UNITED
NATIONS

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United Nations
Conference
on Trade and
Development

TRADE AND DEVELOPMENT BOARD
Intergovernmental Group of Experts on
Competition Law and Policy
2-4 July 2003

Communication from

CONSUMERS INTERNATIONAL
Asia Pacific Office

Competition Policy and Law in the Consumer and Development Interest

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The views expressed in this paper are those of the author.

EXECUTIVE SUMMARY

IN market economies, there is inherent danger that market players may distort or even eliminate competition in order to maximize profits, or in order to acquire and abuse their market power. This has demanded policy intervention and for many countries, such intervention has taken the form of the implementation of competition policy and law. Typically, such policy and law is aimed at maintaining and encouraging healthy competition by dealing with the anti-competitive practices of firms, preventing market concentration that can lead to abuse, and addressing legislation and administrative practices that distort competition.

Part 1 of this paper examines the significance of competition policy and law from the perspective of consumer protection and its relevance to the economic development of developing countries. It begins by setting the context for competition policy and law, first by examining their nature and characteristics, followed by an analysis of the complexities involved in implementing such a policy and law. Examples of such conduct are discussed such as vertical restraints, horizontal restraints, assessment of dominance, cartels and collusive behaviour, and mergers and acquisitions (M&As). It is observed that anti-competitive practices entail a wide range of business practices, some are dealt with by the application of rule of reason while others, deemed so detrimental, demand *per se* prohibition.

Part 2 of the paper focuses on competition policy and law from the perspective of consumer protection. In fact, in recent times, there has been resurgence in the consumer interest aspect of competition policy. Among the reasons for this are first, the entrenchment of the free market concept in the 1980s and particularly the 1990s. The second relates to an ever-increasing number of international as well as regional agencies making explicit commitments to competition policy and law, thereby emphasising their role in consumer protection as well. Thirdly, consumer interest has become paramount given 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 has been tied. In introducing the element of consumer protection, the paper argues that competition policy and law are not panaceas that automatically serve the consumer interest.

Part 2 then goes on to examine what constitutes the "consumer interest". It concludes that though choice, price and quality are central to the consumer interest, these are not the only or even prime concern of all consumers. Consumer groups in developing countries have adopted a developmentalist approach to consumer protection and are concerned with human rights and equitable distribution of benefits. They will therefore assess the efficacy of competition policy and law from a broader perspective than whether it offers consumers better choice, price and quality.

The paper thus identifies four basic requisites for ensuring consumer protection in competition policy and law. The first is the explicit stating of a consumer protection objective in the legislation; second, information on consumer gains needs to be made explicit and publicly available; third, empowering the consumer and consumer associations with legal power to bring actions to enforce competition regulations; and four, focus on the demand side (e.g. consumer search and switch behavior) with view to integration in policy measures.

Part 3, the last part of the paper, delves into the implications of competition policy and law for developing economies, beginning with the implementation challenges to developing countries. The paper notes that competition policy and law can yield benefits to developing countries, particularly so given its potential to promote good public and corporate governance. However, the paper makes a strong case for the fact that it is important for developing countries to have a competition policy that is designed to take appropriate account of their level of development and the long term objective of sustained economic growth. Developing countries are urged to be mindful of their particular developmental and social welfare concerns, retaining their flexibility to meet their development goals, for example through "catch-up" policies and the creation of "national champions".

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). When markets fail competition policy and law are the tool that can be 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.[1]

Traditionally, economic efficiency[2] 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. [3]

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 consequently 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 are determined 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.[4]

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.[5] 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.[6] But this is not a uniformly held perception and market dominance itself may not be tolerated.

Many jurisdictions however consider that market dominance is by itself not a satisfactory condition for assuming abuse. But market dominance is a necessary prerequisite. A firm must occupy a position of dominance in a market for it to be found guilty of abusing that dominance. The threshold varies with jurisdiction but 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. But again, not necessarily so. Where for whatever reasons all firms in the market are found to have particularly high levels of market power, abuse of dominance can be found even when the threshold is not reached.

As noted earlier, where dominance is established, there must be proof of its abuse. It must be shown that the firm in question is abusing that dominance by amongst such means as:

- 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.[7]

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. The fact is that the regulating authority and the courts have to make a ruling in each case. The factors they consider and the weightage they decide to give each factor are not all a matter of precise science.

1.2.2 Cartels and Collusive Behaviour

Policy variance, determination as to whether a particular case should be considered non-permissible, and the difficulties encountered in a case by case approach also plague the area of cartel and collusive conduct regulation.[8]

In all jurisdictions a distinction is 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.

By virtue of its conspiratorial nature, collusion between firms to raise or fix prices[9] and reduce output are typically viewed by most authorities as the most serious violation of competition laws. But even here exemptions and exceptions apply.[10] 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).[11] In several countries, import cartels operate with impunity.

A problem that confounds regulators is cartel-like or collusive conduct that does not 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 and coordinate their actions as if they were a cartel without an explicit or overt agreement. This is referred to as "conscious parallelism". However, in these cases involving "conscious parallelism", should conduct or effect be the basis for intervention? If it were the latter would not action by a regulator be unfair and even unwarranted intervention on enterprise?

A problem that regulators have to contend with is the conspiracy requirement of competition law. The heart of the tension is that in criminal law conspiracy consists of three elements: (1) *agreement*, that is the prosecution must establish existence of an agreement between the parties; (2) duality, that is the agreement involves at least two parties; and (3) irrelevance of the probability of harm, that is there is no need to establish that the parties carried out or had the ability to carry out the illegal act, it is enough that they had a plan to carry it out. (This is the jurisprudence accepted in full by the Sherman Act). The US courts traditionally relied on an *intraenterprise conspiracy* doctrine to uphold findings of conspiracy among parent and subsidiary corporations. The US Supreme Court's most recent pronouncement on *intraenterprise* conspiracy, *Copperweld Corp. v. Independence Tube Corp.*[12], scrapped a large part of the doctrine. The issue in *Copperweld* was whether a parent and its wholly own4ed subsidiary are capable of conspiring. And the Court held that they are not. *Copperweld* dealt with a case of a wholly owned subsidiary, but what would be the decision if the firms are owned wholly by the same owner or here is 51, 75 or 99 percent control? The fact is the concept of an economic entity is quite different from that of a legal entity. Associated firms are distinct legal entities but may operate as one economic entity. The potential effect of this change in doctrine as regards associated companies has immense implications to developing countries, especially in the manner in which they will relate to transnational corporations and their subsidiaries the world over.

1.2.3. Mergers and acquisitions

The area of mergers and acquisitions is as complex and poses great implementation challenges.

Firms merge and acquire for a variety of reasons: 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[13] 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 liberalisation of markets and the impending entry of foreign players. The financial sector (banking, insurance, stock broking, etc), the non-fixed line telecommunications

sector and shipping have been of special focus with many 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 regulation is as much an art as science. Competition regulators have to contend with an array of considerations in arriving at decisions; 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 and their decisions may, indeed must, change with time and circumstance. Changes in government therefore often result in a change in policies. This is a legitimate and necessary exercise of the power of governments. Critics may however be led to perceive 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."[14]

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".[15] 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." [16]

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).[17] 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.

Second, 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.

Third, 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[18] points out that the first organised consumer revolt in the US occurred even before the country was founded. Settlers

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.

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.

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

The objectives of any law are meant to have a decisive impact on the interpretation of that law and its application in particular cases. So it would, or at least should, in competition law.

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.

An examination of these objectives provisions reveal two features. The first is that not all competition legislation explicitly provides in their objective clause for consideration of the consumer interest. The statutory provisions of US competition law are contained in the Sherman Act 1890, the Clayton Act 1914 and the Robinson-Patman Act 1936.[19] None of these statutes refer to the consumer interest.

A second feature is that even where they do include consumer interest or welfare as an objective, it is one of several objectives and not the first of the stated objectives. The Canadian Competition Act 1985 for instance

states that the purposes of the Act is to maintain competition in Canada in order to:

- Promote the efficiency and adaptability of the Canadian economy;
- Expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
- Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
- *Provide consumers with competitive prices and product choices.*

Multiple objective purpose clauses are indeed a feature of the statutes of most countries including South Africa, South Korea and Australia.

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. The relevant Article of the Anti-monopoly Act 1947 provides that the Act by prohibiting unjust restriction of business activities aims to promote free and fair competition to:

- Stimulate the creative initiatives of entrepreneurs,
- Encourage business activities of enterprises,
- Heighten employment and peoples' real income

And thereby

- *"to assure the interests of consumers in general",* and also
- To promote the democratic and wholesome development of the national economy.

The Japanese writer Kobayashi[20] comments 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 its implementation is consumer welfare enhancing.

What effect does such different formulations have on implementation of competition law? Not all competition legislation explicitly provides for the consumer interest to be considered. Even where they do, consumer welfare is but one of several objectives. The various objectives may in operation be mutually exclusive, and competition authorities have to decide which of the objectives is to be given precedence generally and in a particular instance. An example will help illustrate. If efficiency-enhancing arrangements among competitors is a permissible 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, whether 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 emphasised, it must be so clearly recognised in competition policy and law and 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.

Competition authorities have to monitor the effect on price, choice and quality for ultimate or end users. They should be required to record this in their annual reports. Such efforts will help build the requisite political and social acceptance that needs to be built for competition policy and law and its regulators, especially in countries where it has yet to gain full acceptance.

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.[21] 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.[22]

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". [23]

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).[24]

Mueller is not referring to some corrupt banana republic. He is writing about the United States of America! 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.[25] 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. They are subject to the deleterious effects of international anti-competitive practices. International cartels of private firms engage in restrictive business practices designed to limit competition in international trade. Cross-border mergers and acquisitions do lead to market dominance in developing countries. Such practices are harmful to developing nations. Developing countries cannot even begin to address these problems without competition legislation.

Many developing countries have also embarked on privatisation. 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.

Competition policy and law offers developing nations an added tool to manage their affairs. The challenge then is to design a competition policy that fits local realities and meets local needs. This is an aspect that unfortunately has received little attention from many an enthusiastic proponent of competition law.

Two authors who have focussed on this area of competition policy and law is Singh and Dhumale.[26] They urge developing countries to be mindful of particular developmental and social welfare concerns. It is important for developing countries to have a competition policy that is

designed to take appropriate account of their level of development and the long term objective of sustained economic growth.

Clearly 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 fact 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.[27]

Singh and Dhumale contend that 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. They suggest that 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. This is however not an unchallenged view.[28] It is also important to keep in mind that the argument that a “one-size-fits-all approach” is inappropriate for competition law also applies equally to industrial policy. It would be perfectly legitimate for a country to adopt a competition policy as its industrial policy as it would be to hold competition policy in abeyance. A consideration that is particularly attractive to leaders of the developing world is that competition policy should be avoided or at least tampered with so as to buy time and space for the creation of “national champions”. At the least it must be remembered that the purpose of creating national champions is precisely that they may eventually compete and there must be a clear time frame within which they should be weaned from the protection from competition that is initially granted them.

A regulator perspective to this discussion of an appropriate competition policy and law for developing countries comes from Hisami Kurokochi[29] of the Japanese Fair Trade Commission:

- The political-cum-social impact of competition policy

  In considering the political and social implications of competition policy, Kurokochi admits that competition policy could lead to increased unemployment and endanger incumbent industries and enterprises, since competition expels inefficient enterprises from the market. However the converse is also true. Anti-competitive practices, if overlooked, can raise prices and burden consumers

as well as user industries. A desirable approach then would be to increase national economic welfare by actively implementing competition policy, and minimizing its negative impact through the creation of new industries, promoting job mobility and providing relief measures 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."

She 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 need to prioritise and sequence competition and industrial and other policy objectives

  Multiple policy tools raise issues not only of appropriateness but also of compatibility, prioritisation and sequencing. Should developing countries seek to develop by industrial policy and then introduce competition policy" or attempt both simultaneously? Kurokochi advises that competition policy is critical for the removal of anti-competitive practices in domestic markets and its introduction in a closed market without the benefit of trade liberalization. She cites the case of the highly successful Japanese auto industry where competition in the domestic market preceded trade liberalization.

- Resource constraints of competition authorities in developing economies

  Developing countries have resource constraints that need to be addressed in implementing competition law. They need to strengthen capacities and build the trust of the public. It is critical therefore that competition policy and law be implemented in a staged manner. Kurokochi suggests that 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.

Competition policy, it is often contended, results in lower prices, greater choice and higher quality for consumers. This, it certainly has the potential to do. 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.

Consumers are not only concerned with price, choice, and quality. More critical to them are issues of employment, sustained development and equity.

Competition policy and law can yield benefits also to developing countries, particularly so given its potential to promote good public and corporate governance. But in adopting such a policy and law they must be mindful that they do not hamper the flexibility with which the country can meet its development goals, for example through "catch-up" policies and the creation of "national champions".

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.

[1] 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". Milos Barutciski, Davies Ward Phillips & 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.

[2] 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 uses.

[3] 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.

[4] 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.

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

[6] 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 circumstance is that of Xerox photocopiers. 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.

[7] Pinci, Marcantonio & Sistilli, Anthony; "The Abuse of Dominant Position Under Article 86 of the Treaty of Rome (2001)"

[8] 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.

[9] 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 exist, 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 produced 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 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.

[10] See also Khemani, R. Shyam, “Application of Competition Law: Exemptions and Exceptions”, UNCTAD, 2002.

[11] 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.

[12] 467 U.S. 752 (1984).

[13] A merger is an amalgamation or joining or two or more firms into an existing firm or to form a new firm. It is a method by which firms can 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.

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

[15] Swann, Dennis, "Competition and Consumer Protection", Penguin Books, 1979.

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

[17] 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.

[18] 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.

[19] The Sherman Act set forth two premises: First, it is unlawful to monopolise a particular industry or market sector by using illegal methods to secure income; and second, restraint of trade is against the law; that is, one may not conspire to collude and restrict trade through the use of such maneuvers as price fixing, division of territories, boycotts, etc. The Clayton Act defines unfair methods of competition; and the Robinson-Patman Act disallows price discrimination by asserting that every buyer must pay the same price for the same product or service unless there is a viable reason to do contracts, clauses and trade-outs.

[20] 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.

[21] Article 49 Law of the People's Republic of China on the Protection of Consumer Rights and Interests 1993.

[22] 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

[23] 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.

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

[25] 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.

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

[27] 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.

[28] See Michael Porter & Mariko Sakakibara, "Can Japan Compete", Basic Books, 2001.

[29] 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

<u>Appendix 2</u>

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.

Sources: Information above is drawn from OECD (1995), American Bar Association (1991), OECD (2000), and from the website www.gettingthedealthrough.com (accessed May 2002).

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.

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 been 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.

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

Country or Organisation	Source and the Year of Act	Objectives of Competition Policy
Canada	* Competition Act (*Chapter C-34, Part 1, Purpose*) 1985	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	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	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	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 national 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*)	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 or by giving aid to private sector companies.
America	* Negotiating Group on Competition Policy 2000 (*Objectives of San José 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	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 of consumers in general, and also to promote democratic and wholesome development of the national economy.

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