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Emerging Issues in Promoting Competition Policy in the APEC and ASEAN Countries

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ABSTRACT

This paper looks at the emerging issues and problems in promoting competition policy and coordinating its implementation under regional arrangements, particularly the APEC and the ASEAN. Implementing competition policy is a big challenge. As the review of country experiences shows, administrative, legal, political, and economic factors are important in the design and implementation of competition law and policy. The APEC experience illustrates that with the wide differences in the countries' stage of socioeconomic development as well as in their legal institutions, countries have differed in their approaches to competition. In the ASEAN, difficulties in the development of competition policy are encountered due to the lack of a culture of competition and weak legal and regulatory infrastructures.

Keyword: competition policy, ASEAN, APEC countries

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I. Introduction

The last decade has witnessed most developing countries and economies in transition adopting competition laws. As globalization proceeds, countries are becoming substantially more open and market-oriented. But countries realize that while economic liberalization may be a precondition for the growth of a free market, it does not, by itself, guarantee effective competition because there are incentives for firms to engage in anticompetitive business practices. Effective competition emerges if trade reforms are accompanied by the creation of competitive market and industry structures. Hence, along with the creation of bilateral partnerships and regional trading arrangements, the policy focus in these countries has shifted towards the promotion and enhancement of competition and level the playing field through the promotion of competition law and competition policy.

In economics, competition is seen as a process that allows a **sufficient** number of producers in the same market or industry to **independently** offer different ways to satisfy consumer demands. As competition is often equated with rivalry, it pressures firms to become efficient and offer a wider choice of products and services to consumers at lower prices. A competitive economy enables individuals to exercise **economic freedom**, meaning freedom for consumers to choose what they value most and for entrepreneurs to choose where they want to invest. The competition process will allow consumers and producers to exercise their freedom of choice free of any price fixing conspiracies and monopolistic bullying.

As the World Bank and OECD [1998] noted, in a competitive economy, price and profit signals tend to be free of distortions and create incentives for firms to reallocate resources from lower to higher-valued uses. Decentralized decision making by firms promotes efficient allocation of society's resources, increases consumer welfare, and gives rise to dynamic efficiency in the form of innovation, technological change, and economic progress. Strong competition policy with effective implementation is also associated with higher productivity and economic growth. The benefits arising from competition and competition policy are of particular interest to developing countries and economies in transition. In the People's Republic of China and Vietnam, stringent competition enactment is viewed as a constructive step toward the development of a market economy and a defensive measure to level the playing field between domestic and foreign companies (MIER, 2008).

This paper aims to identify the emerging competition issues in regional frameworks particularly the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN). It is divided into five sections: after the introduction, section II defines the role of competition law and competition policy with some illustrative cases from developing county experiences. Section III presents the efforts being carried out under the APEC and the ASEAN to include competition policy as part of their agenda. Section IV discusses the emerging issues in promoting competition policy and coordinating its implementation. Section V provides some broad conclusions.

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II. The Role of Competition Law and Competition Policy

Competition law refers to a clear set of enforceable legal rules which are designed to promote a more competitive environment. Competition law addresses commercial tactics, behavior, and transactions by commercial establishments to restrain competition and attain or independently exercise substantial market power obtained through improper means.

On the other hand, competition policy covers all laws, government policies and regulations aimed to achieve economic efficiency to maximize consumer welfare. It is consistent with policies that enhance competition in local and international markets like liberalized trade policy, relaxed foreign direct investment and ownership requirements as well as economic deregulation.

To understand how competition works, we need to introduce the concept of market power. Firms have incentives to acquire and exercise market power, i.e., the ability of firms, unilaterally (monopoly) or in collusion with others (cartel), to profitably raise prices and maintain these over a significant period of time without competitive response by other existing or potential firms. Market power is at the heart of competition policy as it gives rise to reduced output, and in turn, higher prices.

Barriers to entry are necessary for market power. There can never be market power when entry is easy. As soon as one firm or a group of firms attempts to increase prices or lower quality from competitive levels, a new firm can come in to serve the market. Barriers to entry may be classified into three groups (see Box 1):

- Regulatory: barriers imposed by government policies.
- Structural: barriers due solely to conditions outside the control of market participants like basic costs of production
- Behavioral: represent abuse of dominant position where "relatively large" firms engage in anti-competitive conduct or restrictive business practices by preventing entry or forcing exit of competitors through various kinds of monopolistic conduct

Regulatory barriers include investment licensing, tariff and non-tariff measures, antidumping and countervailing duties. Economies of scale (increasing returns to scale) are an example of a structural barrier. When there are increasing returns to scale, there is a minimum size that firms have to attain if they are to have average cost as low as possible. If the minimum efficient scale is so large that only one firm of that size can serve the entire market, there will be a monopoly. This situation often occurs with public utilities such as distribution of water, electricity, and piped gas.

Behavioral barriers represent abuse of dominant position where "relatively large" firms engage in anti-competitive conduct by preventing entry or forcing exit of competitors through various kinds of monopolistic conduct including predatory pricing and market foreclosure. Behavioral restraints are often classified into two: horizontal and vertical restraints. The former refer to barriers imposed through collaborating actions by firms that sell in the same market, often referred to as "naked" restraints of trade, cartel behavior, or collusion. Examples are price-fixing, bid rigging, and allocation of territories or customers, and output restriction agreements.

Vertical restraints refer to restrictions imposed through restrictive contractual agreements between supplier and purchasers/retailers in both upstream and downstream markets. Examples include:

- Resale price maintenance agreements: retail price is fixed by the producer or price floors or ceilings are imposed

- Exclusive distribution agreements: distributors are assigned exclusivity within a geographic area or over particular types of clients, or over specific products
- Exclusive dealing agreements: downstream firms are prohibited from dealing with competing producers or distributors
- Tie-in sale agreements: downstream firms are required to purchase a certain range of products before being allowed to purchase a particular product
- Quantity forcing: downstream firms are required to purchase a minimum quantity of a product.

Box 1
Structural, Behavioral, and Regulatory Barriers to Entry

Structural: barriers due solely to conditions outside the control of market participants

- Sunk costs: costs that a firm cannot avoid by withdrawing from the market, they are a sort of entry fee
- Absolute cost advantage: access to natural resource or human resources
- Economies of scale: unit cost of production fall with increasing output
- Large capital requirements
- Network industries: firms that are competitors share some critical facility like transportation and telecommunications

Behavioral: related to abuse of dominant position

- Horizontal restraints: cartels or collusion (price-fixing agreements, market sharing territorial arrangements, bid rigging), price discrimination
- Vertical restraints: resale price maintenance, exclusive dealing
- Foreclosure and exclusion
- Tactics to increase rivals' costs
- Excess capacity utilisation

Regulatory: barriers imposed by government policies

- Special permits, license to operate
- Regulations influencing the use of some inputs
- Tariffs, quotas, and other non-tariff barriers
- Anti-dumping and countervailing duties
- Discriminatory export practices
- Exclusionary lists
- Ownership restrictions

Source: A Framework for the Design and Implementation of Competition Law and Policy, the World Bank and the Organisation for Economic Co-operation and Development, 1998.

Firms may gain market power by limiting competition, i.e., by erecting barriers to trade, entering into collusive arrangements to restrict prices and output, and engaging in other anticompetitive business practices such as those described above. Market power can be created through mergers or agreements between competitors not to compete or through restrictive vertical arrangements and predatory pricing which is an abuse of pre-existing market power. A firm's exercise of market power can harm consumers and other producers through higher prices (rather than competitive prices), reduced output, and poorer quality products. In general, market power results in inefficient allocation of resources and negatively affects industry performance and economic welfare.

Box 2
Cartel Cases: Experiences from Different Developing Countries

Bulgaria
Price fixing in the transportation on additional destinations: Sofia has three types of public transportation: fixed rout bus service, regular taxi service, and an intermediate service where the beginning and end points are fixed but vehicles may vary their routes. In January 2000, companies announced in a newspaper that they would increase prices for transportation services. This announcement prompted the Commission on Protection of Competition to investigate. It was found that the price increase of BGL 0,20 was agreed during a meeting in a café. The Commission decided that the conduct of independent companies aimed at simultaneous and identical price increases that could be defined as “concerted practice”. Fourteen companies providing transportation on additional destinations were prosecuted for their participation in price fixing and were fined a total of BGL 92,000.

Price fixing conspiracy in phone card business: Bulphone Bulgarian Corporation for Telecommunications and Informatics J-St. Co. and Radio and Telecommunications were prosecuted for participation in a price fixing conspiracy. Both companies set the same prices for phone cards and these prices were coordinated during regular meetings of the companies. Both companies had a common shareholder that acted as intermediary in price coordination. The agreement had a duration of one year. The Commission on Protection of Competition issued a prohibiting order and imposed fines amounting to a total of BGL 18,000.

People’s Republic of China
Bid-rigging conspiracy to operate a brickyard plant: In July 1999, a public tender to the right to operate a brickyard plant in Zhejiang Province was offered. The minimum bid was RMB180,000 and the highest bid would win a tender. Representatives from five groups of companies met to bring down the price and determine the winning price. They decided that the bid winner would pay the other four groups a total of RMB 200,000 as compensation. The agreed winner won the bid with RMB 180,088. However, the Municipal Administration for Industry and Commerce in Zhejiang Province declared the bid as invalide and the five were fined a total of RMB 50,000.

Chinese Taipei
Wheat buyers’ cartel: In 1997 and 1998, the Flour Association instituted a total quantity control and quota system among thirty-two flour producers, by means of “purchase allocation meetings”. The Association improperly intervened in each member’s inventory management and obstructed fair competition among enterprises. The Fair Trade Commission convicted the Association of organizing a cartel. It also issued the decision for the Association to cease these practices, and imposed a fine of NT$20 million.

Source: OECD [2001] “Summary of cartel cases described by invitees” OECD Global Forum on Competition, October 5, 2001.

For instance, in cartels and collusion, the economic freedom of consumers and potential rivals is taken away. In a cartel, firms get together and attempt to fix prices or levels of outputs, rig bids in auctions or procurements and divide markets by allocating customers, territories, relevant products or supplies in order to maximize total industry profits. Instead of competing against each other in terms of price, quality, or service, firms jointly agree to set prices and quantities that would maximize total industry profits. In a competitive environment, firms act independently and rivalry is present among competing firms in the market. Cartels and collusion are anti-competitive; they create market power, and suppress rival and consumer activities. Box 2 presents various cartel cases experienced in the developing world.

The prospect that firms may rely on tacit collusion or implicit coordination enforcement mechanisms to exercise collective market power raises an important issue for competition policy. In the US, collusion is in most instances per se illegal. In the European Community, hard-core cartel agreements are prohibited. In the UK, the policy is directed more at evaluating the results of collusive behavior. Whether firms ‘really’ colluded is not a central issue and what matters is the appraisal of the outcomes of their behavior from the point of view of economic efficiency.

Large firms may further take advantage of their market power by abusing their dominant position or monopolization. This entails the suppression of competition by restricting or foreclosing the entry of smaller rivals, for example by increasing competitors’ costs of entering a market or charging predatory prices which harms the competitive process.

In theory, contestability assumes that with easy and costless entry, the potential threat from imports or from domestic competitors will make incumbent firms behave in a competitive manner. However, if there are barriers to entry like say, high sunk costs, there will be less incentive for new firms to compete against an incumbent which can, therefore, behave in a noncompetitive manner and raise prices and restrict output. In the presence of high barriers to entry, it is necessary to design safeguards that would ensure market contestability and regulate anti-competitive business conduct which can damage emerging competition. Competition law and policy that is workable and credible in the marketplace is therefore necessary to offset market power and protect consumers from abuse of dominant position. Effective competition law is necessary not only in cases where monopolies (a type of industrial structure when there is only one large firm) and oligopolies (when there are a few large firms) are present but even when markets are competitive.

It is important to recognize that high levels of market concentration as well as the presence of monopolies or oligopolies are not necessarily detrimental to competition. Large firms may achieve a dominant position in the market through legitimate ways like innovation, superior production or distribution methods, or greater entrepreneurial skills. Note that competition laws do not prosecute firms that have gained market power through legitimate behavior, i.e., skill, foresight, and hard work.

For as long as markets remain contestable, we would expect large firms in an oligopolistic environment to act independently or monopolies to behave in a competitive manner. How can we have competitive prices if there is only one firm or if there are only a few firms in the market? If entry is easy and costless, the potential threat from imports or from domestic competitors will make incumbent firms behave competitively. As soon as one firm or a group of firms attempts to increase prices or lower quality from competitive levels, a new firm can come in to serve the market and this will drive prices back down to competitive levels.

The goal of competition policy is to preserve and promote competition through the prevention of restrictive business practices by firms and their abuses of economic power including inefficient government regulation. Competition law is about the elimination of abusive monopoly conduct, price fixing and other cartels. It is also about the prohibition of mergers and acquisitions that limit competition. Note that the **focus of competition law and policy is economic efficiency rather than size or market structure alone.** This implies that, as indicated above, not all increases in concentration from mergers are inimical to competition and not all monopolists are inefficient and abusive. While market structure is important, competition law and competition policy emphasizes business conduct, market power and keeping markets competitive and disciplining, whenever necessary, exercises of market power that reduce output or increase prices.

III. State of Competition Law & Policy in Selected ASEAN and APEC Countries

Given the structural changes arising from liberalization, privatization, and deregulation, it is argued that countries should have the appropriate regulatory and competition policy framework in order to ensure improved economic performance. But apart from this, competition laws are also necessary due to the huge international cross-border merger wave that has been taking place which may lead to the increased market power of large multinational corporations (MNCs) and the potential abuse of dominant position (Singh, 2002). As MIER (2008) indicated; the restriction of anticompetitive practices became a policy priority after measures to promote private sector development yielded adverse impacts in India, Korea, Malaysia, and Thailand.

Table 1: Competition Law and Rules in Selected Asian Countries

Country	Competition Law	Date of Adoption	Date of Legislation
People's Republic of China	Law of Anti-Unfair Competition (LAUC)	December 1993	September 1993
	Anti-Monopoly Law	August 2008	
Hong Kong	No effective national competition law		
India	Monopolies & Restrictive Trade Practices (MRTP Act)	1970	1969
	Competition Act 2002	mid of 2008	2002 with amendments in 2007
Indonesia	Law on Prohibition of Monopolistic Practices & Unfair Business (Anti-monopoly Act or AMA Law No. 5/1999)	2000	1999
Japan	Antimonopoly Act	1947	1947 with amendments in 2005
Philippines	No comprehensive competition law as yet		
Republic of Korea	Price Stabilization & Fair Trade Act	1975	1975
	Monopoly Regulation & Fair Trade Act (MRFTA)	1997	1980 With many amendments latest of which is on December 30, 1996
Taiwan	Fair Trade Law	1991	1991 amended in 1993
Thailand	Trade Competition Act (TCA) B.E. 2542 AD 1999 & Goods & Services Price Control Act B.E.2542 AD 1999	1999	1999
Vietnam	Competition Law	July 2005	November 2004

Lao PDR	Prime Minister's Decree on Trade Competition	August 2004	April 2004
Singapore	Competition Act (Chapter 50B)	2005	2004

According to the World Bank (2002), around 90 countries have competition laws. Most of the APEC countries which include all developed and Latin American countries along with Japan, South Korea, Taiwan, Thailand, and Indonesia have competition laws (MIER, 2008). In the ASEAN region, competition law is relatively new in and until recently, most developing countries have not established formal competition laws and policies. As Table 1 shows, countries like Thailand, Indonesia, India and Taiwan have established such law and policy only within the last decade while Vietnam introduced its competition law only in the 2000s. Both India and China have introduced amendments to strengthen their competition legislations, on the other hand, Hong Kong, the Philippines and Malaysia do not have formal competition laws.

ASEAN

The ASEAN was created in 1967 not for economic integration but for political and security reasons. The initial efforts towards economic cooperation began only after almost ten years. In 1976, a preferential trading scheme was developed followed by industrial cooperation schemes. Serious economic integration efforts through the ASEAN Free Trade Area (AFTA) started only in 1992 in reaction to globalization, the emergence of the North American Free Trade Area (NAFTA) and the EU Single Market, and the rise of the People's Republic of China. As described by Chia and Soesastro: "The agreement establishing AFTA consisted of only a few pages and was more a political declaration of intent rather than a legal document and detailed roadmap of economic integration. Rules of origin had to be worked out and negotiated much later. There were no safeguard measures and no dispute settlement mechanism. AFTA covered only trade in goods, and had to be complemented by the ASEAN Framework Agreement on Services (AFAS) in 1995, and by the ASEAN Investment Area (AIA) in 1998. In 1997 ASEAN produced the ASEAN Vision 2020, with the aim to forge closer economic integration and narrowing the development gap between older and newer members."

Currently, ASEAN consists of a diverse set of countries. There are major gaps in their economic capabilities, and some have begun to open up economic and political systems only in the last two decades. Chia and Soesastro indicated that while the ASEAN members were prepared to pool their resources, they were unprepared to share their markets. Therefore, there were continuing tensions between "resource pooling" and "market sharing" in implementing and up-grading the cooperation programs. As a result, not much progress was achieved in the field of economic cooperation.

Given the many challenges that ASEAN members must face in strengthening and further deepening economic integration in the Southeast Asian region, competition law or policy was not included in its earlier Action Plans. However, recognizing the importance of having a competition policy, ASEAN countries are currently exploring the possibility of pursuing one. In the ASEAN Economic Blueprint which was signed by the ASEAN leaders in November 2007, all ASEAN countries are scheduled to adopt some form of competition policy by 2015. The ten member countries are at various stages of development and of these, Indonesia, Thailand, and more recently, Singapore, Vietnam and Lao PDR, have a competition law. Vietnam's competition law has been effective since July 2005. Lao, on the other hand, has not yet set up its competition agency. MIER (2008) observed that competition policy in the ASEAN countries is in many cases industry specific, ad hoc and incoherent.

Philippines

To date, the Philippines does not have a comprehensive and developed legislation relating to anti-trust and monopoly activities. There are several anti-trust bills that had long been pending before the Philippine Congress. Currently, efforts are being made to enact a comprehensive competition law. The country's competition laws are widely fragmented. The Philippine Constitution prohibits and regulates monopolies, combinations in restraint of trade and other unfair competition practices. The Revised Penal Code defines and penalizes anticompetitive behaviour that is criminal in nature. The Civil Code of the Philippines allows the collection of damages arising from unfair competition as well as abuse of dominant position by a monopolist. There is also an "Act to Prohibit Monopolies in Restraint of Trade". All these legislations were influenced by the Sherman Anti-Trust Act of the United States of America.

There is no central government agency that monitors the implementation of competition laws and policy, with various government agencies being tasked with both the regulation and promotion of competition in different economic sectors. For instance, the National Telecommunications Commission for telecommunications, the Energy Regulatory Board for power, Maritime Industry Authority for the shipping industry, Philippine Ports Authority for ports and arrastre services, and the Civil Aeronautics Board for air commerce, among others. The Corporation Code of the Philippines covers the rules on mergers, consolidations, and acquisitions, but does not, address competition issues such as the possible abuse of dominant position arising from mergers and acquisitions.

There is general agreement that despite their considerable number and varied nature, these laws have been ineffective in addressing anticompetitive behavior mainly due to lack of enforcement. The laws have been hardly used or implemented as may be seen in the lack of cases litigated in court against anti-competitive behavior. Since the laws are penal in nature, guilt must be proven without reasonable doubt and hence, the amount of evidence required so that the case may prosper is tremendous. The fines are also insufficient to prevent would-be criminals.

Due to the lack of appreciation and political will to pass a comprehensive law, previous administrations from Aquino to the current Arroyo government have never prioritized the legislation of proposed competition bills. As a result, the government has not been able to effectively deal with industries that are allegedly engaged in anti-competitive practices. Box 3 illustrates the case of the cement industry, which used to be highly regulated and protected through high tariff and non-tariff barriers. After liberalization and deregulation, industry concentration and price cost margins have remained high. Shortly following the Asian crisis, a wave of mergers among foreign investors ensued. Soon after, price increases were observed in the midst of excess supply and depressed demand in the industry. Amidst accusations of cartel activities in the industry, the House of Representatives' Committee on Trade and Industry and the Department of Trade and Industry (DTI) immediately conducted investigations but no resolution of the issue was made. Both investigations did not yield any report on the teams' findings and recommendations.

Indonesia

Prior to the implementation of its competition law and policy, Indonesia was characterized by highly concentrated industries, large state-owned sectors, inefficient firms,

Box 3
The Case of the Alleged Cartel in the Philippine Cement Industry

Historically, the cement industry thrived under a powerful, government-sanctioned cartel. Due to the economic slump in the early 1970s which resulted in large losses and chronic oversupply situation, cement firms pushed for government regulation to prevent cutthroat competition. Immediately, the government created the Philippine Cement Industry Authority (PCIA) in 1973. The PCIA was tasked to allocate supply, control prices and regulate entry in the industry. In the absence of the necessary firm-level information, the PCIA coordinated closely with the industry association, Philcemcor, to perform its price and supply regulation function. Eventually, it delegated the setting of production quotas to Philcemcor.

Collusion in the industry took place through the firms' informal agreement to set production quotas and to assign geographic markets among themselves. Philcemcor held regular monthly meetings to set production quotas. It also collected firm level data on production, prices, capacity utilization and other relevant information on the cement industry. Philcemcor also arranged the geographical division of the markets that restricted Luzon plants to sell only in Luzon and the Visayas/Mindanao plants to confine their sales in the area [SGV Consulting, 1992]. This practice divided the country into regional markets served by a dominant player, thus, eliminating competition from taking place in the industry.

During the 1990s, deregulation and trade liberalization were implemented in the industry. PCIA was abolished, tariffs were reduced and import restrictions were removed. Prior to 1997, the industry was dominated by three big domestic Filipino groups. A wave of mergers and acquisitions took place right after 1997 Asian crisis. Currently, the industry is controlled by the world's top three major cement makers: Holcim, Lafarge, and Cemex.

Between the 1980s and 1990s, the cement industry remained highly concentrated with four-firm concentration ratios (CR4) ranging from 93% to 100%. After the mergers and acquisitions, cement price increases were observed beginning in 1999. Prior to this, big drops in prices starting in mid 1997 eventually leading to a price war were observed. After hitting a price of P45/bag in December 1998, the lowest level hit during the price war period, prices began to increase in a simultaneous fashion between January 1999 up 2000. In May 2000, ex plant price/bag was already P110 and reached around 140-145 per bag in 2001.

These price increases occurred at a time characterized by excess supply, which ballooned from 5 million bags in 1996 to 10 million bags in 1998 and 1999. While demand remained depressed and the industry wallowed in excess capacity which was below 50% in 1999, prices kept on rising. Their sales revenues grew by 25% despite a 12% reduction in production growth and a 130% increase in import growth in 2000. Note that the price increases coincided with reduced tariffs as well as entry of imports.

Consumer groups threatened to file a criminal case against the industry which they accused of engaging in cartel activities, but this never prospered. The House Committee on Trade and Industry and the Department of Trade and Industry (DTI) immediately conducted investigations but no resolution was made. The industry, through its very strong association, Philcemcor, was able to divert government's attention from the cartel issue by filing an antidumping case against imports. The Tariff Commission (TC), however, failed to find sufficient evidence to prove that the industry suffered serious injury from imports. However, DTI reversed the decision of the Tariff Commission by granting safeguard measures to protect the industry against imports. Recently, the Supreme Court voided the safeguard duty on imported cement, thus nullifying the earlier DTI decision.

Source: Aldaba, 2005, "The Impact of Market Reforms on Competition, Structure, and Performance of the Philippine Economy".

and high barriers to market entry. Like many developing countries, Indonesia adopted an import substitution policy in the past which resulted in very limited domestic competition and high concentration of industries. Crony capitalism, which was so entrenched in the country, led to the rise of many conglomerates. Monopoly licenses and other privileges were granted to many state-owned enterprises benefiting mostly policy makers and political elite along with their cronies and relatives [Shauki, 2000].

In 1997, Indonesia agreed to enact its anti-monopoly law as part of the International Monetary Fund (IMF) conditionality. The law, known as the "Prohibition of Monopoly and Anti Competitive Practice" was legislated in 1999 and has been implemented since March 2000. Indonesia's Anti Monopoly Law is generally a standard anti monopoly law covering basic elements such as monopolization, abuse of dominant position, integration, collusion, cartel, and anti-competitive pricing strategy.

The government created the KPPU (Commission for the Supervision of Business Competition) as an independent institution with the authority to conduct supervision of business competition and impose sanctions in the form of administrative measures. The KPPU reports directly to the President and the Parliament.

So far, its tasks have focused not only on law enforcement but also on competition advocacy through its role in providing advice and recommendations to the government. As of 2003, it has made various recommendations to address anti-competitive issues such as floor price limits in the domestic transportation industry, chicken farm partnership, film distribution, market structure in carbon black, and trade policy in the sugar industry; among others. In 2003, the KPPU also handled nine cases on suspected violations of the Anti Monopoly Law (Basri, 2004).

Indonesia is still in its adjustment phase in implementing its competition law. Some of the important issues that it has continued to face include (Basri, 2004; Shauki,):

- Weak competition culture in the country
- Resistance from lobby groups
- Weak regulatory environment and legal infrastructure, lack of readiness by the court system to effectively implement the law
- Lack of competition expertise, inadequate academic infrastructure to conduct research and education on competition

Exemptions have been controversial issues in Indonesia's anti monopoly law. Shauki noted that Indonesia's anti monopoly law provides exemptions for cooperatives and small businesses as well as monopolies which are licensed by law through the Parliament. He noted that exemptions for cooperatives will protect quite a significant number of monopolies. Moreover, legal monopolies will create the opportunity for influential state and private enterprises to maintain their monopoly power by influencing parliament. The state-owned oil company, Pertamina, was able to influence the legislature to reject a draft law from the government that would have reduced its monopoly over oil production in the country.

Basri (2004) noted the importance of political commitment by the government in curbing anti competitive practices and effectively implementing Indonesia's competition law and policy.

Thailand

Thailand introduced its full-fledged competition law in 1999. Unlike Indonesia which passed its competition law under IMF conditionality, the decision to legislate the Trade

Competition Act was made independently by the Thailand Parliament. The Trade Competition Act of 1999 created the Trade Competition Commission as the agency responsible for the implementation of the law and the Office of Trade Competition Commission as the secretariat body. The Office resides within the Ministry of Commerce.

The Competition Act covers all the major substantive provisions found in most competition laws. These include provisions on abuse of dominance provisions, merger control, collusive practices and unfair trade practice. Besides a few horizontal restrictions, such as price fixing, quantity fixing, and bid rigging, other restrictive practices are governed by a rule of reason. The Act also provides exemptions for state enterprises, co-operatives and agricultural cooperatives, central and regional government agencies, and other businesses prescribed by Ministerial Regulations.

After more than five years, the performance of the Thai Competition Commission has been described as dismal (Nikomborirak, 2005). Since its inauguration in 1999, it has only met eight times in five years. This poor track record can be attributed to factors including political intervention, lobbying by interest groups, legal loopholes, lack of human capacity, inadequate funding and lack of transparency in administration.

So far, the Thai Competition Commission has handled eighteen cases but no details are given on the nature of the alleged anti-competitive practices, results of the investigations or the decisions and remedies taken by the Commission. In assessing the enforcement of its competition law, Nikomborirak (2005) concluded that Thailand's experience indicates that simply having a competition law is not sufficient to address competition problems. Political intervention, opposition from big business and institutional limitations have been major constraints to law enforcement and have paralyzed the Competition agency. At the same time, state rules and regulations continue to serve as significant barriers to competition especially in the services sector.

Malaysia

Malaysia does not have a national competition policy or law. The government has been very cautious in implementing one. Since 1991, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) has been working on competition law. The eighth Malaysia Plan 01-05 indicated that "efforts will be made to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy". Lee (2005) identified two major challenges that Malaysia faces in implementing a national competition law. One, the government will have to reverse the sectoral devolution of competition regulation. Sectoral regulators are expected to resist efforts to centralize competition regulation at the national level. Two, competition law and policy may be in conflict with some of the industrial and socio-economic policies in Malaysia which include selective import substitution policies, bank consolidation, and wealth redistribution policies. To accommodate these policies, some exemptions will have to be made, although as Lee (2005) pointed out, too many exemptions may weaken competition regulation and make it vulnerable to regulatory capture. The government needs to be careful in striking the correct balance between the other objectives (industrial development, poverty eradication, and wealth redistribution) and an effective competition law.

Singapore

Prior to 2004, Singapore had applied a sector-specific approach in addressing competition issues. Its comprehensive law, known as Competition Act, was legislated in October 2004 and its competition authority, the Singapore Competition Commission was established in January 2005. The law prohibits anti-competitive agreements, abuse of dominant position one or more undertakings and mergers and acquisitions that considerably lessen competition.

The implementation of Singapore's Competition Act was divided into three phases (MIER, 2008). In Phase 1(January 1, 2005), only the provisions establishing the Commission came into force. In Phase II, (January 1, 2006), the substantive provisions on anti-competitive agreements, decisions and practices, abuse of dominance, enforcement and appeal process came into force. In Phase III (January 1,2007), the remaining provisions relating to mergers and acquisitions came into force.

Bilateral Economic Partnership Agreements or New Age FTAs: Japan with Singapore, Philippines, Malaysia, and Thailand

With the failure of the WTO ministerial conference in Cancun in 2003, the renewed frenzy of forging both bilateral and regional agreements has intensified. Two of the key players in the global trading system, the United States and Japan, are currently engaged in or are considering a number of bilateral trading arrangements.

Japan signed a comprehensive bilateral economic partnership agreement with the Philippines (in 2006), Singapore, Malaysia and is about to conclude a bilateral agreement with Thailand. These economic partnership agreements represent "new age free trade agreements (FTAs)". New age (FTAs) have been developed in response to the pressures arising from the growing trend in regionalism along with increasing globalization and technological progress. They entail efforts that go beyond traditional FTAs' liberalization of trade in goods and services. They include measures towards the smooth trans-border flow of people, capital, and information along with areas like competition, investment, government procurement, trade facilitation, as well as cooperation in science and technology (S&T), human resource development (HRD), small and medium enterprises (SMEs), and the environment.

There is a standard template for the economic partnership agreements signed by Japan with Singapore (Japan Singapore EPA signed in January 2002), Malaysia (Japan Malaysia EPA signed in December 2005), Philippines (Japan Philippines EPA signed in September 2006) and also for Thailand (Japan Thailand EPA). In all these agreements, there is a chapter on competition aiming for the promotion of competition and cooperation to address anti-competitive activities and to facilitate trade and investment flows between the countries and the efficient functioning of markets.

The countries are bound by their respective bilateral agreements with Japan to, when necessary, review and improve or adopt laws and regulations to effectively promote competition by addressing anti-competitive activities. Countries, based on their laws and regulations, shall take measures to promote competition by addressing anti-competitive activities.

APEC

The Asia Pacific Economic Co-operation (APEC) is a regional trade group of 21 countries and regions in Asia Pacific with the objectives of promoting liberalization, trade and investment facilitation, and economic and technical cooperation. Many of the members aim to move to free trade within the group by 2010 and by 2020 for the remaining member countries. Like many multilateral frameworks, APEC has undertaken efforts to promote market competition or prohibit anticompetitive practices to ensure free and fair market. Competition policy was one of the fifteen specific area designated in the 1995 Osaka Action Plan focusing on the development of national competition policies in all member countries and cooperation among members. The plan specified the following objective (Lloyd, 1998):

> APEC economies will enhance the competitive environment in the Asia-Pacific region by introducing or maintaining effective and adequate competition policy and/or laws and associated enforcement policies, ensuring the transparency of the above, and promoting cooperation among the APEC countries, thereby maximizing, *inter alia*, the efficient operation of markets, competition among producers and traders, and consumer benefits (APEC, 1995).

In its Ministerial Meeting in 1999, APEC countries came up with the "Principles to Enhance Competition and Regulatory Reform". Hosada (2002) indicated that like APEC's other activities and outputs, these principles are non-binding in nature and are expected to be implemented by individual member economies on a voluntary basis. APEC recognizes the diverse circumstances in which the member countries are in and emphasizes flexibility in implementing the principles. This involves the flexibility to address anti-competitive activities by implementing competition policy while considering issues of timing and steps involved in introducing competition mechanisms and reform measures, within the context surrounding individual countries' economies.

APEC's competition cooperation efforts have resulted in the preparation of a database to enhance information exchange on competition law and policy among APEC member countries which has been led by Taiwan. Trainings and capacity building programs on competition law and policy were also carried out. These were led by the Japan Fair Trade Commission in partnership with Thailand.

While there is widespread agreement on the need to promote international cooperation in the implementation of competition policy, APEC has encountered many difficulties in achieving this goal. APEC member countries are characterized by substantial differences in levels of economic and development conditions. There are also differences among countries' legal institutions as well as in their social and cultural background. One important issue that has emerged is the wide difference in countries' approaches to implementing competition law and policy. Some countries have competition laws and competition agencies, while others do not. The latter do not have comprehensive antitrust laws but have consumer protection laws along with industry specific laws to promote competition. Even among the developed country members, competition policies differ and competition legal institutions are not necessarily the same. All the ASEAN members whose details have given above (Malaysia, Thailand, Indonesia, and the Philippines) are also members of APEC. Other members who are not part of ASEAN include Korea and Taiwan.

Republic of Korea

The Republic of Korea can be regarded as having a fairly long history of competition law enforcement. The Monopoly Regulation and Fair Trade Act (MRFTA) was enacted in 1980, and the Korea Fair Trade Commission (KFTC) is the enforcement agency. In 2002, the MRFTA was amended to make rational improvements to the Act, applying behavioral regulation instead of one size-fits-all regulation that monitors conglomerate according to its asset size. The KFTC organized Seoul Competition Forum and International Workshop on Competition Policy in 2002 and promoted cooperation with its foreign counterparts, through signing bilateral cooperation agreements with Australia and cooperation memorandum with transition economies in Eastern Europe.

To date the KFTC actively engages in competition advocacy works, exercising its prior consultation rights to detect and improve anti-competitive acts and enforcement decrees, launching regulatory reform on anti-competitive regulations and promoting competition in the public sector. The KFTC has also made some notable achievements. The KFTC identified and ordered corrective measures against cartels in gas, credit card, record production and ski resort industries while ordering the correction of unfair provisions on adhesion contract in apartment rental services, private institutions, entertainment and professional sports sectors. Moreover, the KFTC imposed corrective measures on unduly advertising in television home shopping, private institutes and learning materials publishers. In 2004, the KFTC handled a total of 3,942 cases and imposed surcharges of 35.8 billion won (about 360,000 dollars). The KFTC detected 35 cartels, among which 12 cases were faced with 28.7 billion won (about 290,000 dollars) of surcharges, and ordered corrective measures on six anti-competitive M&A cases[2].

Taiwan

Taiwan's competition regime is underpinned by the Fair Trade Law, enacted in February 1991 and first implemented in 1992. The Taiwan Fair Trade Commission (TFTC) was established in terms of the Fair Trade Law on January 27, 1992 to begin enforcement of the competition law. The Law was amended in February 1999 and April 2000 to keep up with new dimensions in the competition policy field. In addition to ensuring fair competition, the Fair Trade Law also aims at maintaining trading order, protecting consumers' interests, and promoting the stability and prosperity of the economy as a whole.

One of the most notable achievements to date of the TFTC is its action on the international cement cartel. In 2001, the TFTC initiated proceedings an investigation of a cartel formed among 21 domestic cement enterprises (11 cement manufactures and 10 cement silo holders or distributors) and international cement companies from Indonesia, Japan, Korea, Mexico, Philippines and Thailand for conspiracy to fix the prices, allocate shares of cement and other anti-competitive practices in Taiwan. The TFTC carried out extensive investigations for four years. On December 15th, 2005, the Commission issued a penalty order varying from 5 to 18 million New Taiwan Dollars fine against the 21 cement enterprises, totally amounting to 210 million New Taiwan Dollars fine (approximately USD$ 6.3 million) for their anti-competitive practices. To date, this is the highest administrative fine ever issued by the TFTC since its establishment in 1992. (Hwang, 2006)

IV. Competition Policy Cooperation: Issues and Difficulties

Currently, developed countries are much more active in the area of competition policy cooperation than developing countries. This is to be expected considering that the latter's competition policy experience is still evolving. The MIER Study (2008) indicated that many of the industrialized countries led by the United States of America have cooperation agreements between them and several trade agreements involving developing countries have provisions on competition policy and law and cooperation. These include, among others: Andean Subregional Integration Agreement, NAFTA (Mexico, Canada, United States), Southern Agreement Common Market in South America (MERCOSUR), Treaty Eastablishing the Southern Africa Development Community, and the Canada/Chile Free Trade Agreement.

While competition issues and barriers to competition policy cooperation abound, the MIER Study (2008) pointed out some convergence in competition law and practice across competition law jurisdictions including across developing and developed countries. This is indicated by the modernization of competition laws in Thailand, Mexico, and Brazil as well as the development of competition laws in Central and Eastern Europe in a way that is

[2] KFTC 2004 annual report

broadly compatible with European Union rules. The same study highlighted some convergence in the following areas:

- treatment of mergers and dominant positions;
- growing use of the substantial lessening of competition test in assessing mergers, abuse of dominance, many vertical restraints, and some kinds of other horizontal arrangements such as R&D joint ventures, specialization/rationalization agreements and strategic alliances;
- the more relaxed approach to non-price vertical restraints, R&D joint ventures and other high technology based horizontal arrangements;
- method of investigation;
- strictly limiting the number of broad/sectoral exemptions under the competition law; and
- the requirement for competition agencies to be as independent as possible from government.

Convergence is also taking place in the analytical techniques used to apply competition laws such as in defining markets, barriers to entry and restrictive business practices as well as in measuring dominance and static and dynamic efficiencies. Moreover, the Study indicated that there are considerable variation, flexibility and innovation in competition laws and enforcement practices across all countries including industrialized and developing countries. As the research noted, this flexibility should be encouraged to meet the needs of each country.

In another study, Jones (2000) pointed out that within the APEC region, cooperation in the implementation of competition policy was met by the following difficulties:

1. **Differences in the treatment of market behavior**

Import and export cartels

Import cartels are allowed in Taiwan and Japan under certain circumstances. In both countries as well as in South Korea, cartel exemptions for "crisis cartels" are common. In Taiwan, export cartels can also be authorized. In Japan and the US, these can be partially exempt. Mexico also provides exemptions for specific exporters.

Vertical Restraints

Most APEC countries have adequate provisions in their competition legislations to deal with anticompetitive vertical relationships. In Australia, and New Zealand the competition laws allow most vertical practices to be subject to a competition test and may or not be authorised. In Taiwan and Indonesia both a rule of reason test or a *per se* approach are applied to vertical restraints, depending on the particular category of the restraint and focusing on the market share of the firm. In other countries like Korea, Japan, Mexico and the USA most vertical arrangements are subject to a significant lessening of competition test or a rule of reason approach. In Thailand, prohibitions on vertical restraints exist for 'controlled' products, mostly composed of basic consumer products.

Resale Price Maintenance (RPM)

In general, most APEC countries with specific competition legislation prohibit RPM. In the US, Australia, Japan, New Zealand and Taiwan RPM can be treated as a per se offence. In Korea, Canada and Mexico, RPM may be authorised as a rule of reason approach is called for.

Monopolization, Dominant Firm Behavior and Merger Policy

APEC countries with specific competition policy have controls on monopolisation and dominant firm behaviour. However, the definitions of monopolisation and dominance vary greatly between APEC members. Some countries use a quantitative measure. In Taiwan and Korea, a firm having a 50 percent market share is considered dominant. In other countries, a behaviour test is adopted in which regulators evaluate the extent to which a firm's behaviour is constrained by the conduct of rivals. There is also no consistency between APEC members on appropriate merger policy.

2. Issues on Cooperation Towards the Implementation of Competition Policy

Sequencing of trade, industry, and competition policy reform

In most ASEAN nations, competition policy is relatively new and has been implemented after they started trade liberalization and industry deregulation. In contrast, the developed countries, Japan and the United States, have older competition policy in operation. Australia adopted a different sequence, it introduced competition policy in the early 1970s, but its more substantial trade liberalization did not begin until the late 1980s and much industry deregulation even more.

There are two opposing arguments with respect to the need for competition policy as an accompanying measure to trade liberalization and deregulation. On the one hand, Bollard (1997 as cited in Jones, 2000) argues that without competition policy reform, deregulated firms might merge and restore the monopoly power eliminated by deregulation. Hence, for deregulation and liberalization to be effective, competition policy is necessary.

On the other hand, some experts believe that trade liberalization and industry deregulation lead to a reduction in market distortions and the market power of national firms, hence there may be no need to institute competition policy. Nicolaides (1997 as cited in Jones, 2000), however, countered that such an approach relies on the assumption that national markets are competitive prior to trade and industry deregulation. He pointed out that in most countries, markets are not competitive and the process of economic integration between countries may enable firms with national market power to preserve and enhance their power in a now larger market.

Major Elements of Competition Policy

Currently, there are still debates on what the essential elements of a competition policy should be. Jones (2000) noted that there are concepts and issues such as market dominance and monopolisation, anti-competition impact of vertical arrangements and RPM where economic studies are needed to provide more clear-cut guidance for regulators. Jones also indicated the profound diversity in views on business behaviour. In Australia, Canada, the US and New Zealand, for example, competition policy reform has had a high degree of support from the political processes. Meanwhile, in some Asian APEC countries, competition policy has less support. In the Western democracies competition policy concerns are primarily related to anti-competitive agreements between businesses while in some Asian APEC countries competition issues are sometimes related to anti-competitive arrangements between business and government or monopolisation by business with the government providing facilitating regulation.

Differences in Stages of Development and Cultural and Social Diversity

Cultural, social and economic factors have played an important role in the design and implementation of competition policy. As Jones pointed out in comparing the US and Japan, the latter has historically tended to look more favorably on cooperation between firms than the US (see Box 4). The US approach has focused on efficiency as the primary objective of competition policy, while in other countries, social objectives have greater relevance. One of the major difficulties for APEC countries in developing greater coordination of competition policies is the considerable difference in the stage of economic development with some developing countries hoping to exempt government trading enterprises from competition to pursue social objectives.

Box 4
Japan's Competition Policy: What are the lessons for developing countries?

Japan's competition policy was instituted in the late 1940s with the legislation of the Antimonopoly Act 1947 and the establishment of the Japan Fair Trade Commission (JFTC) which were patterned after the US. One important phase in Japan's history was the period 1950-1973 when Japan achieved spectacular economic growth at 10% per year. During this period, Japan adopted a policy that emphasized dynamic efficiency through an institutional structure that combined cooperation and competition between firms. The Japanese government gave more weight to industrial policy than to competition policy with the Ministry of International Trade and Industry (MITI) having the upper hand over the JFTC.

The MITI officially sponsored a wide variety of cartels, sequenced investments by firms and intervened in the entry and exit of companies. At the same time, it promoted an industrial policy that encouraged contest-based competition between oligopolistic firms where the rewards were access to cheap credit and foreign exchange as well as protection from international competition, where necessary. The rewards were contingent on relative performance either in export markets, technological development or in introducing new products. As a result, the rivalry between firms in the country became extremely intense (Odagiri, 1994 and Porter, 1990 as cited in Singh, 2002). What emerged was a manufacturing sector characterized by intense competition. Odagiri (1994 as cited in Singh, 2002) indicated that the intensity of competition in Japan's manufacturing industry was greater than in US manufacturing.

Japan's competition law has been in place for more than half a century. The implementation of its Antimonopoly law was heavily criticized for being overly slack (Lin, 2002). Due to its frictions with trade partners and prolonged economic stagnation, Japan's antitrust system has been going through substantial changes since the early 1990s. The reforms aim to strengthen the antimonopoly law and its enforcement body, the JFTC. In April 2005, Japan's Antimonopoly Act was amended to (Mehta, 2006):

- Increase administrative fines by 100% for price fixing, bid rigging or conspiracy to limit supply;
- Introduce leniency or amnesty, i.e., exempt from administrative fines the first member of a cartel who voluntarily provides information to the JFTC;
- Abolish JFTC's *shimpan* hearing process that allows companies to challenge, in an adversarial hearing, allegations of unlawful conduct; and
- Expand significantly JFTC's criminal investigative powers by authorizing it to seize documents, with court-issued warrant.

V. Conclusions

While there is general consensus among countries on the need to promote competition policy and international cooperation in its implementation, countries and regional groups are facing difficulties in realizing this. APEC experience has shown that with the wide differences in the countries' stage of socio-economic development as well as in their legal institutions, countries have differed in their approaches to competition. Some countries have comprehensive competition laws and competition agencies, while others do not. While the latter do not have comprehensive antitrust laws and national competition agencies, they have enacted consumer protection laws along with industry specific laws to promote competition. But note that even among the developed countries, competition policies differ and competition legal institutions are not necessarily the same.

Note, however, that some improvements in competition trends and practices have been observed as indicated by the MIER Study. The Study, which assessed the developments in competition law and policy in various countries, highlighted the convergence taking place across developing and developed countries in competition areas such as mergers and dominant positions and growing use of the substantial lessening of competition test in the assessment of mergers, abuse of dominance, and some vertical and horizontal restraints. A more flexible approach is also being applied to non-price vertical restraints and R&D ventures. Substantial convergence is also occurring in the analytical techniques used to apply competition laws.

Currently, the ASEAN countries are exploring the possibility of having competition policy in the region with the signing of the November 2007 ASEAN Economic Blueprint. Competition law and policy is relatively new in the ASEAN region with most countries having adopted their competition laws only in the late 1990s and early 2000s. Given their early implementation stages of competition law, countries have faced some enforcement difficulties which demonstrate the complexities of designing and implementing effective competition law and competition policy. Some of the emerging issues in the development of competition policy in the ASEAN include:

- Lack of a culture of competition
- Resistance from various interest and lobby groups
- Inadequate regulatory and legal infrastructure, widespread corruption, poor corporate governance, and lack of transparency
- Differences in competition policy objectives: consumer welfare versus efficiency
- Conflicts with other national policies such as selective protection
- Differences in scope and coverage of competition laws with some countries having exemptions in certain activities

As the experience of Thailand shows, the legislation of a comprehensive competition law is necessary but not a sufficient condition to effectively allow developing countries to address anti-competitive activities particularly issues of cartels, market dominance and abuse of dominant position by large MNCs. In general, without an adequate legal and institutional framework along with access to information to prove that anti-competitive activities by international corporations are taking place, it is often difficult for developing countries to restrain anti-competitive behavior.

Given the wide differences in ASEAN's economic development and institutional capacity, an effective anti-monopoly system cannot be built overnight. It takes time for any country to develop a comprehensive competition regime and the regime will also need to be improved upon with time. But this should not discourage countries that are contemplating the legislation of a competition law. There already exists a wide understanding of the issues and problems along with international best practices on competition policy and its implementation, countries can draw from this in designing their own competition law. The key challenge is finding the correct measures to the effective and judicious implementation of competition law.

Country experiences show the importance of administrative, legal, political, and economic factors in the design and implementation of competition law and policy. Competition policy needs to be country specific taking into consideration the stage of a country's economic and industrial development as well as its institutional and governance capacity. Competition policy cannot be a unique, one-size-fits all policy which is appropriate for all developing countries (Singh and Dhumale, 1999 as cited in Singh, 2002).

With globalization, the world economy becomes increasingly integrated. As such, competition issues of international nature are expected to arise. It is important that countries have their own domestic competition law along with cooperation agreements with other countries, bilateral or regional, to help in handling cross-border competition issues. Bilateral and regional arrangements can also help in building institutional capacity and competition advocacy through education and information campaigns. Sharing country experiences and documenting and analyzing implementation experiences would also be helpful.

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