefore be examined quickly, if at all, particularly if a decision has to be taken before the merger can go ahead.

Merger investigations should be closed as soon as there is enough information to demonstrate that the merger does not pose a threat to competition both to preserve the scarce resources of the investigative authorities and to avoid holding up the healthy operation of the market. For example, only mergers that involve or would create an entity with a certain market share may be subject to investigation, or a market share test may be used as a prima facie test of legality. The analysis should take account not only of the current situation but also of the dynamic of the industry and prevailing market trends. In fact, much of merger analysis is forward-looking as it assesses the likely

future effects of the transaction.

Most merger control laws written generally, states that mergers are unlawful if they "substantially harm competition." It is then left to the competition authority to interpret and employ the standard. Some competition authorities have made public the guidelines that they use to assess mergers, which helps firms to prepare for the regulatory response or to take preventative actions even before notification of the proposed merger.

A national competition law may or may not require companies to seek permission or register their intention to merge before doing so. In most countries, notification is only necessary where the merger entity has or is likely to have a certain concentration of market power. In the US and the EU, there is a system of notification prior to the consummation of the merger. In other countries, mergers must be notified after they have been consummated, while in other countries, the system of notification is purely voluntary.

The Competition Authority

A key feature of a national competition policy is the agency charged with the implementation of the law. This section looks at relevant features of the authority and examines how they may be designed to ensure maximum effectiveness in implementation. In countries where the competition law has been heavily or completely revised, there has also been a tendency to set up a new administrative body for the law. There is no single efficient model for the structure of the authority, but some general considerations can be noted.

a. Composition of the authority

The authority should be a multi-member body made up of experts in law, economics, business administration and international law. Selection of the members should be done in such a way as to ensure the independence and quality of the personnel. There has been a general trend away from the appointment of public officials towards the appointment of trained economists and lawyers. The tenure of appointment for members should be long enough to allow members to develop expertise without developing entrenched positions. In some developing countries, qualified individuals may be hard to find, and it will take time and technical assistance to build up capacity.

Possible remedies in abuse of dominance cases:

- Orders to cease abusive behaviour.
- Imposition of fines on the firm. Criteria for fixing fines include gravity, time period, effect, non-enforcement, difficult market conditions, size and profitability of the firm etc. Fines on individuals and imprisonment will usually not be appropriate in abuse of dominance cases because there is no criminal intent.
- Order to repay "undue profits:
- Divestment or division of firms
- Order to take action to ensure fair competition for other firms
- Award of damages

Source: A Framework for the design and implementation of a competition law and policy, World Bank/OECD, 1999

b. Independence

The independence of the competition authority is necessary to ensure that businesses and consumers have confidence and respect for the authority, although in some countries the authority is a quasi-government authority. If the authority falls within a Government ministry or is supervised by a ministry official, the agency may be, or at least may seem to be, susceptible to political influence. Budgetary independence is also important.

On the other hand, sufficient checks and balances need to be in place to ensure that the authority does not act over-zealously. The action of the authority should be reviewed according to the competition principles set down in the law/policy, and the Supreme Court or other high judicial authority should be able to review the authority's actions.

c. Functions

The authority has four essential functions which should be separated to ensure the integrity of the agency.

1. *Investigation:* Making inquiries and investigations, suo moto and on receipt of complaints from businesses or consumers;

2. *Prosecution* of defaulting firms;
3. *Adjudication:* Taking the necessary decisions, including the imposition of sanctions or making recommendations for action to the responsible minister, imposition of immediate injunctions;
4. Advocacy: Informing and educating the public, conducting studies and publishing reports. Assisting in the preparation, amending or review of government legislation and policy on restrictive business practices, or other policies that has direct & indirect effects on competition policy.

d. Powers, sanctions and penalties

The authority needs strong judicial and administrative powers for conducting investigations, applying sanctions etc., while at the same time providing for the possibility of recourse to a higher judicial body, such as the national Supreme Court. To be effective in discouraging firms from engaging in anti-competitive practices, the penalties need to be severe. Possible sanctions that the authority could impose include:

1. Fines (in proportion to the secrecy, gravity and illegality of offences, or in relation to the illicit gain achieved by the activity);
2. Imprisonment (in cases of major criminal violations by a natural person);
3. Interim orders and injunctions;
4. Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure etc,;
5. Divestiture (in regard to completed mergers or acquisitions) or rescission (in regard to certain mergers, acquisitions or agreements);
6. Restitution to the injured customers.

Injured persons should also be able to use the findings of the authority as evidence in damage actions.

e. Capacity for making inquiries and investigations

The authority needs to have its own investigative staff, the power to access information and the resources to carry out in-depth studies. The authority should be able to launch an investigation on its own initiative or following a complaint by a person or an enterprise. The competition authority may need

to have access to information held by government departments, such as the internal revenue, foreign trade, customs, etc which should be facilitated by the administrative set-up, and the collection of information from enterprises should also be facilitated by government regulation.

In cases where enterprises do not comply with requests for information, the authority needs to have the power to order persons or enterprises to provide information and to call for and receive testimony. In the event that the information is not supplied, the authority should be able to obtain a search warrant or a court order to gain access to the information. Of course, any investigation should be conducted according to the due process of law.

In order to retain the confidence of business in the authority, and to encourage cooperation in future investigations, the authority must be able to ensure the confidentiality of information obtained from enterprises containing legitimate business secrets. It must also be able to protect the identity of persons who provide information to the authorities and who need anonymity to protect themselves from economic retaliation. The law should also encourage 'whistle-blowers', particularly in relation to cartels where hard evidence is notoriously hard to come by. These informants should be rewarded and provided with legal immunity.

f. Information dissemination and competition advocacy

This is one of the most important roles of the authority. To create a healthy competition culture in the country, and for the competition law to be truly effective, consumers have to be aware of their rights and have to be active in demanding them.

In many developing countries, consumer awareness is very low, and consumers generally do not recognize that the law is there to protect their interests. The authority must therefore have adequate resources to carry out programmes of consumer education and competition advocacy, perhaps financed these activities through a fund in which all fines imposed by the authority are collected.

The Competition Authority can play an important role in revealing any anti-competitive impact that other government policies might have and actively providing input to changes in the legislation, improving access and opening markets by reducing barriers to entry through deregulation, privatization,

tariff reduction or removal of quotas and licenses. Marketing board schemes are specifically highlighted as important objectives in the administration of the competition policy of several industrial countries.

This does not mean that the competition authorities have a direct mandate over commercial, regulatory and privatization policies in these jurisdictions. However, through inter- and intra-governmental participation in the development of public policies and by making submissions and interventions in regulatory proceedings, competition authorities can wield influence favouring market-determined solutions.

In some countries, competition authorities can analyze whether regulatory measures from the public sector will negatively affect competition and strive to have any measures that unreasonably limit competition amended or abolished, or propose legislation that could enhance competition. This is mainly found in advanced industrialized countries, but might also be a useful provision in developing countries that are trying to liberalize the face of domestic resistance.

Conclusion

The elements of a national competition policy outlined in this paper would together form a comprehensive framework to ensure that a country reaps the benefits of competition between firms while achieving its national development objectives.

Under most circumstances, policies to promote healthy competition will also lead to growth and development but there may be clashes and the relationship between the two needs to be given careful consideration by policy-makers.

Furthermore, economic, political and historical factors vary from country to country and the design of the competition policy must take this into account. For developing and developed countries alike, developing and implementing a truly successful competition policy requires an active debate involving all stakeholders.

Policy Issues Formulating Malaysian Competition Policy And Law:
A Discussion Paper

Planning and Development Division
Ministry of Domestic Trade and Consumer Affairs

I. Competition Policy: Scope And Definition

1. Competition policy in a very broad sense refers to those policies that promote or preserve competition. These would include a specific and comprehensive competition law itself, privatization and deregulation policies (i.e. those underpinned by the principle of competitive neutrality), trade liberalization policies (e.g. lowering or removal of tariff and non-tariff barriers with resulting competition from imports/ bigger world market), etc. Some aspects of competition policy are currently in place, namely, competition provisions in the Commission and Multimedia Act 1998 (CMA 1998) and some references to it in the Energy Commission Act 2001. There are also regulatory bodies that undertake programs of deregulation, but these are sector specific or sector-based.

2. Competition policy covers policies relating to market structure and enterprise behavior (conduct), much along the lines of those countries with specific competition (on fair trade laws/regimes) such as Japan, Taiwan, Thailand, Canada, Australia etc. Such policy is backed up by a piece og legislation, ideally administered and enforced by an independent body (e.g. commission, etc.). Competition/Fair Trade policy and law for Malaysia will be in the spirit and context of that referred to in the English Malaysia Plan (RMK8).

II. Issues

3. Several policy issues need to be addressed and policy guidance/ decisions are needed to assist in the concurrent drafting of the

Competition/Fair Trade policy and Bill. These cover the following:

A. Objective Of Competition Policy//Law

(i) The reference to fair trade and law in RMK8 (Chapter 16 para 16.32) is for the purpose of "preventing anti competitive behavior" such as collusion, cartel price fixing, market allocation and the abuse of market power. This is made in the context of efforts to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy. This represents one official position with regard to the objective of a fair trade policy/law.

(ii) The competition provisions in the CMA 1998 is specific in that it "prohibits anti-competitive conducts by seeking to sustain/ maintain competition by sanctioning against acts which substantially reduce competition" (elaborated further in guidelines). Similarly, the guidelines on dominant firms also basically sanction against anti competitive behavior or conduct of such firms, although authorization is allowed for if it is in the national interest. The Energy Commission under the Energy Commission Act 2001 has as one of its functions "to promote and safeguard competition and fair and efficient market conduct or, in the absence of competitive market, to prevent the misuse of monopoly or market power" (i.e. per section 14(1)h of the Act). Further, both the terms "competition" and "fair market conduct" have been used. It seems to also take *status quo* market structure as given, but with responsibility (of the Energy Commission) to prevent abuse.

(iii) Others (e.g. Peter Lloyd 2001*) have argued that a (comprehensive) competition policy/law is needed for Malaysia to promote competition whilst there are others (e.g. De Vito, 1995**) who rationalised the need for the law to control restrictive business practices (RBPs) or anti competitive practices due to the high degree of concentration and the consequent market distortion. Zainal and Phang (1993) in an empirical study of determinants of industrial market structure suggested a need for competition policy to ensure that the market structure is not excessively concentrated and to erode monopolistic policies.

(iv) It is obvious from the above that there is concern on efficiency (static) and welfare implication of highly concentrated market structures and restrictive business conducts which a competition policy/law should address. At the same time authorization may be allowed for certain conducts under certain circumstances whilst efficiency and competitiveness. Objective were also invoked with regard to the need for a competition policy as stated in RMK8.

** using info of APEC countries and based on Australian experience*
*** Based on empirical analysis of Malaysian Manufacturing industries*

4. We believe that a statement of the objectives of competition policy and law should be very explicit and clear, reflecting the key considerations for its existence. It is also suggested that apart from the related pronouncements and suggestions discussed above, a statement of the Competition/Fair Trade objective should satisfy some basic elements. Amongst others, it should:

(a) be positive;

(b) address anti competitive practices/conduct and concentrated market structure;

(c) through promoting and maintaining competition, achieve static efficiency as well as dynamic efficiency (through innovation etc) objectives;

(d) ensure there is a balance and consistency of the benefits of competition with that of socio-economic objectives of the economy i.e. optimality (social) aspect should be overriding; and

(e) contribute also to the protection of consumer interests.

5. In the context of the above we propose the objectives of competition policy and law as:

"to promote and maintain competition and fair trade practices that are consistent with the growth and development needs of the economy"

B. Focus Of The Law

6. The relevant **issues for considerations are:**

(i) should it be on firms, partnerships, persons (natural and legal), undertakings, etc. Some jurisdictions focus on undertakings (i.e. as in the German and Indian laws) although these are not defined. The entity that will be focused on will have to be broadly defined to cover both commercial and non-commercial undertakings, involving persons and organizations which have an impact on competition and it should be in line with the current rules and laws in the country (e.g. the Companies Act 1975, the Registration of Business Act 1956), forms of business organizations such as producer/seller/trader, organizations and associations including professional bodies formed or enabled by a separate act of legislation (such as for the medical and legal professions, etc.). All these have impact upon competition and influence or determine trade practices.

(ii) We propose that the focus of the policy/law be on **enterprises**, which include the following:

(a) **companies** (as defined under the Companies Act 1965);

(b) **businesses** (as per the Registration of Businesses Act 1956);

(c) **associations**; and

(d) **any organizations or persons** engaged in transactions to supply goods and services

C. Coverage

7. The issue here is whether the policy should be comprehensive or partial, namely:

(a) should it apply to all enterprises including state-owned/ controlled, either privatized or corporatised;

(b) should it also apply to a state activity (or enterprise) as a sole producer if goods and services (e.g. water supply) – generally involving natural monopolies. (N.B. here the state is providing the goods or services as part of its usual/normal public service);

(c) should it apply to enterprises in sectors with their own specific laws (embodying competition and consumer protection elements) such as the communications and multimedia industry;

(d) should it apply, irrespective of ownership, to enterprises considered as national champions (state-owned/controlled enterprises need not necessarily constitute national champions); and

(e) should it apply to all enterprises irrespective of size (e.g. SME's.)

8. In the case of (a) above which generally started with utilities, whether corporatised or privatized, there will usually be a regulatory body generally under a particular Ministry, supported by an enabling law. (i.e. to provide for corporatisation or privatization and the regulatory regime post-corporatisation/privatization). A regulatory body will oversee the entity and administer the law to ensure fair play by the entity/ entities or enterprises, particularly with regard to prices, quality and availability of services. In some cases, where there is little or no concern for competition in the market concerned (e.g. sewage disposal and cleaning services), there is a view that the competition law should be applied since the force of the policy/law is intended to and yield signals and outcomes which are different from that of a regulatory regime. (An example is the postal services which was corporatised several years ago and has now been privatized in a market where there is some competition, albeit dominated by the incumbent, and where the privatization process of the incumbent is not based on competitive neutrality. It in fact becomes a private monopoly or dominant firm from a position of one of the public).

9. With regard to (b), although in almost all cases the operations are not commercial in nature (i.e. not profit making), they are nevertheless operating enterprises i.e. involved in transactions by way of the exchange of goods and services for a payment, e.g. production and sale of treated water. They are monopolistic enterprises and they do practice price differentiation (e.g. based on quantum of usage type of user and on the ability to pay). Cross subsidies are being practiced to

ensure continued ability/need to supply water. Nevertheless, because of the absence of competition in the market, close surveillance by a competition authority may be necessary to ensure measures are taken to reduce costs and enhance efficiency, quality of products and services. The usual path taken is to corporatise (i.e. maintaining state-ownership and control) or to directly privatize, coupled with the establishment of a regulatory body. At the minimum this should proceed, if not put under the purview of competition policy/law.

10. For the issue relating to (c), up to now two sectors have their own separate respective regulatory body which also administers specific laws relating to the sectors concerned. These are as follows:

(a) For the communications and multimedia industry, the specific law is the Communications and Multimedia Act 1998 (CMA 1998), administered by the Communications and Multimedia Commission which is not a totally independent body i.e. it is responsible to the Minister concerned; and

(b) The energy (gas and electricity) industry where the Energy Commission is set up along the same framework/regime as (a) above through the Energy Commission Act 2001 (ECA 2001).

11. The CMA 1998 and to very much lesser extent ECA 2001, have substantive provisions relating to competition (and the protection of consumer interests) although not of the level of detail or focus as that of a specific competition law, administered by a dedicated full fledged and independent competition authority. Further, the sectoral approach to competition is partial and piecemeal and misses the whole rationale and benefits of a comprehensive competition law.

12. There is further the issue of jurisdiction. There is the view that the respective commissions should be allowed to handle all matters including competition as provided for by the respective Acts since they know best the sectors concerned. On the other hand, in view of the sector's importance to the economy and the virtual lack of substitutes (particularly electricity) and the fact that competition is not the sole focus of the commissions (which function more as regulatory licensing bodies), it is argued that competition proper is better left to a professionally staffed and dedicated independent

competition authority. Further, joint jurisdiction is very demanding technically and logistically on both the competition authority and the sector regulating body, particularly in view of the rapid development of the sector (particularly the communication and multimedia sector) which requires close market surveillance. The United Kingdom, however, has join jurisdiction whilst Australia, on the other hand, has a competition law which overrides the sector law and the sectoral authority is confined to regulation and licensing.

13. The indications to date are that the competition law be the anchor (mother) law and that the two sectors retain their own domain on sector specific competition although in cases of conflict the "mother" law prevails. Further, amending the existing sectoral laws to suit a single legislation competition regime can delay the whole process of putting in place such a legal framework, besides upsetting current competition regulation work of the sectoral bodies.

14. With regards to (d) and (e), we recommend that all enterprises be covered that no blanket exemption from the law is proposed, given its stated objectives (except perhaps the sovereign acts of government itself, or to those of local governments).

D. Exemption Or Authorization

15. These are two particular issues:

(a) Issue (I) is the provision for and use of the instruments of exemptions; and (ii) is that of authorization i.e. when and what to authorize and what to exempt. Welfare related efforts and cost to competition will be the key basis for deciding on the use of authorization and exemption.

(b) It is proposed that when certain behaviors are a *priori* harmful or anti competitive, they may be **authorized** if there are redeeming circumstances that on balance field net social benefit. One of the evaluating criteria would be whether it leads to substantial lessening of competition and also the economy-wide benefits. In contrast to exemptions which should be severely limited, authorization provides sufficient regulatory policy leeway to allow certain behaviors and conduct which meet explicit criteria and

needs of the industry and the economy. The use of rule of reason, i.e. on a case by case basis, will be the key element in this.

(c) With regard to **exemptions**, they have to be based on very clearly identified factors and of overriding, if not strategic, considerations. Exemptions also cannot be given across the board, covering conduct and structure. In view of the difficulty of determining priori industries or projects that should be exempted for particular conduct or market structure, it is proposed that no exemptions are allowed except for national security enterprises and purposes and those obligations which Malaysia is legally bound to observe and comply with international commitments.

E. Mergers And Acquisitions (M&A)

16. Mergers and acquisitions of enterprise can increase concentration in the industry and may lead to the existence of a dominant firm and hence the need to oversee or regulate them. Current policy is by way of guidelines such as the Guideline for Regulation of Acquisitions, Mergers and Take-overs administered by the Foreign Investment Committee (FIC) and the Malaysian Code on Take-overs and Mergers 1998 by the Securities Commission. However, we believe the FIC Guideline, at least, (which stand to be corrected) only ensures that the moves follow stipulated conditions and procedures but does not control or monitor the resulting concentration or possible monopolisation of the industry/sector.

17. In other words, from the perspective of competition policy and in particular with regard to mergers, there is little or no concern on the impact of M&A on market share or on concentration or on competition arising from the M&A. The acquisition of an enterprise, particularly a competing firm, will lead to increased concentration and in some cases monopolistic structure, creating conditions for monopoly rentals which will be captured by the merged enterprises concerned. It may seem that because of the implied exemptions (automatic approvals) to State M&A, the FIC is willing to tolerate the resultant monopolistic rentals and market dominance arising from such M&A. Attempts are being made to access records of past M&A and evaluate the impact on

market structure concentration resulting from decisions of the FIC (whose overriding considerations are other than that of competition).

18. It is suggested that for the purpose of the competition policy, a different approach should be taken in the issue of M&A:

(i) M&A can be considered as two separate activities/processes. In some jurisdictions these two are considered separately (i.e. in Germany) whilst some treat acquisitions as a process towards merger (e.g. Taiwan). It is suggested that:

(a) A general definition by way of listing be used i.e. by defining/ specifying those circumstances that constitute a merger;

(b) This should be supplemented by related rules to meet changing requirements. The present FIC guidelines could be drawn upon in this regard.

(ii) An outright prohibition on M&A which prevents competition or are harmful to competition will have to be stated upfront. The need for filing for approvals should be retained (as in FIC) but with documentation and details of justification which puts on the onus on applicants. However, the broad parameters for evaluating the applications should be spelt out in the Act and/or rules. In the light of the above arguments, the policy content shall be as follows:

(a) to define mergers.

(b) To specify parameters for authorization / consideration of merger applications.

F. Preventing Abuse Of A Dominant Position Of Market Power

19. Abuse of a dominant position of market power refers to those anti-competitive conduct or business practices or RBPs which a dominant or monopolistic enterprise engages in so as to unfairly or uncompetitively maintain or increase its position in the market. The prevention of abuse of a dominant position of market power is incorporated in the competition legislation of countries such as Canada, France, Germany, the EU and latterly in Asian countries such as Taiwan, Republic of China.

I. Elements For Regulation

20. In this context, there are two elements which need to be considered for regulation, namely the question of dominance and consequently the ability and the high probability to exert market power.

(i) A firm holds a dominant position when it accounts for a significant share of a relevant market and has a significantly larger market share than its next largest rival. According to the UNCTAD Model Law on Competition, when a firm holds market shares of 40 per cent or more, it is usually a dominant firm which can raise competition concerns when it has the capacity to set prices independently and abuse its market power. However, **a dominant position in itself is not anti-competitive;** and

(ii) Market power represents the ability of a firm (or a group of firms acting jointly) to raise and profitably maintain prices above the level that would prevail under competition for a significant period of time. It is also referred to as monopoly power. The detriment to the economy by the exercise or abuse of a dominant position or market power is that it leads to reduced output, loss of efficiency and economic welfare. In addition to higher than competitive prices, the exercise of market power can be manifested through reduced quality of service or a lack of innovation in relevant markets with long term implications to the vibrancy of the economy.

21. Factors that tend to create market power include a high degree of market concentration, the existence of barriers to entry and a lack of substitutes for a product/products supplied by the firm concerned. Abuse of a dominant position of market power can vary widely from one sector to another. Abuses include the following: charging unreasonable or excessive prices, exercising price discrimination, predatory pricing, refusal to deal or to sell, tied selling or product bundling, pre-emption of facilities, etc.

(II). Policy Issues

A. Abuse Of Dominant Position Of Market Power By A Monopolistic Enterprise

22. A monopolistic enterprise or firm is one which holds a dominant position of market power and which faces no competition or has a dominant position and abuses its monopolistic power or dominant position by excluding competition in a relevant market. Two or more enterprises acting together shall be deemed to be a monopolistic enterprise, even though by themselves they are not monopolies. Malaysia's Competition Policy will not be against monopolistic or dominant enterprise per set but would be watching out for the abuse of the monopolistic power or dominant position.

23. The types of abusive conduct of monopolistic or dominant enterprises may include the following:

(a) To raise and maintain the price of goods or services above the level that would prevail in a competitive market. The more power a firm has to raise prices above marginal cost, the more market power it shall be deemed to have;

(b) To directly or indirectly prevent any other enterprise from competing in or entering a market by use of unfair means;

(c) To improperly set, maintain or change the price of goods or the remuneration of services; and

(d) To force or coerce a trading partner or counterpart to give preferential treatment to itself without justification.

24. However, there may be circumstances where certain behavior considered abusive by a monopolistic or dominant enterprise may be allowed. If so, the Competition Authority (usually an independent commission) needs to issue clear rules and guidelines on the types of behavior that may be authorised and those which would be per se illegal.

B. Collusive Or Concerted Action Of Enterprises

25. This would refer to cartel agreement, understanding or contract by two or more manufacturers or suppliers, forming a majority in a market, to collude or agree to limit or fix what would normally be market determined parameters such as outputs, supply, or price or when they divide the available market between themselves. Such collusive or concerned cartel types of conduct have the effect of substantially lessening competition in the relevant market and are treated as per se illegal in most existing competition laws..

26. It is felt that the policy position on the issue of cartels or collusive or concerned actions by enterprise should be per se illegal.

C. Restrictive Business Practices (Rbps) Which Create A Situation Of Unfair Competition

27. The following situations, according to international experience, have the distinct tendency of creating situations of unfair competition in the relevant market and prevent the entry of new competitors. Most of them are not however per se illegal (following international best practice) but are usually examined by the relevant Competition Law Administering Authority and authorized or disallowed according to its merits/detriment to the economy. Therefore, the following types of conduct should not be per se illegal in Malaysia but decided on a case-by-case basis. The types of conduct include:-

(i) **"predatory pricing"** – where a manufacturer or supplier aims to eliminate competitors of a certain goods or service by selling those goods or services at below cost prices for a certain period;

(ii) **"discriminatory or differential pricing"** – where the manufacturer fixes the price at which distributors must sell his products – usually minimum prices, and he will refuse or discontinue to supply the products if the distributors give discounts;

(iii) **"resale price maintenance"** – where the manufacturer fixes the price at which distributors must sell his products – usually minimum prices, and he will refuse or discontinue to supply the products if the distributors give discounts;

(iv) **"refusal to deal"** – where a manufacturer in a dominant position of market power refuses to supply or threatens to stop supplying the distributor with his products unless the distributor accepts or practices certain RBPs;

(v) **"exclusive dealing"** – where a manufacturer undertakes to provide exclusive supply to dealer in a given market (a city, region or country), thus guaranteeing him a monopoly in that market;

(vi) **"reciprocal exclusively"** – where the distributor undertakes to sell only the goods of his exclusive supplier and no-one else's;

(vii) **"tied-selling"** – where the manufacturer forces the distributor to hold more goods then he wishes or needs, where the purchaser is forced to buy more products than he wants – making the supply of particular goods or services dependent upon the purchase of other goods (especially slow moving ones) or the purchase of the whole range of the sellers' products (full-line forcing); and

(viii) **"transfer pricing"** (involving predatory pricing) – where a parent company supplies or underprices its invoices to its subsidiary to enable the subsidiary to have very low production costs/to undercut prices until its competitors are put out of business. (Then the subsidiary will have a monopoly or a dominant position of market power in the country where it operates).

H. Functions And Powers Of A Competition Law Administering Authority

28. The functions and powers of the Administering Authority (usually an independent Commission) include:
    (i) Making inquiries and investigations, as a result of receipt of complaints;
    (ii) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;
    (iii) undertaking studies, publishing reports and providing information to the public;
    (iv) issuing forms and maintaining a register, or registers, for notifications;
    (v) making and issuing regulations;
    (vi) assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy; and
    (vii) promoting exchange of information with other competition authorities.

29. Confidentiality by the Authority/Commission will be essential, especially pertaining to:
    (i) Information obtained from enterprises containing legitimate business secrets and other reasonable safeguards to protect confidentiality;
    (ii) Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation; and
    (iii) Protecting the deliberations of the government in regard to current or still uncompleted matters.

I. Sanctions, Rerlief And Appeals Under A Competition Regime

30. The imposition of sanctions under competition law should include for:
    (i) violations of the letter of the law itself;

(ii) failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) failure to supply information or documents required within the time limits specified; and

(iv) furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.

31. Sanctions to be provided for under a competition regime could include:

(i) **fines** (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by);

(ii) **imprisonment** (in cases of major violations involving flagrant and international breach of the law, or of an enforcement decree, by a natural person);

(iii) interim orders or injunctions;

(iv) permanent or long-term **orders to cease and desist** or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(v) **divestiture** (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vi) **restitution** to injured consumers;

(vii) treatment of the administrative or judicial finding or illegality as **prima facie evidence of liability** in all damages action by injured persons.

32. Appeals to be provided under competition law should only be for the following reasons:-

(i) Request for review by the Administering Authority of its decisions in the light of **changed circumstances**; and

(ii) Affording the possibility for an enterprise or individual to appeal to the appropriate judicial authority against the whole or any part of the decision of the Administering Authority, or on any **substantive point of law**.

III Conclusion

33. The aim towards introducing a competition policy and law in Malaysia should be supported. The currently existing legislations in Malaysia were not intended and are inadequate to control anti-competitive behavior or RBPs of enterprises, including collusive or cartel actions and abuses of dominant positions of market power by monopolistic or dominant firms. The existing guidelines and codes on mergers, takeovers and acquisitions also do not specifically address the issue of competition. The currently prevailing statutes are primarily aimed at promoting consumer interests but does not address the wider issue of correcting deficient market structures and abusive market behaviors which, leaving aside international pressures, is beneficial to Malaysia's economy in the long run.

Competition Policy and Law in the Consumer Interest

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Part 1: Competition Policy & Law: Setting The Context

1.1 Nature and Characteristic of Competition Policy and Law

Where markets operate freely and effectively, competition can be expected to bring benefits (encouraging firms to improve productivity, reduce prices and to innovate, whilst rewarding consumers with lower prices, higher quality and wider choice). However, when markets fail competition policy and law are the tool that are used to bring about the efficient workings of markets and to alleviate market failures.

Competition policy encompasses all government policies intended to influence competition in markets. Competition law is the legal framework to give effect to this policy. Competition law is therefore a sub-set of competition policy.

A more detailed definition that similarly treats competition law as a subset of competition policy is as follows:
"A state's competition policy is comprised of the national instruments of general applications that govern the competitive effects of commercial activity by economic actors within its jurisdiction, including laws, regulations and government policies (formal or informal), as well as derogation from such instruments or policies such as exemptions for certain types of activity or exclusions for certain sectors."[i]

Traditionally, economic efficiency[ii] has been the key aim of competition policy and competition law. Effective enforcement of this law, it is assumed, contributes inestimably to the efficient and equitable functioning of the progressive market economy that in the long-term will result in producer benefit and consumer welfare.[iii]

It is estimated that out of 145 members of the WTO, 90 member countries have implemented or put in place competition policy and law. Looking closer to the Asia Pacific region, it is estimated that some 21 countries have enacted competition laws while numerous others can be said to be progressing with theirs (see Appendix 1).

These laws have a number of characteristics that are important for the discussion that ensues:

- Competition law currently exists only at the national (or in the case of the EU, single market) level;
- The criteria for determining anti-competitive behaviour is applied in the national market only, and welfare considerations are assessed only as they affect nationals;
- Anti-competitive behaviour that affects nationals of other countries are not within the domain of national competition laws;
- As national competition laws seek to protect competition in the national market, its benefits accrue directly only to consumers at the national level;
- There is currently no mandatory international regulatory framework for competition policy *per se*.

1.2 Complexities in Implementing Competition Law

Anti-competitive practices refer to a wide range of business practices that firms or group of firms may engage in. The type of practices that are considered anti-competitive and in violation of competition law, vary by jurisdiction and on a case by case basis. Certain practices may be prohibited outright (or declared *per se* illegal), while others may be subject to rule of reason.[iv]

Generally, competition-restricting practices can be said to fall into two categories, namely horizontal and vertical restraints on competition. Horizontal restraints entail collusive conduct with other competitors in the market and include specific practices such as cartels, conspiracy, as well as pricing behaviour such as predatory pricing, price discrimination and price fixing. Vertical restraints entail supplier-distributor relationships and include practices such as exclusive dealing, geographic market restrictions, refusal to deal/ sell, resale price maintenance, and tied selling. Transfer pricing i.e. where TNCs refuse to trade with local firms who are able to supply equivalent products

at lower prices but instead with their associated firms overseas, has often been addressed from the perspective of the law of taxation because they have been seen as a means of avoiding local taxation. They are, however, anti-competitive, a genre of the category of refusal to deal. Competition authorities also pay considerable attention to mergers and acquisitions primarily because they could result in monopolies or at least a dominance that will permit anti- competitive behaviour.

Typologies and descriptions of anti-competitive behaviour are well documented.[v] This paper will concentrate instead on particular concepts as well as practices for the purpose of establishing:

- The contextual basis in the regulation of anti-competitive practices; and

- The complex set of considerations that needs to be considered in implementing competition law.

1.2.1 Abuse of dominance

The primary characteristic of a firm in a dominant position in a market is its ability to undertake conduct to a significant extent independently of its competitive rivals and its customers (whether consumers or intermediate industry participants), and thereby exert pressures that distort a competitive market. This independence generally manifests itself as the ability to independently fix prices, although it extends to the ability to fix levels or the quality of output with similar disregard for the responses of rivals and customers in the market.

Being a dominant firm in any given industry is increasingly perceived as not enough to provoke the attentions of competition watchdogs. In such a perception, observation of a dominant position within a market is by itself not a satisfactory condition to assume that there is competition policy infringement or inefficiency. Dominance within a market can denote the reward for technical innovation and entrepreneurial risk taking, important elements of economic progress and most competition authorities are at pains to avoid providing a disincentive to investment.

A famous case of this circumstances is that of Xerox photocopies. They took the risk on research and development spending to develop the first photocopying machine. Their success was rewarded by dominance in the market. Such advantage is often short lived as high profits encourage new firms to enter the market and pursue innovation of their own, in particular when a product patent expires.

Whilst market dominance is not a satisfactory condition for assuming abuse, it is a necessary pre-requisite. It is self-explanatory but necessary to point out that a firm must occupy a position of dominance in a market for it to be found guilty of abusing that dominance. As a general rule, it is very unlikely that a firm with less than 35% market share either could or would be found guilty of dominance abuse. The only exception to this is in special circumstances where for whatever reason all firms in the market are found to have particularly high levels of market power.

If market dominance is assumed then it must be shown that the firm in question is abusing that dominance. Abuses of a dominant position can take the following forms:

- Directly or indirectly imposing unfair purchase and sale prices or other unfair trading conditions
- Limiting, markets, production or technical development to the prejudice of consumers
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

Prescient examples of abuse of dominance include excessively high pricing of products in relation to the costs incurred in their production, or conversely, excessively low pricing when it is used as a means of predation upon rivals. Similarly, firms are not allowed to refuse to deal with other firms if by doing so they are able to decrease competition for the product in which they are dominant. Dominance can also be

abused by change to the structure of the dominant firm such as a take-over or merger.[vi]

The ambiguities surrounding the definition of an abuse of dominance illustrates the importance of including macro socio-economic criterion in the process of defining competitive infringements. In relation to developing countries, the dominance of a domestic firm must be considered along with its other roles within the domestic context in which it operates. Relevant in the decision making process is the social role that it fulfils, especially strong in the case of public utilities, and the cost to the national interest that is inherent when the only alternative to domestic dominance is foreign competition. Many, especially from the developing world would argue that these considerations should be of equal importance to regulators as considerations of geographic and product market and potential abuse.

1.2.2 Cartels and Collusive Behaviour

A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits, or a combination of these. Cartels are formed for the mutual benefit of member firms. The theory of "cooperative" oligopoly provides the basis for analyzing the formation and economic effects of cartels. Generally, a cartel attempts to emulate a monopoly by restricting industry output, raising or fixing prices in order to earn higher profits.

The term collusion is used to refer to informal combinations, conspiracies or agreements that seek to achieve what cartels do. As the economic effects of cartels and collusive behaviour are the same, these terms tend to be used interchangeably.

A distinction needs to be drawn between public and private cartels: in the case of public cartels, the government may establish and enforce the rules relating to such matters as prices and output. Export cartels and shipping conferences are examples of public cartels. In many countries, depression cartels have been permitted in industries deemed

to be requiring price and production stability and/or to permit rationalization of the industry structure and excess capacity. In Japan for instance, such arrangements have been permitted in the steel, aluminum smelting, shipbuilding and various chemical industries. International commodity agreements covering products such as coffee, sugar, bauxite, tin, rubber, palm and petroleum (OPEC) are examples of international cartels that have publicly entailed agreements between different national governments. Crisis cartels have also been organized by governments for various industries or products in different countries in order to fix prices and ration production and distribution in periods of acute shortage.

In contrast, private cartels involve an agreement on terms and conditions from which the members derive mutual advantage but which are not known or likely to be deducted by outside parties.

For cartels to be successful, whether public or private, there must be "concurrence", "coordination" and "compliance" among members. This means that cartel members need to be able to detect when violations of an agreement take place and be able to detect when violations of an agreement take place and be able to enforce sanctions against violators. These conditions, it was contended, are not easily met and therefore cartels can be stable and endure for very long periods. [vii] As noted earlier, collusive conduct does not necessarily have to involve an explicit agreement or communication between firms. In oligopolistic industries, firms tend to be interdependent in their pricing and output decisions so that the actions of each firm impact on and result in a counter response by the other firm(s). in such situations, oligopolistic firms may take their rivals' actions into account or overt agreement.

Factors that facilitate the formation of price-fixing conspiracies include the following:

- The ability to raise and maintain industry price. However, if entry barriers are low or substitute products exists, collusion may not be successful and firms will not have any incentive to join the conspiracy.
- Firms do not expect collusion to be easily detected or severely punished.

- Organizational costs are low. If the negotiations between firms are protracted and enforcement/monitoring costs of the conspiracy are high, it may be difficult to form a conspiracy.
- The products produces are homogenous or very similar. Uniform price agreements are not easily reached if the products differ in attributes such as quality and durability. It becomes difficult for firms in such circumstances to detect whether variations in sales are due to changes in buyer preferences or cheating by firms in the form of secret price cuts.
- The industry is highly concentrated or a few large firms provide the bulk of the product. When the number of firms is low, the costs of organizing collusion will also tend to be low. Also the probability of detecting firms that do not respect the fixed prices will be correspondingly higher. However, while it is generally easier to collude when the number of sellers is few and the product is homogenous, price fixing conspiracies[viii] can also happen in the sale of complex products.
- The existence of an industry or trade association. Associations tend to provide a basis for coordinating economic activities and exchange of information, which may facilitate collusion.

Similarly, there are factors in a given market that may limit collusion. These include product heterogeneity, inter-firm cost differences, cyclical business conditions, the existence of sophisticated customers, technological change, infrequent product purchases, differing expectations of firms, and incentives to secretly cut prices and increase market share in a move away from the pact.

By virtue of its conspiratorial nature, collusion between firms to raise or fix prices and reduce output are typically viewed by most authorities as the most serious violation of competition laws. But even here exemptions and exceptions apply.[ix] In almost all countries, associations of the learned professions (medicine, law, etc.) have effected "social contracts" which require them to supervise compliance by their members via professional codes. In exchange, the associations are permitted to determine entry and exit terms and even, limited rights to fix prices. There are also in some countries, exemptions for agricultural cartels and those that involve co-operatives or small and medium sized enterprises. In many countries export cartels are not only tolerated but also encouraged. (See Appendix 2 for a list of countries that provide

national exemptions for exporters).[x] In several countries, import cartels operate with impunity.

1.2.3. Mergers and acquisitions

A merger is an amalgamation or joining or two or more firms into an existing firm or to form a now firm. It is a method by which firms con increase their size and expand into existing or new economic activities and markets. An acquisition differs slightly - generally it is the purchase of one company by another business entity. Here, the acquired company no longer retains its own identity.

The motive for merging and acquiring may be any of these: to increase economic efficiency, to acquire market power, to diversify, to expand into different geographic markets, to pursue financial and other synergies etc.

Mergers and acquisitions are obviously not objectionable per se. In many developing countries, governments are in fact forcing mergers because it is considered that firms in a particular area are too many and inefficient. This is considered particularly urgent given the liberalization of markets and the impending entry of foreign players. The finalcial sector (banking, insurance, stock broking, etc), the non-fixed line telecommunications sector and shipping have been of special focus with governments even specifying the number of firms that would be permitted to operate after specified time periods.

Mergers and acquisitions, especially when they involve firms that operate in more than one country, pose even more problems – they have different effects in different markets.

Competition regulators have to contend with an array of considerations in arriving at decision; and the truth is in most such instances, the decisions are not even theirs to make. Governments see competition regulation as part of the policy mix for economic management. Changes in government therefore often result in a change in policies and can lead to perceptions that competition policy is being followed with less vigour. The following observation by Charles E. Mueller, editor of the

Antitrust Law & Economics Review is instructive:

"The Reagan and Bush administrations...were ideologically hostile to antitrust and the present (Clinton) administration – ...eager for "business" support – is rapidly compiling a pro-monopoly (non-enforcement) record which rivals that of the McKinley administration (1897-1901). It has virtually untended ...mergers with competitors and exclusionary (e.g. predatory) business practices."[xi]

Part 2: Protecting The Consumer Interest

The proposition that competition policy and law promotes competitive markets rather than the interests of individual competitors makes them, in a general sense, favourable from the consumer perspective. Most competition laws shun market power and anti-competitive practices. This results in positive outcomes for consumers.

But it would be wrong to treat competition policy and law as a panacea that will automatically serve the "consumer interest". To appreciate the argument it is necessary to first take a few steps back and address some preliminary questions.

2.1 Why the current emphasis?

Almost a quarter of a century ago, Dennis Swann titled his book *Competition and Consumer Protection* and argued that "It is not easy in practice to separate competition policy from that concerned with consumer protection".[xii] But neither competition regulators nor their consumer protection counterparts saw much common ground in their tasks, even in agencies that were charged with both functions.

John Vickers, the Director-General of the UK Office of Fair Trading, notes:

"There was once a time when they inhabited different worlds, moved in different political and social circles, and read different newspapers, or at least different sections of the newspaper. They seemed to be subject to different aspects of public policy and remained largely ignorant of each other's habits, thoughts and feelings.

On the one hand there was competition policy, the province of industrialists, lawyers and investment bankers, both unfathomable and irrelevant for the man on the street. Consumer policy, on the other hand, had its own audience - the general public - and own staunch defenders in the shape of consumer bodies. Indeed, once upon a time, it was even suggested that the Office of Fair Trading (OFT) itself was a double- headed hydra, with some staff wearing competition hats and others consumer hats.
But things are now changing and for the better. Competition is increasingly being recognised as a core consumer issue." [xiii]

Indeed the competition-consumer protection interface is now very much emphasised. A number of developments have provided the impetus for this.

The first relates to the entrenchment of the free market concept. In the 1980s and particularly the 1990s, many developing countries underwent far reaching market oriented reforms leading to a considerable whittling down of the role of the state in economic activity through widespread privatization, deregulation, and internal and external financial liberalization. Structural adjustment programmes saw this being even extended to such areas as health and education. It is estimated that between 1990-1997, the leading developing countries with privatization proceeds worth more than US$1 billion were Argentina ($27.9 billion), Brazil ($34.3 billion), Colombia ($5 billion), India ($7.1 billion), Indonesia ($5.2 billion), Malaysia ($10 billion), Mexico ($30.5 billion), Pakistan ($2 billion), Peru ($7.5 billion), Singapore ($1.9 billion), South Africa ($2.5 billion), Turkey ($3.6 billion), Thailand $3.6 billion), and Venezuela ($5.9 billion).[xiv] Privatisation meant that the social objective goals of government ownership could not be sustained. In particular, privatising natural monopolies did not lead to greater social welfare when all it meant was replacing a public monopoly with a private one. If it is the market that was to be relied on, then it had better be an efficient market. Competition policy and law came to be seen as an additional tool of consumer protection.

Secondly, an ever increasing number of international as well as regional agencies made an explicit commitment to competition policy and law and in their effort to promote competition policy and law, have emphasised the role these can play in consumer protection. Consumer issues have therefore been forced to the forefront. Examples of these organizations are the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO), the Asia Pacific Economic Community (APEC), the International Competition Network (ICN) and the International Bar Association's

(IBA) Global Forum. Appendix 3 provides a background to these various organizations as well as their stated positions on competition policy.

Lastly, many developing countries also have had competition policy and law thrust upon them. For a number of Asian economies, this occurred after the economic crisis of 1997. Financial aid packages meted out by the International Monetary fund (IMF) were made contingent on the adoption of certain domestic measures, among them competition policy and law. Thailand and Indonesia are two nations affected by this condition put forth by the IMF.

There has also been significant bilateral pressure from the US as well as the EU for the adoption of trade liberalizing measures, to which the adoption of competition policy and law have been tied. Regional agreements have also served to extend their adoption.

Consumers did not campaign for competition policy and law. But this is in place and consumers and their representative organisations have begun to organise their response. Some see it as a panacea, others remain deeply skeptical.

2.2 What is the consumer interest?

Competition policy and law, when effectively enforced can result in lower prices, better quality and better choice. Reduced prices mean increased access, especially if they are in the goods that the lower income purchases. These are clearly of prime consumer interest.

Consumers however are not just economic beings – they are also social and political beings governed by their political orientations and sense of ethics. There are therefore important differences in the criteria that different consumers use to evaluate products. Product images and patronage vary as much as purchasing orientations and strategies.

"Economic shoppers" are extremely sensitive to price and quality, indeed to such shoppers, price and quality is decisive in affecting evaluation. Not so for "ethical shoppers". They are willing to sacrifice lower price or a wider selection of products to help a cause or make a statement. Consumers do show a concern for and act in support of far broader concerns than maximising economic gains. Boycott of offending corporations and governments, and support for environment friendly products and animal rights campaigns through

purchasing behaviour have proven successful. These are calls on the consumer as a social and political being.

Using consumer purchasing-behaviour as a "political tool" is a feature not only of our times. Witkowski[xv] points out that the first organised consumer revolt in the US occurred even before the country was founded. Settler in the 1760s fought to reverse imperial policies by boycotting imported goods. The colonists protested British taxes on stamps, glass, paint, paper and tea. Over a 12-year period, many consumers gave up imported tea, liquor, ribbons, laces and silks. This colonial era experience gave birth to the traditions of the US consumer movement. Some groups may have chosen the path of protectionism but many have grounded their efforts on a proud tradition of equity and human rights. It is the latter tradition that has spawned some of the staunchest supporters of the "Southern position" in the current critical debate on trade related issues.

The American anti-colonial experience is however not unique. The struggle for independence in much of Africa, Asia and Latin America saw consumer boycotts as a crucial part of the anti-colonial struggle. Mahatma Gandhi's call for homespun cotton was similarly a consumer boycott.

For consumer groups in the South, however, interest in issues of equity and human rights is not a matter merely of tradition, it is an interest based on the practical reality in which they live. Empathy with the marginalised and less fortunate is required because poverty, deprivation, exploitation and injustice are the stark reality that confronts these groups. Most southern groups very early on rejected the "value for money" paradigm which in their context served the interest of the privileged and shifted to a "value for people" paradigm. This shift necessarily means an emphasis on the consumer as not just an economic being seeking the best economic outcomes in the market place but also as a social and political being seeking social and political outcomes. This has probably been stated often enough, but what is not generally known is that even consumer protection statutes of the developing world reflect this slant.

Appendix 4 provides a list of consumer protection law provisions of Asia that provide a broad definition of the term consumer. Some highlights are as follows:

In India, Section 2 (1) (d) of the Consumer Protection Act, 1986 provides the same degree of protection to purchasers of goods and services bought

exclusively for earning a livelihood, as it does those who buy for household use. This extends the protection to the self-employed, thus including in its scope amongst others, farmers, fishermen, hawkers and petty traders, as long as they are self-employed.

In the Philippines, Article 4 of the Consumer Act of the Philippines, 1990 covers consumer goods and services as used "primarily for personal, family, household or agricultural purposes". This expands the definition of the term consumer to include those in the agricultural sector.

In China, the Law of the People's Republic of China on the Protection of Consumer Rights and Interests 1993, extends to "peasants who purchase means of production for direct agricultural uses" all the rights conferred on the consumer.

Article 1 (2) Law of the Republic of Indonesia Number 8 1999 also takes a wide definition of the consumer to include goods and services bought for purposes of trade.

The Vietnam Ordinance on the Protection of Consumer's Interest, 1999 and the Consumer Protection Act 1998 of Nepal include within the definition of consumer, an" organization" and "institution" respectively, buying or using goods and services for its own consumption.

In South Korea, Article 2 of the Consumer Protection Act 1986 permits for an extension of the definition of the consumer by Presidential decree. This power has been exercised to extend such protection to small-scale agriculture (including livestock) and fishery activities.

In Malaysia, Section 3 of the Consumer Protection Act 1999 covers consumer goods and services as acquired for personal, domestic or household purpose. Consumers are concerned with much more than price, quality and choice, and the consumer movement's brief extends to ensuring human rights and equitable distribution of benefits. They call for equitable arrangements that address the legitimate claims of the other poorly represented underprivileged groups in their respective societies. They are deeply concerned with development. They will come to reject competition policy and law unless it can be established that its adoption will not compromise the development goals of developing countries.

2.3 Requisites for Consumer Protection

Even meeting the limited definition of consumer interest (choice, lower prices and better quality) is not an inevitable corollary of competition policy and law. For consumer welfare to be made a lynchpin of competition policy and law, certain requisites need to be put in place, such as:

2.3.1 A consumer protection objective

Appendix 5 provides a list of some social and economic objectives of competition law as identified by the WTO Secretariat. Appendix 6 provides an analysis of the objectives of competition policy; either as explicitly stated in the legislation or policy statements of various countries, or implicitly in specific legal texts.

As an explicit objective, the Canadian legislation stipulates "...*to provide consumers with competitive prices and product choices",* a phrase that is repeated in the South African legislation as well. Likewise, South Korean legislation refers to "...*protecting consumers...*"as does the Australian Trade Practices Act.

Japanese legislation provides an interesting case where the consumer interest is mentioned not as a direct objective of its Anti-Monopoly Act, but as the ultimate objective, i.e."...*and thereby to assure the interests of consumers in general, and also to promote the democratic and wholesome development of the national economy."* Kobayashi states that this differentiation between direct and ultimate objectives within a detailed and complex objectives provision is the result of catering for competition law 50 years ago in Japan, at a time when it was relatively unknown to political leaders, government officials and the general public.

However, on the question of whether maximizing consumer welfare should be given the highest priority, Kobayashi states that the strongest support in Japan is for the view that "consumer welfare" is not the objective of competition policy, but that competition policy is consumer welfare enhancing.

The objectives of any law are meant to have a decisive impact on the

interpretation and application of that law in particular cases. Yet, not all competition legislation explicitly provides in their objective clause for the consumer interest to be considered. Even when they do, consumer welfare is one of several objectives. Given that the various objectives may in operation be mutually exclusive, it is uncertain as to what competition authorities will give precedence to. For example, if efficiency-enhancing arrangements among competitors is a permissable practice, it is possible that such agreements may be permitted even in circumstances where the transaction results in higher consumer prices. Alternatively, if consumer welfare is the paramount objective, it is possible such a transaction would nevertheless be prohibited if it also results in moderately higher prices.

The fact is objectives may be stated or unstated, attempts will be made to prioritize these and discretion, if not even arbitrariness, is inevitable. Different objectives may lead to divergent results in different instances. If indeed the consumer interest is to be emphasized, it must be so clearly recognized in competition policy and law in its application thereof.

2.3.2 Making Explicit the Consumer Gains

Competition authority reports often carry details of the authorities' activities. They enumerate the sectors or firms focussed on and the decisions arrived at. In some, the penalties imposed are stipulated. What most reports lack is an assessment of the tangible benefits that accrue to consumers from the activities of the agencies.

In competition law, the term 'consumer' refers to all categories of consumers and not only the ultimate user of goods and services. This is not generally appreciated. It is assumed that only the ultimate consumer is being addressed. This is especially a concern since competition- enhancing measures may not benefit the ultimate consumer but instead may be absorbed by intermediaries. Consumer prices are particularly sticky when on a downward slide.

The reports also need to list the complaints received from consumers and the consequent remedial action. Part of the regulatory framework

should provide for a reporting mechanism where positions are discussed in a consultative manner and findings made public.

2.3.3 Empowering the Consumer

Competition authorities exhort consumers to be vigilant, to complain and to inform in relation to anti-competitive behaviour. Yet, there is often not the willingness to recognise consumer involvement and participation as a right. More specifically, there has not been a willingness to permit challenges to the decisions of competition authorities' to not take action, or findings in favour of particular competitors.

Individual consumers and their representative organisations have in many jurisdictions been granted the required standing (*locus standi)* to appear in consumer related matters. This is not only in specially created consumer dispute forums but also in the ordinary courts. Granting such standing has increased the number of cases filed including on behalf of those otherwise unable to exercise their rights. This very progressive feature of modern consumer law is not however a feature of competition laws, even in countries that have only recently legislated for them. Permitting consumers and their representative organisations the required standing will permit them to play a supportive role in competition law enforcement.

The enforcer role of the consumer is achieved not only by expanded rules of standing. Other Innovative approaches can and need to be evolved. An example of such is the provision in the consumer protection law of China which enables the consumer to claim from the seller twice the price paid if it is established that the product purchased is an imitation. Each consumer thus becomes an enforcer of the law. Revisiting the penalty provisions of competition law may offer similar opportunities.

For competition law to truly serve the consumer interest there must be the willingness to allow consumers to go beyond their role as complainants and informants. They need to be empowered to play the more active role as enforcers of the law. Providing them an enabling

environment and the required standing and other avenues is an essential requirement.

2.3.4 Focus on the demand side

For the market system to operate optimally it is axiomatic that there must be a focus on both the supply and demand sides. The traditional approach is for competition regulators to focus on the supply side and consumer regulators to focus on the demand side. Such a dichotomous approach has led to narrow conceptions of what constitutes anti-competitive behaviour and limited approaches to address such behaviour.

Consumer choice is critical for competition. For consumers to exercise that choice the options must be known to the consumer and the consumer must be able to exercise choice. The fact is that even if a substitute of a lower price is available consumers do not always exercise their choice.

To understand this phenomena it is necessary to focus on consumer behaviour, in particular search behaviour (i.e. how much consumers search and how many players they search amongst) and switching behaviour (i.e. how they respond to differences in prices and other desired characteristics of products offered by competing players in the industry). These two features of consumer behaviour impact directly on competition.

The following examples will serve to illustrate the point. A survey carried out for the UK Consumers' Association by Delgado and Waterson of the replacement tyre industry showed that 71% of customers wanting to buy tyres contact no other outlet apart from the one at which they buy, and this despite the same tyre costing 40% more, than in a store approximately 500 metres away.[xvii]

Waterson provides more illustrative examples – current account banking, motor insurance, electricity supply and contraceptive sheaths. Having considered the rates of switching in these various industries and the possible causes for the variations in rates, he concludes that

there is a considerable challenge for policy:

"I have argued that in some cases, the most efficacious policy measures in terms of developing competitive outcomes have been through standard-setting and through making pricing behaviour more transparent, and that the alternative actions of competition authorities in seeking behavioural remedies have not been particularly useful. Competition authorities also need to embrace the idea that consumers may need substantial assistance in challenging established players. Thus, the role of competition authorities might usefully be extended to encompass actions designed to spur consumers into forcing industries to operate more effectively". [xviii]

There is thus an important role for policy measures to strengthen consumer protection, in particular by improving the information made available and rooting out prohibitive switching costs. The latter calls for, amongst others, an examination of the terms and conditions imposed in consumer contracts, or are read into them because they have become "custom" (for instance in banking, insurance, etc.) that make switching between players expensive and cumbersome.

Part 3: Competition Policy and Law in The Context of Developing Economies

3.1 Implementation Challenges

The foregoing is testimony to the fact that competition law is arguably one of the more difficult regimes to implement effectively particularly because it cannot be applied 'uniformly'. All law has to be applied on a case by case basis, but competition law calls for a myriad of considerations, many of which are subjective and imprecise in nature. Moreover competition law confers immense power and it has to be ensured that this power is exercised competently and honestly. Successful implementation of competition law is therefore contingent on certain requisites being in place:

- A high degree of economic and legal sophistication on the part of the enforcement agency and on the part of the courts and/or specialised

tribunals that have judicial functions in the implementation of competition law.

As noted earlier, competition law is highly complex. It calls for a deep understanding of economics and the application of that knowledge on a case-by-case basis. In antitrust cases, for instance, there has to be an understanding of the "relevant market", the percentage share of every firm in it, and identification and measurement of each "entry barrier" around it. It has to be demonstrated exactly how this overall structure – of the entire industry or market – is going to be so drastically altered by the defendant's predatory act that consumers will thereafter be doomed to pay long-term inflated (monopoly) prices. The sophistication required is critical as wrong evaluations can drive decisions the wrong way. Training a core of administration experts to confidently handle such tasks is difficult. An even more Herculean task is the required retraining of a judiciary woefully ignorant of economics to competently adjudicate competition cases.

- High levels of administrative and judicial independence from corrupt practices and political and other influences.

Corrupt practices result in perverse decisions that may favour particular firms and, given the high stakes involved, is a particular concern in relation to the implementation of competition law. It must be emphasised however that influence is not achieved by corruption alone, at least not as it is narrowly defined. There are other insidious ways of influencing decisions. In relation to the judiciary this can begin with the process of appointing judges and extend to their subsequent training. The observations of Charles E. Mueller, Editor of the Antitrust Law & Economics Review, as regards the US judiciary are instructive as to how induction to particular viewpoints occur:

"'Repealed by the Judges'

[A] ... number of major corporations and corporate foundations were persuaded to finance a "law and economics" movement that includes a series of 2-week economic "seminars" for the federal judges (at over $5,000 per judge, all-expenses paid at Florida luxury resorts) taught by a group of hand-picked economics professors from the University of Chicago and similarly "conservative" campuses, with no

opportunity for economists of opposing views to participate. In the 20 years since this judicial teach-in began (1976), over 2/3rds of the entire federal bench has attended these indoctrination programs. Over that same period, those judges have transformed American anti-trust law, in effect legalizing anticompetitive mergers and the various monopolization techniques Congress had legislated against. Today only a handful of antitrust cases are filed each year and a recent study found no victories for the plaintiffs involved. On the books, the laws still read the same as they did in 1976; in practice, they've been repealed by the judges.

'Constitution Was Wrong'

How did the judges do it? First they took away the right to a jury trial. Under the U.S. Constitution (7th Amendment), "the right to a fair trial by jury shall be preserved," but the judges decided on their own – after their new "economic" training – that, in antitrust cases, the Constitution was wrong. So they began to either dismiss antitrust complaints as insufficient on their face or (again before trial) by simply deciding they didn't believe the plaintiffs could prove what they were alleging (granting "summary judgement" for the defendant). In the handful of cases that were actually allowed to go to trial, the judges have either granted a "directed verdict" for the defendant at the end of the plaintiff's case or, after the jury had returned a verdict for the plaintiff, set it aside ("judgement notwithstanding the verdict") on the ground that they didn't think it was "reasonably" supported by the evidence presented. In the rare case where an antitrust plaintiff has been allowed to go before a jury and hasn't had his jury verdict set aside by the trial judge, the court of appeals has almost uniformly overturned it (for alleged flaws in either the law as applied by the trial or in the evidence).[xix]

These are serious allegations. It would be unreasonable to assume that other jurisdictions do not or will not face similar problems with competition law implementation

- Adequate financial resources to marshal the necessary technical and professional expertise to assess and prosecute contravention.

A major challenge in implementing competition policy and law is the

capacity constraints of the competition authorities themselves. An independent, well-resourced regulator is essential in order to upkeep the key principles of good regulatory decision-making, namely transparency, objectivity, professionalism, efficiency, independence, effectiveness, and accountability. In developing countries such resources are unfortunately of limited supply. There is concern that the establishment of new agencies or the assignment of new tasks to existing agencies will see a diversion of resources available for implementation and enforcement away from more critical areas, including consumer protection. This is not an unfounded fear. In many developing countries the enforcement of intellectual property laws has been stepped up because of U.S. and EU coercion. Intellectual property laws when enacted came under the purview of Ministries of Trade or Commerce that are also responsible for consumer protection. Consumer leaders attest to a diversion of enforcement capacity in the Ministries concerned away from consumer protection to intellectual property – in effect away from enhancing consumer welfare to securing the interest of a select group of entrepreneurs and enterprises. The concern is that developing countries will, by introducing competition regulation, cause a similar diversion of enforcement capacity.

3.2 Should developing countries implement competition laws?

Given a deficit of the foregoing requisites, are developing countries and in particular least developed countries, in a position to implement competition laws?

There are those who argue passionately against the introduction of competition law, not only because the countries concerned lack the requisites but more so because of the fear that it will hamper the flexibility with which these nations can meet their development goals. They contend that competition law is inherently biased towards a wide-open free-market model inappropriate for developing countries, and would hinder developing countries in their "catch-up" policies and their efforts to create "national champions". There is particular concern that the effort to get on board competition law is but part of the scheme for foreign corporations to prize open the markets of these countries.

Yet, very cogent arguments can be put forth for competition policy and law in these countries. Pradeep Mehta argues that competition policy promotes good governance in the corporate sector as well as governments by

diminishing the opportunities for rent-seeking behaviour and corruption respectively. Governments intervene when markets fail. In the absence of a clearly defined competition policy and regulatory mechanism, the intervention can be arbitrary and worse, serve vested interests rather than consumers.

Developing countries have liberalised and deregulated and are continuing to do so. This has resulted in many Corporatised State Owned Enterprises (SOEs) enjoying monopoly power in the market. In the absence of competition policy and an appropriate regulatory mechanism, privatization will simply mean the transfer of monopoly power from the public to the private sector.

An added reason relates to international anti-competitive practices. Such practices are harmful to developing nations. International cartels of private firms engage in restrictive business practices designed tolimit competition in international trade. Cross-border mergers and acquisitions do lead to market dominance in developing countries. Developing countries cannot even begin to address these problems without competition legislation.

Competition policy and law offers developing nations an added tool to manage their affairs. Very importantly, competition policy and law must not constrain the range of other developmental and industrial policy tools available. It must not compromise the development goals of the countries concerned.

In examining the inter-relationship between competition policy and economic development, Singh and Dhumale [xxi] urge developing nations to be mindful of particular developmental and social welfare concerns. Among others, they state that:

- It is important for developing countries to have a competition policy which is designed to take appropriate account of their level of development and the long term objective of sustained economic growth;

- A "one size fits all" approach is wholly inappropriate in developing competition policy and law. There needs to be a distinction made between countries at low levels of development and hence meager institutional capacity on the one hand, and semi-industrialised countries with greater institutional capacity on the other hand. It is also important that the special circumstances of small economies, in particular island economies that are handicapped by isolation and high transport costs are considered;

- In particular, US/UK-type competition policies are not appropriate for developing countries as there are major differences amongst them not just regarding policy but also their underlying philosophies, legislative practices as well as modes of implementation;

- An appropriate competition policy model for developing countries to follow from the perspective of economic development may be that of Japan, which over the 1950-73 period evolved its industrial policy and consequently its competition policy in a coherent fashion. Japan's starting point was very much akin to the developing nations of today, fraught with low levels of industrialization and economic development.

- In considering competition policy from a developmental perspective, Singh and Dhumale argue that new concepts may need to be adopted going forward, particularly in the lexicon of international trade bodies such as the WTO and OECD.[xxii]

Yet another interesting discussion of the concerns of developing economies regarding competition policy, this time from a regulator's perspective,[xxiii] is provided by Hisami Kurokochi . His observations about the following are significant:

- The political-cum-social impact of competition policy

  Kurokochi admits that there is truth in the claim that competition policy could lead to increased unemployment and endanger incumbent industries and enterprises. This is especially so as competition necessarily expels inefficient enterprises from the market resulting in bankruptcies and unemployment. Conversely, he notes that it is also true that anti-competitive practices, if overlooked, can raise prices and burden consumers as well as user industries

  A desirable approach he states, is to increase national economic welfare by activity implementing competition policy on the one hand, and minimizing its negative impact on the other through the creation of new industries, promoting job mobility and providing relief measure to the unemployed:

  "The Government should also deepen the understanding of businesses

and the general public that competition policy would produce more economic advantage than disadvantage in the long run, and that the short-run cost of competition policy could be compensated by taking appropriate counter-measures without suspending competition policy."

He cites the Japanese Cabinet's attempts to counter the effects of its long recession through the adoption of a programme called "Strategy for Revitalizing Industries" in January 1999. This programme aims at creating employment opportunities and new businesses as well as expanding investment for increasing productivity.

- The priority between competition and industrial and other policy objectives

  On the questions of policy priority i.e. "first development by industrial policy, then competition policy" or vice versa, Kurokochi advises that the promotion of competition policy in domestic markets (i.e. removal of anti-competitive practices) should be considered separately from the diminishing of trade barriers. In fact, he argues that competition policy becomes more important for economic growth in closed markets that cannot have the benefit of trade liberalization. He cites the case of the highly successful Japanese auto industry where competition in the domestic market preceded trade liberalization.

Kurokochi also addressed the issue of resource constraints of competition authorities in developing economies and proposes that competition policy should be implemented in a staged manner, as competition agencies need to strengthen capacities and build the trust of the public. In a staged development policy, developing economies should focus on restriction of horizontal cartels and competition advocacy in the first stage, mergers and vertical restraints in the second stage, and regulatory reform in the third stage.

Part 4: Conclusion

It is a reality that barriers exist which prevent the entry of new firms and the ability of existing firms to adjust to changing market conditions. These barriers can result from a variety of sources – information asymmetries between competing firms regarding market and technology, economies of scale, regulation and the use of anti-competitive practices by incumbent firms. It is this latter danger posed by market players distorting or even eliminating competition that has been the mainstay of competition policy and law. Increasingly, competition authorities have also focused on regulation that distorts competition.

This paper argues that while the argument in favour of national-level competition policy and law may already have been won, there is not adequate clarity as to how that policy and law can be made to benefit the consumer. At least four requisites must be in place for the consumer interest to be upheld:

- enshrining a consumer protection objective in competition legislation,
- making it obligatory for competition authorities to explicitly report on consumer gains,
- empowering the consumer to enforce the law through such means as expanded rules of standing, and
- Urging competition regulators to focus on the demand side of the market system and not just the supply side.

In sense the jury is still out on the implications of adopting competition policy and law in the context of developing economies. On one hand, there are those who are vehemently against the introduction of competition law. An important reason for this is that such a law could hamper the flexibility with which developing nations can

Whatever the course charted, it should be of primal concern to developing economies that the implementation challenges are immense. Competition law is a complex and difficult law to put in place and enforce. A sound understanding of its challenges can help ensure that a robust regulatory mechanism that has the trust of the public is put in place, even if gradually so.

i Milos Barutciski, Davies Ward Philips & Vineberg LLP, Toronto, Canada, September 2002. this definition is contained in a Technical Paper entitled "Proposed WTO Negotiations on Competition Policy: The implications for Consumer Interests" commissioned by Consumers International.

ii In the context of industrial economics and competition law and policy, efficiency relates to the most effective manner of utilizing scarce resources. Theory typically differentiates between 2 types of efficiency, the technological (or technical) and economic (or allocative). Economic efficiency arises when inputs are utilized in a manner such that a given scale of output is produced at the lowest possible cost. An increase in efficiency occurs when an existing or higher scale of output is produced at lower cost. In competition terms, efficiency increases the probability of business survival and success and the probability that scarce economic resources are being put to their highest possible use.

iii Consumer welfare refers to the individual benefits derived from the consumption of goods and services. It is seen differently from consumer surplus, which in applied welfare economics is defined, as a measure of aggregate consumer welfare. This paper, however, uses the term "consumer interests", which can be interpreted as being synonymous with consumer welfare.

iv Rule of reason refers to a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. Some market restrictions, which prima facie give rise to competition issues, may on further examination be found to have valid efficiency-enhancing benefits. The opposite of the rule of reason approach is to declare certain business practices *per se* illegal i.e. always illegal. In some jurisdictions such as the US, price fixing arrangements and resale price maintenance are *per se* illegal, whereas in Canada, the negative effects must cover a substantial part of the market.

v This section draws heavily from Khemani R.Shyam & Shapiro D.M., "Glossary of Industrial Economics and Competition Law", Published by OECD/The World Bank.

vi Pinci, Marcantonio & Sistilli, Anthony; "The Abuse of Dominant

Position Under Article 86 of the Treaty of Rome (2001)"

vii OECD, "Fighting Hard-Core Cartels, Harm, Effective Sanctions And Leniency Programme," 2002. this is one of a series of publications on gard-dore cartels issued by the OECD.

viii Khemani and Shapiro (op.cit) cite the example of the US electrical equipment industry which saw collusion among 29 different companies selling diverse technical products such as turbine generators, transformers, switch gears, isulators, controls and condensers. Similarly, through agreement on product specification and standards, US steel producers were able to collude successfully for some time.

ix See also Khemani, R. Shyam, "Application of Competition Law: Exemptions and Exceptions", UNCTAD, 2002.

x The Appendix is taken from a paper prepared for UNCTAD by Evenett, Simon J., of the World Trade Institute, Bern, Switzerland, entitled "Can Developing Counties Benefit from WTO Negotiations on Binding Principles for Hard Core Cartels", 20 February 2003.

xi Mueller, Charles E. (Editor-in-Chief) Antitrust Law & Economics Review Homepage, www.metrolink.net/-cmueler/dfault.html

xii Swann, Dennis, "Competition and Consumer Protection", Penguin Books, 1979.

xiii Vickers, John, Healthy Competition and Its Consumer Wins, "Consumer Policy Review", Jul/Aug 2002, Volume 12, Number 4.

xiv World Development Indicators, 1999. As cited in Ajit Singh, Rahul Dhumale, "Competition Policy, Development and Developing Countries", TRADE Working Paper 7, South Centre, November 1999.

xv Witkowski, Terence H., "Colonial Consumers In Revolt: Buyer Values and Behaviour During The Nonimportation Movement 1764-1776", The Journal of Consumer Research Vol. 16, Issue 2 (Sep., 1989), 216-226.

xvi Kobayashi, Hideaki (Deputy Secretary-General, Fair Trade Commission of Japan), "Competition Policy Objectives – A Japanese View", Paper presented at Competition Workshop, Florence, Italy, June 13-14, 1997.

xvii Delgado,Juan and Waterson, Michael, "The Determinants of Retail Tyre Price Dispersion In the UK", *1999* www2.warwick.ac.uk./fac/soc/economics/staff/faculty/waterson/publications

xviii Waterson, Michael (University of Warwick, UK), "The Role of Consumers in Competition and Competition Policy", Paper prepared for a plenary session at the EARIE meeting in Trinity College, Dublin, August/September 2001.

xix Mueller, Charles E. *op cit.,* Antitrust Overview, " Laissez-faire, Monopoly and Global Income Inequality: Law Economics, History and Politics of Antitrust".

xx Pradeep Mehta (CUTS Centre for International Trade, Economics and Environment, Jaipur, India), "Competition Policy in Developing Countries: An Asia-Pacific Perspective", Bulletin on Asia-Pacific Perspectives 2002/03.

xxi Ajit Singh, Rahul Dhumale, "Competition Policy, Development and Developing Countries", TRADE Working Paper 7, South Centre, November 1999.

xxii Amongst others, Singh and Dhumale state that:

- the emphasis should be on dynamic rather than static efficiency as the main objective of competition policy;
- to promote long term growth of productivity, there should be a concept of "optimal degree of competition" rather than maximum competition;
- there should be a related concept of "optimal combination of competition and co- operation" between firms so that developing countries can achieve fast long term economic growth;
- the critical need to maintain the private sector's propensity to invest at high levels requires a steady growth of profits. For this to occur, there is a need for government coordination of investment decisions which in turn requires close co-

operation between governments and business;

there should be recognition of the concept of "simulated competition", which involves contests among those seeking state support, which are a powerful alternative to real market competition.

xxiii Hisami Kurokochi (Commissioner of the Japan Trade Commission), "The Relationship Between Economic Development and Competition Policy", Paper presented at the 6th Asian and Oceanic Antimonopoly Conference, Canberra, Australia, November 1999.

Appendix I

ENACTMENT OF COMPETITION LAW IN ASIA-PACIFIC COUNTRIES

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

Sources:
APEC Competition Policy and Law Database, www.apeccp.org.tw, 2003
International Bar Association's Global Competition Forum, www.globalcompetitionforum.org, 2003

Appendix 2

NATIONAL EXEMPTIONS TO COMPETITION LAW FOR EXPORTERS

Country	Exemption for...	Reporting Requirement
Australia	Contracts for the export of goods or supply of services outside Australia	Submission of full particulars to the national authority within 14 days
Brazil	Joint ventures for exports, as long as there are no effects on the Brazilian market	Must be approved by the national authority
Canada	Export activities that do not affect domestic competition	None
Croatia	Agreements that contain restrictions aiming at improving the competitive power of undertakings on the domestic market	Prior notification of the agreement to national authority within 30 days of the conclusion of the agreement
Estonia	Activities that do not affect the domestic market	None
Hungary	Activities that do not affect the domestic market	None
Japan	Agreements regarding exports or among domestic exporters	Notification and approval of industry administrator required
Latvia	Activities that do not affect the domestic market	None
Lithuania	Activities that do not affect the domestic market	None
Mexico	Associations and cooperatives that export	None
New Zealand	Arrangements relating exclusively to exports and which do not affect the domestic market	Authorization required
Portugal	Activities that do not affect the domestic market	None
Sweden	Activities that do not affect the domestic market	None
United States	Webb-Pomerene Act: Activities that do not affect domestic competition. Export Trading Companies Act: Strengthened immunities granted by Webb-Pomerene Act.	Webb-Pomerene Act: Agreements must be filed with the US Federal Trade Commission. Export Trading Companies Act: Certificates of Review provided by US Department of Commerce.

Appendix 3

INTERNATIONAL ORGANISATIONS DEALING WITH COMPETITION POLICY ISSUES

1. Organisation for Economic Cooperation and Development (OECD) www.oecd.org

Overview

OECD is international organisation helping governments tackle the economic, social and governance challenges of a global economy.

The OECD groups only 30 member countries sharing a commitment to democratic government and the market economy. With active relationships with some 70 other countries, NGOs and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation.

The OECD plays a prominent role in fostering good governance in the public service and in corporate activity. It helps governments to ensure the responsiveness of key economic areas with sectoral monitoring. By deciphering emerging issues and identifying policies that work, it helps policy-makers adopt strategic orientations. It is well known for its individual country surveys and reviews.

The OECD produces internationally agreed instruments, decisions and recommendations to promote rules of the game in areas where multilateral agreement is necessary for individual countries to make progress in a global economy. Sharing the benefits of growth is also crucial as shown in activities such as emerging economies, sustainable development, territorial economy and aid.

Dialogue, consensus, peer review and pressure are at the very heart of OECD. Its governing body, the Council, is made up of representatives of member countries.

Competition Policy

OECD work on competition law and policy actively encourages decision-makers in government to tackle anti-competitive practices and regulations and promotes market-oriented reform throughout the world.

Improving national competition law enforcement efforts and increasing international cooperation in competition law enforcement are regular themes of OECD work. Currently, the focus is on tougher enforcement against cartels and simpler reporting requirements for mergers.

2. The World Trade Organisation (WTO) www.wto.org

Overview

The WTO is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

The WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably. It does this by:

- Administering trade agreements
- Acting as a forum for trade negotiations
- Settling trade disputes
- Reviewing national trade policies
- Assisting developing countries in trade policy issues, through technical assistance and training programmes
- Cooperating with other international organizations

The WTO has more than 140 members, accounting for over 97% of world trade. Around 30 others are negotiating membership. Decisions are made by the entire membership. This is typically by consensus. A majority vote is also possible but it has never been used in the WTO, and was extremely rare under the WTO's predecessor, GATT. The WTO's agreements have been ratified in all members' parliaments.

The WTO's top-level decision-making body is the Ministerial Conference, which meets at least once every two years.

Competition Policy

Work in the WTO on investment and competition policy has largely taken the form of responses to specific trade policy issues, rather than a look at the broad picture.
During the 1996 Ministerial Conference in Singapore, ministers decided to set up two working groups to look more generally at the relationships between trade, on the one hand, and investment and competition policies, on the other.
The working groups' tasks are analytical and exploratory. They will not negotiate new rules or commitments. The ministers made clear that no decision had been reached on whether there will be negotiations in the future, and that any discussions cannot develop into negotiations without a clear consensus decision.

3. The International Bar Association's Global Forum www.ibanet.org www.globalcompetitionforum.org

Overview

In its role as a dual membership organisation, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organisations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

Grouped into three Sections - Business Law, Legal Practice, and Energy & Natural Resources Law - more than 60 specialist Committees provide members with access to leading experts and up to date information as well as top-level professional development and network-building opportunities through high quality publications and world-class Conferences.

Competition Policy

Founded in 1991, the International Bar Association's Global Forum for Competition and Trade Policy consists of a group of experts representing the key interests of economists, lawyers, academics, practitioners and national and international policy-makers who are committed to expanding the global discussion of the ramifications of competition policy for global trade and investment.

4. United Nations Conference on Trade and Development (UNCTAD) www.unctad.org

Overview

Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and the interrelated issues in the areas of finance, technology, investment and sustainable development. UNCTAD is a forum for intergovernmental discussions and deliberations, supported by discussions with experts and exchanges of experience, aimed at consensus building. UNCTAD undertakes research, policy analysis and data collection in order to provide substantive inputs for the discussions of experts and government representatives. UNCTAD, in co-operation with other organizations and donor countries, provides technical assistance tailored to the needs of the developing countries, with special attention being paid to the needs of the least developed countries, and countries with economy in transition.

5. The International Competition Network (ICN) www.internationalcompetitionnetwork.org

ICN is a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. ICN will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. ICN's activities will take place on

a voluntary basis and rely on the high level of goodwill and cooperation among those jurisdictions involved. ICN will build on the many excellent contacts that already exist among the organizations concerned. The work of ICN will be project-driven. During its regularly scheduled meetings, ICN will decide which projects it will pursue and will adopt a work plan for each project. ICN is not intended to replace or coordinate the work of other organizations, nor will it exercise any rule-making function. ICN will provide the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress meetings. Where ICN reaches consensus on recommendations arising from the projects, it will be left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

Membership of ICN Members is national or multinational competition agencies entrusted with the enforcement of antitrust laws. Only members will participate in the internal decisions necessary for the organization and the operation of the ICN.

Competition Policy

Founded in 1991, the International Bar Association's Global Forum for Competition and Trade Policy consists of a group of experts representing the key interests of economists, lawyers, academics, practitioners and national and international policy-makers who are committed to expanding the global discussion of the ramifications of competition policy for global trade and investment.

4. United Nations Conference on Trade and Development (UNCTAD) www.unctad.org

Overview

Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and the interrelated issues in the areas of finance, technology, investment and sustainable development. UNCTAD is a forum for intergovernmental discussions and

deliberations, supported by discussions with experts and exchanges of experience, aimed at consensus building. UNCTAD undertakes research, policy analysis and data collection in order to provide substantive inputs for the discussions of experts and government representatives. UNCTAD, in co-operation with other organizations and donor countries, provides technical assistance tailored to the needs of the developing countries, with special attention being paid to the needs of the least developed countries, and countries with economy in transition.

5. The International Competition Network (ICN) www.internationalcompetitionnetwork.org

ICN is a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. ICN will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. ICN's activities will take place on a voluntary basis and rely on the high level of goodwill and cooperation among those jurisdictions involved. ICN will build on the many excellent contacts that already exist among the organizations concerned. The work of ICN will be project-driven. During its regularly scheduled meetings, ICN will decide which projects it will pursue and will adopt a work plan for each project. ICN is not intended to replace or coordinate the work of other organizations, nor will it exercise any rule-making function. ICN will provide the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress meetings. Where ICN reaches consensus on recommendations arising from the projects, it will be left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

Membership of ICN Members is national or multinational competition agencies entrusted with the enforcement of antitrust laws. Only members will participate in the internal decisions necessary for the organization and the operation of the ICN.

6. Asia Pacific Economic Cooperation (APEC) www.apecsec.org.sg www.apec2003.org www.apeccp.org.tw

Overview

APEC is the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region.

APEC has a membership of 21 economic jurisdictions, a population of over 2.5 billion and a combined GDP of 19 trillion US dollars accounting for 47 percent of world trade.

It is a unique forum operating on the basis of open dialogue and equal respect for the views of all participants.

As the primary regional vehicle for promoting trade and investment and practical economic cooperation, the end result of APEC's activities includes increased employment opportunities and community development.

APEC is working to achieve what are referred to as the 'Bogor Goals' of free and open trade and investment in the Asia-Pacific by 2010 for developed economies and 2020 for developing economies.

APEC has identified three specific areas that are crucial to achieving the Bogor Goals. These three pillars are:

- Trade and Investment Liberalisation
- Business Facilitation, and
- Economic and Technical Cooperation.

Since its inception in 1989, APEC has helped to reduce tariffs and other barriers to trade in the Asia-Pacific region. APEC has also worked to ensure the safe and efficient movement of goods, services and people across the borders in the region through facilitating practical policy formulation in APEC economies and by facilitating economic and technical cooperation.

Competition Policy

APEC's objective in the field of competition policy is to enhance the competitive environment of the region. In November 1994, APEC Ministers agreed that the CTI would develop an understanding of competition issues, in particular competition laws and policies of economies in the region and how they affect flows of trade and investment in the APEC region. They would also identify potential areas of technical cooperation among member economies. In 1996, the *Osaka Action Agenda (OAA)* work programs for competition policy and deregulation was combined.

During 2002, the Competition Policy and Deregulation (CPD) Group worked on information gathering and analysis as well as experience sharing. In particular, the competition database covering all APEC economies was completed and is available for public access.

Appendix 4

DEFINITION OF CONSUMER

China

Law of the People's Republic of China on the Protection of Consumer Rights and Interests, 1993.

Article 2

The rights and interests of consumers to purchase or use commodities or receive services necessary for daily consumption are protected by the present law, or by other relevant laws and regulations in case no stipulations are provided for in the present law.

Article 54

Peasants who purchase means of production for direct agricultural uses can refer to the present law.

India

Consumer Protection Act, 1986

Section 2 (1) (d)

"consumer" means any person who –

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) [hires or avails of] any services for a consideration which has beer paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 10 [hires or avails of] the services

for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

[*Explanation.*- For the purpose of sub-clause *(i),*"commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]

Korea

Korea Consumer Protection Act, 1986

Article 2

The term "consumers" means those who use or utilize for their daily lives consumer goods and services furnished by enterprises or those who are designated by the Presidential Decree;

For the purpose of subparagraph 2 of Article 2 of the Act the term "those who are designated by the Presidential Decree" means a person who uses or utilizes any goods or services supplied by enterprises for production activities and who fall under any of the following subparagraphs [amended by presidential Decree No. 16209. Mar. 31. 1999: Presidential Decree No. 17266. Jun. 30.2001]:

1. A person who finally uses or utilizes any goods or services supplied or furnished. Provided. that those who use the furnished goods as raw materials (including intermediate materials) and capital goods shall be excluded: and

2. A person who uses the furnished goods for agricultural (including the livestock industry) and fishery activities. Provided that a person who carries on the livestock industry on or beyond the scale of livestock husbandry as prescribed by the Ordinance of the Ministry of Agriculture and Forestry under Article 21(1) of the Livestock Industry Act and the deep-sea fisherman who has obtained the license of the Minister of Maritime Affairs and Fisheries under Article 41(1) of the Fisheries Act shall be excluded.

Nepal

Consumer Protection Act, 1998

Section 2 (a) (d)

Unless otherwise meant with reference to the subject or context, in this Act,

(a) Consumer means an individual or institution consuming or using any consumer good or service.

(d) Consumer goods mean goods or materials made through the admixture of several goods which are consumed or used by consumers; the term includes raw materials, colors, flavors or chemicals used in the production of such consumer goods.

Philippines

Consumer Act of the Philippines (Republic Act No. 7394) 1990

Article 4

n) "Consumer" means a natural person who is purchaser, lessee, recipient or prospective purchaser, lessor or recipient of consumer products, services or credit.

q) "Consumer products and services" means goods, services and credits, debts or obligations which are primarily for personal, family, household or agricultural purposes, which shall include but not limited to, food, drugs, cosmetics, and devices.

Vietnam

Vietnam Ordinance on the Protection of Consumer's Interest, 1999

Article 1

Consumer shall mean the buyer, the user of the goods, services for the own consumption purpose of the individual, household or organization.

Malaysia

Consumer Protection Act 1999

Section 3(i)

Unless the contect otherwise requires -

"consumer "means a person who —

(a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and

(b) does not acquire or use the goods or services, or hold himself out as acquiring or using teh goods or services, primarily for the purpose of —

  (i) resupplying them in trade;

  (ii) consuming them in the course of a manufacturing process; or

  (iii) in the case of goods, repairing or treating, in trader, other goods or fixtures on land;

"goods" means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes—

(a) goods attached to, or incorporated in, any real or personal property;

(b) animals, including fish;

(c) vessels and vehicles;

(d) utilities; and

(e) trees, plants and crops whether on, under or attached to land or not,

but does not include choses in action, including negotiable instruments, shares, debentures and money.

"services" includes any rights, benefits, privileges or facilities that are or are to be provided, granted or confered under any contract but does not rights, benefits or privileges in the form of teh supply of goods or the performance o work under a contract of service.

Appendix 5

WTO LIST OF SOME SOCIAL & ECONOMIC OBJECTIVES OF COMPETITION LAW

- protecting consumers from the undue exercise of market power;
- promoting economic efficiency, in both a static and dynamic sense;
- promoting trade and integration within an economic union of free trade;
- facilitating economic liberalization, including privatization, deregulation and the reduction of internal trade barriers;
- preserving and promoting the sound development of a market economy;
- promoting democratic values, such as economic pluralism and the dispersion of socio-economic power;
- ensuring fairness and equity in marketplace transactions;
- protecting the "public interest", including (in some cases) considerations relating to industrial competitiveness and employment;
- minimizing the need for more intrusive forms of regulation or political interference in a free market economy;
- protecting opportunities for small and medium-sized businesses.

Source: 1997 WTO Annual Report of the WTO Secretariat. (Chapter titled: "Trade and Competition Policy"

Appendix 6

OBJECTIVES OF COMPETITION POLICY

Canada : Competition Act *(Chapter C-34, Part 1, Purpose) 1985*

Objectives:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

South Africa : Competition Act *(Chapter I) 1998*

Objectives:

The purpose of this *Act is* to promote and maintain competition in the Republic in order:

- to promote the efficiency, adaptability and development of the economy;
- to provide consumers with competitive prices and product choices;
- to promote employment and advance the social and economic welfare of South Africans;
- to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

South Korea : Monopoly Regulation and Fair Trade Act *(Article 1) 1980*

Objectives:

The purpose of this Act is to encourage fair and free economic competition by prohibiting the abuse of market-dominant positions and the excessive concentration of economic power and by regulating improper concerted acts and unfair business practices, thereby stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy.

United Nations Conference in Trade and Development : The set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Part IV, *Section A: Objectives) 1980*

Objectives:

Taking into account the interests of all countries, particularly those of developing countries. The Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
   a. The creation, encouragement and protection of competition;
   b. Control of the concentration of capital and/or economic power;
   c. Encouragement of innovation;
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize

benefits to international trade and particularly the trade and development of developing countries;

5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the nation and regional levels.

European Union : The official statement of EU Commission concerning the objectives of EU's competition *policy 2003 (The official server of EU: www.europa.eu.int) Objectives:*

Competition policy seeks to encourage economic efficiency by creating a climate favourable to innovation and technical progress. It protects the interests of consumers by allowing them to buy goods and services under the best conditions. It also makes it possible to ensure that any anti-competitive practices by companies or national authorities do not hinder healthy competition.

EU competition policy must guarantee the unity of the internal market and avoid the monopolisation of certain markets by preventing firms from sharing the market via protective agreements.

It must also prevent Member States' Governments from distorting the rules by discriminating in favour of public enterprises orb giving aid to private sector companies.

America : Negotiating Group on Competition Policy *2000 (Objectives of San Jose Ministerial Declaration)*

General Objectives:

To guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices.

Specific Objectives:

To advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti competitive business practices

To develop mechanisms that facilitates and promote the development of competition policy and guarantee the enforcement of regulations on free competition among and within countries of the Hemisphere.

Japan : Anti-monopoly Act *(Article 1)* 1947

Objectives:

This Act, by prohibiting private Monopolization, unreasonable restraint of Trade and unfair trade practices, by Preventing excessive concentration of economic power and by eliminating unreasonable restraint on production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiatives of entrepreneurs, to encourage business activities of enterprises, to heighten the employment and people's real income, and thereby to assure the interests.

Australia : Trade Practices Act *(Sect 2)* 1974

Objectives:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair-trading and provision for consumer protection.

Hong Kong : Description of Competition Policy 2003 (Competition Policy and Law Database, *www.apeccp.org.tw)*

Objectives:

We adopt a comprehensive competition policy - one that seeks not only to discourage restrictive business practices but also to encourage competition; that relies not only on legislative controls but also on guidelines or codes of practice; and that focuses not only on the practices of the private sector but also the public sector.

USA : Promoting Competition Protecting Consumers *2003,* FTC's Guide to Antitrust Laws (www.ftc.gov)

Objectives:

The Bureau of Competition of the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) share responsibility for enforcing laws that promote competition in the Marketplace. Competition benefits Consumers by keeping prices low and the Quality of goods and services high.

The FTC is a consumer protection agency with two mandates under the FTC Act: to guard the marketplace from unfair methods of competition, and to prevent unfair or deceptive acts or practices that harm consumers. These tasks often involve the analysis of complex business practices and economic issues. When the Commission succeeds in doing both its jobs, it protects consumer sovereignty - the freedom to choose goods and services in an open marketplace at a price and quality that fit the consumer's needs - and fosters opportunity for businesses by ensuring a level playing field among competitors.

Singapore : Description of Competition *Policy 2003 (Competition Policy and Law Database, www.apeccp.org.tw)*

Objectives:

Singapore does not have any anti-trust laws. However, we run a free market economy and have always subscribed to the economic philosophy that competition, both international and domestic, is desirable and healthy for the economy. Singapore adopts a broad, international view of competition policy. Given the small economic size in the world, it cannot afford not to. Singapore regard the world as its market, and international competition as the "invisible hand" which disciplines domestic inefficiency, keeping companies on their toes.

About ERA Consumer

The Education and Research Association for Consumers, Malaysia (ERA Consumer, Malaysia) is a voluntary, non-profit and non-political organisation that was founded in Ipoh, Perak in 1985. ERA Consumer is a registered membership organisation under the Malaysian Societies Act of 1966. It was set-up to undertake and promote the task of developing critical consciousness on public-related issues out of the larger socio-economic issues.

ERA Consumer is a dynamic institution that is constantly responding to and developing its services according to the needs and demands of the people. It aims to create awareness among the public on issues that are effecting their lives, through research and educational programmes by undertaking independent, authoritative, balanced research on public issues; carrying out public education projects; making policy recommendations to the government & international institutions; building solidarity and understanding among NGOs in Malaysia and society at large, and to increase South-South relations and North-South understanding. ERA Consumer's components and main programmes are consumer issues; human rights education; food, trade and economics.

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