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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 socio-economic 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
Emerging Issues in Promoting Competition Policy under Regional Frameworks
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I. Introduction

Countries adopt competition policy in order to achieve economic efficiency and maximize consumer welfare. Competition is promoted through the prevention of restrictive business practices by firms and their abuses of economic power including inefficient government regulation. Competition policy is consistent with policies that enhance competition in local and international markets like liberalized trade policy, relaxed foreign direct investment and ownership requirements and economic deregulation.

The last decade has witnessed most developing countries and economies in transition legislate their competition laws. The increasing globalization and the creation of regional trading arrangements have led the focus on the need to enhance competition and level the playing field through the promotion of competition policy and greater coordination towards its effective implementation.

This paper aims to identify the emerging competition issues in regional frameworks particularly the APEC and the ASEAN. It is divided into three main sections: after the introduction, section II reviews the concepts of competition 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 plans and frameworks. A short discussion of competition provisions in “new age agreements” as represented by Japan’s bilateral economic partnership agreements with Singapore, Philippines, Malaysia, and Thailand will also be included. As the paper shows, implementing competition policy is a big challenge. The last part looks at the emerging issues and problems in promoting competition policy and coordinating its implementation under regional arrangements. Section IV provides some broad conclusions.

II. Competition and Competition Policy

A. Competition, Market Power, and Barriers to Entry

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. This way, consumer welfare increases resulting in dynamic efficiency through innovation and technological change.

Competitive rivalry may take place in terms of price, quantity, service, or combinations of these and other factors that customers may value [World Bank and OECD Study, 1998]. 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.

It is important to recognize that high levels of market concentration as well as the presence of monopolies (a type of industrial structure when there is only one large firm) or oligopolies (when there are a few large firms) 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. For as long as markets remain contestable (when entry into a market is easy), 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.

Competition can be lessened significantly by (a) government regulatory policies, (b) behavioral restraints and (c) structural characteristics of the market that can act as barriers to entry (see Box 1). Regulatory barriers include investment licensing, tariff and nontariff measures, antidumping and countervailing duties. 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 agreements that are 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 are 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.

Economies of scale (increasing returns to scale) is 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.

### 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: 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**
- Excess capacity
- Product differentiation and advertising
- 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

**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

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. The presence of barriers to entry impedes competition and allows firms to acquire and exercise market power. Market power enables 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. Barriers to entry are necessary for market power. 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 preexisting 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.

For instance, with cartels and collusion, the economic freedom of consumers and potential rivals is taken away. Cartels make consumers believe that what they see are independent offers while potential rivals are made to believe that the market is amply supplied. By raising prices and restricting supply, artificial shortages are deliberately created. As a result, goods and services become completely unavailable to some buyers and unnecessarily expensive for others. These output restrictions cause inefficiency, reduce productivity, result in economic and social harm, and hinder development.
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.

Collusion describes a type of conduct or form of behavior where firms agree to coordinate their actions. 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.

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. Box 2 presents various cartel cases experienced in the developing world. Cartels and collusion are anti-competition, they create market power, and suppress rival and consumer activities. Cartels are worse than monopolies because they make it appear that there is competition in the market, when in reality there is none. They make consumers believe that what they see are independent offers while potential investors or rivals are made to believe that the market is sufficiently supplied. By raising prices and restricting supply, artificial shortages are deliberately created. As a result, goods and services become completely unavailable to some buyers and unnecessarily expensive for others. These output restrictions cause inefficiency, reduce productivity, and result in economic and social harm.

Collusion is a cooperative game involving two elements: (1) a process of communication/discussion and (2) an exchange of information with the aim of reaching an agreement and the imposition of punishment in case of deviations. It is important to differentiate between hard and soft cartels. Hard-core cartels or explicit collusion refers to explicit agreements to fix prices or share markets between producers and sellers of substitute products. Soft cartels or tacit collusion refers to collusive agreements that are merely implicit. Implicit coordination may be achieved without any communication or negotiation between firms. There will be no evidence of firms’ having met or having discussed coordination of market behavior. The only evidence that will be available relates to firms’ market behavior. The operation of both implicit and explicit mechanisms will require information. To be sustainable, information on other firms’ costs, outputs, prices, and discounts are necessary. The greater the number of firms and the more product heterogeneity, the greater these information requirements expand.

It is not easy to detect cartels and to uncover them; it is necessary to understand how they work. A cartel needs to convince all significant competitors to increase their prices above competitive level and keep them there long enough to earn monopoly profits. It is difficult to agree on the price because different firms may prefer different prices. A firm with higher cost would prefer higher cartel price while a firm with lower cost would prefer lower cartel price that would still generate monopoly profits. Assuming a price has been agreed, the cartel must make sure that no members would cheat by lowering prices.

There is always a temptation to produce more than is agreed and hence, make higher profits assuming that the rest of the industry will produce at a constant level and will not respond. To be successful, a cartel must have a punishment strategy to police members’ behavior usually in the form of a price war. This requires that firms must be able to keep track of the prices and production levels of the other firms in the cartel.

It is important to recognize that 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. These firms may act on their own and do not come to an agreement governing their behavior.

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**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 invalidate 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.


In the real world, there are many facilitating devices that have been developed to help firms achieve successful tacit collusion. This would not involve explicit agreement but simply the unspoken acceptance by the firms that it is in their best interests to produce the monopoly output on the understanding that failure to do so would provoke a price war. Rees [1993] noted that in many industries, trade associations may act as facilitating devices which involve collecting and disseminating information on costs, outputs, prices, and policing both tacit and explicit agreements. There are also many opportunities for company officials to make their views known to each other on the state of the market and the direction prices should take, for example, in newspaper interviews, articles in trade publications, or in speeches.
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. In the enforcement of competition policy, the current trend is now moving away from “per se” rule towards the use of the rule of reason approach.

B. Competition Law and Policy

Competition policy refers to policy aimed at preserving and promoting competition, both by enforcing competition law against restrictive business practices by firms and by influencing the design or implementation of other governmental policies or measures affecting competition [UNCTAD, 1997]. Khemani and Dutz [1995] defined competition policy as government measures that directly affect the behavior of enterprises and the structure of industry. Competition policy includes both (1) policies that enhance competition in local and national markets such as liberalized trade policy, relaxed foreign investment and ownership requirements, and economic deregulation; and (2) competition laws (also referred as antitrust or antimonopoly law) consist of a clear set of enforceable legal rules applying to commercial tactics, behavior, and transactions by commercial establishments and are designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace. The goal of competition policy is to achieve economic efficiency to maximize consumer welfare. More recent literature has emphasized the importance of dynamic efficiency as a legitimate objective of competition policy. This is often associated with the benefits arising from technological change, learning, and economic growth accumulated over time.

Competition policy aims 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 laws prohibit firms from attaining or exercising substantial market power obtained through improper means. Competition laws do not prosecute firms that have gained market power through legitimate behavior, i.e., skill, foresight, and hard work. Competition law is concerned with the elimination of abusive monopoly conduct, price fixing and other cartels. It is also concerned with the prohibition of mergers and acquisitions that limit competition. Competition law prevents artificial barriers to entry.

It is important to emphasize that competition law does not include the following state interventions [Evenett, 2005]:

- Consumer protection laws like those relating to defective products, warranties, and misleading advertising
- Unfair trade laws like antidumping and countervailing laws as well as measures to protect national industries from import surges
- Government policies on the registration of new businesses and on the taxation and corporate governance oversight of existing businesses
- Trade policies and FDI policies in general (although policies on mergers & acquisitions are within the scope of competition law).
III. State of Competition Law & Policy Under Regional Frameworks

A. Competition Policy Cooperation Attempts

With the increasing globalization and liberalization of markets along with the creation of regional trading arrangements like the Association of Southeast Asian Nations (ASEAN) and the Asia Pacific Economic Co-operation (APEC), the focus has shifted on measures to promote competition and greater coordination of competition law and policy between 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. 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).

<table>
<thead>
<tr>
<th>Country</th>
<th>Competition Law</th>
<th>Date of Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong</td>
<td>Competition Policy Statement &amp; sector specific competition policy framework</td>
<td>1998</td>
</tr>
<tr>
<td>Japan</td>
<td>Antimonopoly Act</td>
<td>1947</td>
</tr>
<tr>
<td>Philippines</td>
<td>Article 186 of Revised Penal Code (Republic Act 3815) An Act to Prohibit Monopolies &amp; Combinations in Restraint of Trade</td>
<td>1930 1961</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>Price Stabilization &amp; Fair Trade Act Monopoly Regulation &amp; Fair Trade Act (MRFTA)</td>
<td>1975 1980</td>
</tr>
<tr>
<td>Taiwan</td>
<td>Fair Trade Law</td>
<td>1991</td>
</tr>
</tbody>
</table>

Table 1: Competition Law in Selected Asian Countries
Competition policy is relatively new in Asia and until recently, most developing countries have not established formal competition laws and policies. As Table 1 shows, countries like Thailand and Indonesia along with Taiwan and Hong Kong have established such law and policy within the last decade while Vietnam introduced its competition law only in the 20s. Both India and China have introduced amendments to strengthen their competition legislations, on the other hand, Singapore and Malaysia do not have formal competition laws. In the Philippines, which has existing competition laws legislated since 1930 and 1961, these have not been effectively implemented to control monopolies and cartels along with anticompetitive practices.

### 1. 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 has not yet been included in its Action Plans. The ten member countries are at various stages of development and half of these consisting of the Philippines, Indonesia, Thailand, and more recently, 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. The most advanced, Singapore, does not have a competition law.

### Philippines

While the Philippines has the oldest competition laws in the region, it has not developed a comprehensive framework for competition policy. The country’s current competition laws and regulations 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. These provisions were based on the Sherman Act of the US.

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 balloon 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.

Other laws include the Act to Prohibit Monopolies and Combinations in Restraint of Trade, meanwhile, allows treble damages for civil liability arising from anticompetitive behaviour. The Corporation Code of the Philippines also covers the rules on mergers, consolidations, and acquisitions. It does not, however, address competition issues such as the possible abuse of dominant position arising from mergers and acquisitions.

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.

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, 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 an 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. 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**

Like Singapore, 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.

2. **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 FTAs”. New age free trade areas (FTAs) have been developed in response to the pressures arising from the growing trend in regionalism along with increasing globalization and technological progress. These so-called “new age FTAs” entail efforts that go beyond traditional FTAs’ liberalization of trade in goods and services. They include measures towards the smooth transborder 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.

3. 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.

B. Competition Policy Cooperation: Barriers and Difficulties

Jones (2000) pointed out the following competition issues and barriers to cooperation to enhance competition with emphasis on the APEC region:
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*

Currently, APEC countries do not have any significant competition policy towards vertical relationships. In Australia, most vertical practices are subject to a competition test and/or may be authorised. In Taiwan a rule of reason test is applied to vertical restraints 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 competition test or a test of reasonableness. In Thailand, prohibitions on vertical restraints exist for ‘controlled’ products, mostly composed of basic consumer products.

*Resale Price Mechanisms (RPM)*

In general, most APEC countries with specific competition legislation restrict RPM. In the US, Australia and Japan RPM is a per se offence. In Taiwan, Korea and New Zealand, RPM may be authorised while in Mexico it is subject to a competition test and is illegal if the result is to lessen competition. Countries like Indonesia, the Philippines, Singapore, and Hong Kong have no RPM restrictions.

*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. Barriers to 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.

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.
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.

IV. 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 many difficulties and problems 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.

Currently, ASEAN does not have competition policy in its Action Plans. Competition law and policy is relatively new in the ASEAN region with most countries having legislated their competition laws only in the late 90s and early 20s. While the Philippines has the oldest competition law in the region, this has been deemed ineffective. Given their early implementation stages of competition law, the four other countries have faced enforcement difficulties which demonstrates 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

Note that, as shown by the experience of Thailand, while the legislation of a comprehensive competition law is a necessary condition, it is not sufficient 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 difficulties that ASEAN countries face, they cannot build an effective anti-monopoly system overnight. It took Japan more than half a century to modernize its anti-trust system and up to the present it is still trying to improve its mechanism. But this should not
discourage countries that are contemplating the legislation of a competition law. There exists a wide understanding of the issues and problems, finding the right solutions to the effective and judicious implementation of competition law remains a challenge to many developing countries.

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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