LESSONS FROM THE SIX COUNTRY ANALYSES

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The purpose of this concluding chapter is two fold: to draw out several themes that recur in the six chapters describing country experiences with competition laws and proposals to enact such statutes, and to identify a number of lessons for policymakers in the coming years. It is hoped that these concluding observations will be of interest to government officials in the Asia-Pacific region, to scholars of that region and of competition law and its enforcement in developing countries, and to officials from international organizations and civil society. To sharpen the discussion the remarks in this chapter concerning competition law and its implementation are organized around the following four questions:

1. Is competition law a threat to development?

2. Is the Asia-Pacific region different?

3. Is competition law inherently anti-big business?

4. Is effective implementation possible?

A few caveats and preliminary comments are also in order. First, although these four questions cover many of the important matters relating to competition law in the Asia-Pacific region, the reader should not conclude that these are the only significant issues. Second, even though the comments presented here draw extensively on the country analyses, these concluding remarks are mine and not necessarily those of the authors of those country
studies. The latter, after all, have had their opportunity to present their own policy recommendations and findings in earlier chapters. My value-added, if any, is to look across chapters, to identify common themes and findings, and to draw from the experiences of other developing countries, where that is relevant.

The six country analyses in this volume highlight many of the nuances associated with competition law and its enforcement. These nuances often make competition law seem an alien and complex beast to those used to analysing relatively more straightforward policy instruments, such as ad valorem tariffs. Such complexity does not mean competition law is unnecessarily burdensome or bad, instead it points to the fact that a number of inter-related factors influence the effectiveness of its enforcement. Indeed, the country analyses demonstrate the importance of administrative, judicial, and political-economy factors as well as economic considerations in the design and use of competition law. In this respect competition law is similar to sectoral regulation, which experience has shown can vary markedly in its effectiveness. Given that many developing countries in the Asia-Pacific region have turned to competition laws in the wake of perceived failings of apparently more straightforward reforms (such as trade reforms, investment liberalization, and privatization or corporatization), it would seem that policymakers appreciate the limits of some of the relatively clear-cut advice given to them in the 1990s.

In the remainder of this chapter I discuss each of the four questions posed above and in doing so I point out a number of policy recommendations. I then tie together a number of the themes raised in this volume in some final remarks.

**Is competition law a threat to development?**

It is striking reading the country analyses just how many times policymakers in the Asia-Pacific region have turned to competition law when prominent liberalizing reforms have not
had the desired effects. That is not to say that these reforms have retarded development, rather that they have often produced unintended side effects, such as enabling incumbent firms to exploit market power to the detriment of purchasers and often to the economy as a whole. Given that few business interests have actively supported the enactment and enforcement of competition laws, the recent interest in these statutes by Asian policymakers almost certainly does not reflect a desire to promote narrow commercial interests. Instead, by their own actions Asian policymakers appear to have accepted that competition laws have a role to play, possibly even a pro-development one. Of course, enactment does not necessarily lead to effective implementation, nor does it mean that influential commercial and bureaucratic interested have been completely overridden. Even so, it would seem that the debate over competition law in the Asia-Pacific region has shifted from the black-and-white question of whether competition laws are good or bad to a discussion of what types of competition law best promote the standard of living and how best to implement and enforce such laws.\(^1\)

There are certain similarities in the rationales for the heightened recent interest in competition laws by policymakers in the six Asian nations studied here. In Korea, India, Malaysia, and Thailand tackling anti-competitive practices rose up the policy agenda after measures to promote private sector development were seen an generating unfortunate by-products. In Korea this is putting the matter mildly as curbing the power of the chaebol became a significant policy imperative after the 1997-8 financial crisis; a crisis that many Korean observers thought was brought on by the steps taken by large conglomerate groups of firms. In Vietnam and China there were similar motives for proposals to adopt more stringent competition legislation: first, as a constructive step towards the development of a market economy and secondly as a defensive measure to "level the playing field" (increasingly in China's case between domestic firms on the one hand and foreign firms and joint ventures involving foreign firms on the other.)

\(^1\) I return to this latter matter in the fourth major question addressed in this chapter.
There are also similarities in the considerations that these nations took on board when drafting their competition laws. The desire, for better or for worse, to preserve national industrial policies was a prominent concern in drafting India's and Vietnam's recent competition laws. Such concerns would echo those in Beijing and Kuala Lumpur as to the appropriate provisions of these nations' proposed competition legislation. Quite distinctly, these are parallels between India's and Malaysia's concerns about the impact of a competition law on the well-being of certain favoured societal groups. (Indeed, it appears that Malaysian academics and policymakers have examined India's, and for that matter's South Africa's, experiences in this regard.) The interest in the late 1990s in Korea and Thailand in more vigorous competition laws was due to yet another factor: the perception that all too often in the past incumbent firms have taken too much advantage of their substantial market positions with little or no offsetting benefits.

These findings have a number of policy implications. First, while country circumstances inevitably differ, a small number of factors have been important in nations with similar levels of development. Now that approximately 100 nations have adopted some form of competition law, this suggests that on certain matters there is plenty of room for cross-country learning and the sharing of experiences by policymakers. International and regional development agencies can play an important role in fostering this international exchange of experience and associated expertise.

The second implication for policymaking is that competition legislation is adaptable enough to take account of a wide variety of initial conditions and societal objectives. Transition economies have tailored competition laws to their own circumstances, and industrial and social policy objectives have been reconciled with the broader goals of competition statutes. In such reconciliations exemptions, exceptions, and exclusions from the reach of competition law have been used, along with injunctions to consider factors other than consumer welfare
and economic efficiency when implementing these laws. Of course, the fact that such reconciliations are feasible does not make any one set of associated compromises and trade-offs desirable.

Ideally, policymakers ought to consider whether fostering or (explicitly or tacitly) allowing anti-competitive practices is the most effective way to attain a nation's social or industrial policy goals. Generally, constraining competition between firms is a sub-optimal means to promote developmental ends. Indeed, one might have thought that one side benefit of debates over the merits of enacting and enforcing competition laws is that questions are raised as to efficacy of existing measures that effectively constrain competition in the pursuit some "developmental" goal. However, the typical reaction to proposals for competition laws that might infringe on these measures is initially defensive with the affected commercial and social interests, and the government agencies and ministries that "oversee" such interests, seeking to preserve the status quo often by opposing the enactment of competition laws. It is an open question as to whether the passage of time will undermine these favored groups' knee-jerk reactions against competition legislation.

Another interesting feature of the country studies is that, even though competition laws in the Asia-Pacific region tend to have a higher priority attached to them than previously, the contributors to this volume do not see competition law as a panacea. If this view is shared by policymakers in the region, then it may well be a very healthy state of affairs as competition law may well be asked to bear an appropriate load; misplaced expectations in the past having essentially damned many potentially useful liberalizing measures. This modest view of the prospects of competition law in the Asia-Pacific region may well reflect these laws' relative youth. Moreover, the fact that the country analyses in this book have identified few robust linkages between competition law enforcement and poverty reduction is probably a reflection of the limited experience with the former.
The contributors to this volume were also careful to stress the that greater attention to competition laws should not come at the expense of measures to remove inappropriate state impediments to domestic and international competition, a proposition with which I entirely agree. It should be noted, however, that calls for tackling private anti-competitive practices can complement, even reinforce, measures to rationalize state intervention in national markets. In fact, measures to expand the scope for inter-firm rivalry and private sector ownership (say, by deregulation and privatization, respectively) while taking steps to ensure such rivalry is preserved (by enacting and appropriately enforcing competition legislation) can be consistent with one another. Even though these measures can be implemented together, enacting and enforcing competition laws can and does often proceed without any connection to freeing markets of state intervention.

Is the Asia-Pacific region different?

It is all to common in discussions on development policy to hear arguments to the effect that a given region is different and "therefore" needs a new recipe for growth, poverty alleviation, etc. These arguments are often advanced to explicitly or implicitly reject the approaches taken in other parts of the world, typically those taken in the industrialized world. A number of discussions in recent years in international fora on the relationship between competition law and economic development have had this flavor and it is appropriate to ask, on the basis of the country studies in this volume and what is known about other developing countries and their competition laws, just how similar or different circumstances or experience in the Asia-Pacific region is from other nations.

\[\text{Having said that, there is one well known trade-off between promoting inter-firm rivalry and privatization. That is, when competition is deliberately frustrated so as to enhance the value of a firm that is being privatized by a government. Here the interests of purchasers--who need not just be consumers--are sacrificed to those of the national treasury and, in principle, the nation's taxpayers.}\]
The four principal considerations addressed when the six countries studied in this volume discussed adopting competition laws resonate with those of other developing countries at comparable stages of development. The use of competition law as one instrument in effecting the social and economic transformation of South Africa has parallels in the experiences of Korea and Malaysia described in this volume. The transition economies of Eastern Europe and the countries comprising the former Soviet Union faced many of the same challenges identified in the Chinese and Vietnamese country studies although, naturally, these experiences are not identical. Moreover, concerns about the anti-competitive conduct of large firms after a decade of reform and liberalization is an important impetus behind the renewed interest in Latin America. These similarities imply that the Asia-Pacific region is not alone in tackling the harm created by anti-competitive practices and that opportunities for learning from the experiences of peers should be taken advantage of.

When one considers the range of anti-competitive practices experienced in the Asia-Pacific, which the country analyses have identified in the relevant enforcement records of active competition agencies and in numerous case studies, they find counterparts in other parts of the developing world. Cartelization, anti-competitive mergers and acquisitions, the abuse of a dominant position, and the like can be found in these country analyses, just as they can in countries of all levels of development. It is difficult to accurately assess the relative importance of different types of anti-competitive practices across countries and regions, not least because researchers can typically only rely on those practices that are the subjects of complaints or enforcement actions, which may well generate a biased sample of cases. Even so, certain Asian nations appear to place a greater priority on taking actions against predatory pricing by firms than in the larger industrialized jurisdictions. In this particular respect the experience in the Asia-Pacific may be similar to that in Africa, where a recent study found

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3 On the basis of the discussion in the last section these considerations are development of a market economy; the need to tackle anti-competitive practices and the desire on the part of some to curb the powers of large firms;
quite a few allegations of predatory pricing too. Given the considerable skepticism among scholars and practitioners of competition law in industrialized countries as to the viability of predatory pricing by firms, it may be worth examining whether the preconditions for such a commercial strategy are more likely to be found in the Asia-Pacific region. If so, then different circumstances may legitimately call for different enforcement priorities.

The Asia-Pacific region is similar to many other developing countries in another important respect; namely, the tendency to omit of merger and acquisitions provisions from national competition legislation. This omission is said to reflect the political strength of corporate interests and, separately, the power of ministries that wish to promote large firms. It is worth noting here that there are a number of different types of merger review regimes and that developing countries need not immediately adopt the most rigorous oversight of mergers and acquisitions. Moreover, the absence of a merger review regime can place a greater burden on the abuse of dominance provisions of a national competition law, as anti-competitive acts by a merged or acquired entity can be tackled ex-post. Worse still, the absence of a merger review law will, in the presence of tough anti-cartel provisions, provide a strong incentive to firms who might otherwise cartelize a market to merge with one another. This consideration suggests that policymakers should consider the full set of anti-competitive strategies available to firms when deciding which provisions to enact and enforce.

To summarize, even though the economies of the Asia-Pacific region differ from one another and from those outside the region, when it comes to the motivations and challenges faced when designing and enacting competition laws there are plenty of commonalities with other developing countries. Participation in international fora, such as the International Competition Network and the Inter-Governmental Group of Experts of the United Nations Conference on Trade and Development, as well as bilateral technical assistance and capacity building
programs, can strengthen the design and the enforcement of competition law in the Asia-Pacific region.

**Is competition law inherently anti-big business?**

With the possible exception of recent experience in Korea, no reader of the country analyses in this volume can avoid the widespread emphasis by policymakers in the Asia-Pacific region on promoting large firms. The motives for doing so appear to differ, from a generalized desire to be self-reliant to equating national economic prowess with export competitiveness or the performance of so-called national champions in international markets. The country analyses strongly suggest that opponents of enacting and enforcing competition laws--in particular to laws establishing powers to review proposed mergers and acquisitions--have often centered on the perception that such laws are inherently anti-big business. Perhaps it cannot be stressed enough but properly enforced competition law does not target firm size but threats to, and actual distortions of, the competitive process and resource allocation. A merger between two domestic firms that offers the prospect of reducing incremental production costs (say, because it allows the execution of larger production runs) need not fall foul of a properly enforced competition law. Now, if this merged entity decided to raise prices to domestic consumers then a competition enforcement agency may raise objections. However, without such harm to domestic purchasers and in the absence of some other concerns (such as the buying power of the combined entity), the size of this merged entity ought not be an independent concern of the officials tasked with enforcing the competition law. Similarly, mergers that help lower costs and promote export performance should under a broad set of circumstances be approved by competition agencies.

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4 See Evenett and Jenny (2004).
The points made in the last paragraph are hardly novel, nor are they particularly subtle, which makes one wonder whether there could be other explanations that account for the repetition of this size-based argument against the adoption of competition law. First, there could be a concern that the officials responsible for implementing competition law will not have the necessary skills or experience to assess whether a merger is pro-competitive or not and, therefore, that errors of diagnosis and prescription could be made. If this really is the concern then the solution is to ensure adequate training for enforcement officials, perhaps even delaying (or phasing in) the full implementation of the merger review law until the necessary expertise is in place.

Second, the underlying concern could be that the officials enforcing the competition law may be motivated by considerations other than those stated in the competition law. Private firms may fear that political interference from a minister could influence the outcome of an official merger review. While this logical possibility cannot be ruled out, especially when the competition agency is not independent of elected officials or their appointees, not enacting a merger review on these grounds seems far too sweeping a solution. Mechanisms that increase the autonomy of competition enforcement officials and that make political leaders pay a higher "price" for interfering in the merger review process may well be preferable alternatives. These last two arguments highlight the importance of implementation-related matters to which I now turn.

**Is effective implementation possible?**

It is a straightforward and inconvenient fact that policymakers cannot legislate anti-competitive practices out of existence. Firms being rational decisionmakers will trade off the benefits of engaging in anti-competitive acts against the likelihood of enforcement action and any resulting punishments, be they fines or otherwise. The deterrent effect, therefore, of a
competition law depends on firms' perception of the effectiveness of the implementation of competition law. Enactment of such laws is not enough; what matters is judicious and efficient implementation.

The country analyses in this volume provide plenty of evidence of the challenges faced when implementing competition laws. In fact, I know of no more comprehensive account of the failings of a competition law enforcement agency in a developing country than can be found in this volume's chapter on Thai experience. As was noted there, the noble intentions of policymakers in enacting the 1999 competition law have been undermined by a combination of the following six factors: interference by government ministers, officials, and other politicians; lobbying by interest groups; legal loopholes; a lack of transparency in decisionmaking; lack of human capacity; and, relatedly, a lack of funding. Moreover, a standard prescription for policymakers concerning the implementation of competition laws seems less relevant in the Thai case; namely, that competition agencies should be functionally independent of government ministries. As I understand it, in Thailand the creation of an independent regulatory agency requires a change in that country's constitution. Such a change is most unlikely, as it would be in many jurisdictions--including many of those in the industrialized world. The imperative, then, is to find other measures that secure some if not all of the benefits of independence.

One option worth exploring is that representatives of purchasers and those potentially harmed by anti-competitive practices are given a say in decisionmaking at competition agencies. Moreover, sunshine--that is, attention from the media and others as to the plight of victims of anti-competitive practices--may offset some of the disadvantages of the lack of independence of the competition agency from government ministries and their interlocutors.

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5 The obvious caveat here is that purchasers and other parties with a direct interest in a specific case or enforcement action should be recused.
Policymakers in developing countries will also find the Korean experience, described in considerable detail in this volume, instructive in this regard. To bolster the prestige and credibility of the competition enforcement agencies in Korea, its government decided to endow the Korea Fair Trade Commission (KFTC) with significant powers to force the economic restructuring of large business groups as well as to tackle anti-competitive practices. In addition the chairman of the KFTC sits in the cabinet of the national government and is directly responsible to the Prime Minister. In principle this set of institutional arrangements provides the chairman of the KFTC with the mandate as well as the means to present pro-competitive recommendations to influential policymakers on a wide range of economic matters. It appears, however, that this combination is not necessarily an unalloyed good. In the view of some observers the mandate of economic restructuring has dominated the KFTC's decisionmaking, sometimes to the detriment of economic efficiency and the goals of competition law. If this analysis is correct the greater stature given to the agency responsible for implementing Korean competition law has come at the expense of the effectiveness of that law.

The Thai and Korean examples highlight the difficulties faced in designing an effective system to implement national competition law. Given these difficulties some might erroneously conclude that competition law should not be enacted at all. In the absence of any effective alternatives for tackling anti-competitive practices, this conclusion is tantamount to throwing the baby out with the bathwater. Alternatively put, and at the risk of mixing metaphors, there is a serious risk here of policymakers and analysts making the perfect the enemy of the good. The same type of commercial and other pressures faced by competition enforcement agencies also confront the regulators of banks, utilities, and other sensitive sectors. Seen in this light, the challenges faced in effectively implementing competition law are not unique to this form of economic legislation. Indeed, former officials from established competition agencies in countries with political representatives that are especially sensitive to
corporate interests and support recount (off-the-record) just how much time they spent countering the attempts of commercial interests to water down powers to enforce competition laws.

Although this is difficult terrain readers should not be unduly pessimistic. Opportunities do arise that can be exploited to raise the stature and credibility of competition enforcement agencies. The judicious choice of cases to bring is one factor that is often credited with raising the credibility of a competition agency. Knowing what cases to fight and when can be particularly important for nascent competition agencies in industrialized as well as developing countries. Taking advantage of bilateral and regional trade negotiations to include commitments to properly enforce competition laws can help the relevant enforcement agencies to secure more funding from national legislatures. Given the resurgence of interest in regionalism in the last ten years, which shows little sign of abating, the latter point may be of particular interest. Finally, in the aftermath of corporate scandals covering "rip offs" and the like, resourceful leaders of competition enforcement agencies and government ministries can further strengthen their positions. Of course, bureaucratic imperatives need not always lead to higher welfare for purchasers and a better allocation of national resources (two prominent goals of competition law), but it does not mean that every opportunity for such entrepreneurship should not be seized.

In sum, much more is known about the principles of competition law and competitive markets than about the minutiae of the effective implementation of these laws in the Asia-Pacific region and elsewhere. This state of affairs is not surprising given the fact that interest in such laws has only picked up in the last ten years. While the challenge is clear, a reliable set of adaptable solutions is not. Documentation and analysis of implementation experience, and the sharing of such evidence, will help in this regard, just as it does in pretty much every other
significant area of economic regulation that requires substantial post-legislative enforcement action.

Concluding remarks

As the backlash against the Washington Consensus continues, and against the often simplistic mantras of the 1990s, policymakers in developing countries often have a clearer sense of the problems that their nations' face than the effective solutions available to them. The side effects—or in some cases, unintended consequences—of certain liberalizing reforms in the 1990s has helped propel anti-competitive practices up the policy agenda. Officials and analysts in developing countries, including in the Asia-Pacific region, have rightly given greater attention to competition law and its associated principles. However, enactment does not guarantee effective enforcement. The imperative in the coming years is, therefore, to design implementing practices and institutions that are robust, judicious, and transparent in societies in which there is a legacy of tight business-state relations (not least because in some Asian nations the state used to own many important companies.) This is as much a political and legal challenge as an economic one. Moreover, given that some commercial interests will always have an incentive to weaken the enforcement of competition law, this challenge will endure—just as it has in jurisdictions with well-established competition law enforcement regimes. Supporters of equitable economic development, where purchasers—including the poor—reap the benefits of progress as well as producers, will recognize the importance of this challenge, which amounts to nothing less than making sure that market forces work for the good of all.
References.