

Competition Policy and Containing Corruption

Competition:... 6. Ecology. The struggle between individuals of the same or different species for food, space, light, etc., when these are inadequate to supply the needs of all.

Collins English Dictionary (Millennium Edition), 1999

The fight against corruption does not, of course, take place only within the public sector, or only where the public sector and the private sector do business in the form of public procurement. It takes place, too, within private sector organisations and in areas governed by a country's "competition policy".

It is well beyond the scope of this Source Book to attempt to examine the concept of "competition policy" in its entirety. Instead, this chapter seeks to comment on some of its aspects where competition policy touches on matters which many consider to be "corrupt", including abusive exercises of economic power.

Because competition is essentially indiscriminate, in that it does not favour one interest over another, there are few political constituencies which have a vested interest in promoting and building a culture of fair competition. This renders the consumer movement an important stakeholder in the anti-corruption movement, with strategic alliances between consumer groups and Transparency International proliferating.¹

In essence, competition policy provides opportunities for civil society to mobilise and intervene in defence of consumer rights. Consumer groups can:

- informally monitor compliance with the standards which have been set;
- monitor the truthfulness of advertising;
- examine the safety of products;
- engage with the private sector, using the legal requirements as a minimum benchmark;
- make submissions to regulators; and
- where dialogue with the private sector interests in question fails, they can run test cases in court.²

At the same time, civil society (and consumer groups in particular) can foster the political will to pursue a process that stimulates an understanding of how a properly-conceived competition policy works in the interests of all.

1 E.g. with Consumers International: <http://www.consumersinternational.org>. Consumers International is a federation of more than 260 member consumer organisations in 112 countries. Its current president is Pamela Chan Won Shui, of the Hong Kong Consumer Council (HKCC). The head office is located in London, along with the Programme for Developed Economies and the Programme for Economies in Transition. There are also three

regional offices - in Santiago, Chile; Kuala Lumpur, Malaysia; and Harare, Zimbabwe.

2 For example, a local association in Kenya has been mounting court challenges to determine whether competition policy permits corrupt state-owned enterprises to raise their charges to the public when these reflect in large measure the costs of corruption, and when the enterprises are doing little to counter them.

What is "competition policy"?

"Competition policy" is an essential tool to protect and promote economic activity, and to ensure and to underwrite the integrity of private sector activities. It determines the place of the state in the economic life of the nation, defining the activities the state will be involved in and which will be left to the private sector. It also regulates in appropriate ways the manner in which the private sector is to function so as to ensure that this serves the best interests of all.

Competition policy seeks to deliver goods and services to a country's citizens at the cheapest sustainable prices, to encourage innovation and development, to increase productivity and to engage in trade and competition on international markets. A prime purpose is to minimise the scope for rigging markets by prohibiting the formation of cartels. It also aims to reduce barriers to entry into business activities and to expand opportunities for small and medium sized businesses, but its aims are not confined to the economic. They include social objectives, including equity, the welfare of consumers and the enhancement of the quality of life of all (and particularly the most vulnerable, the poor).

Some might be forgiven for thinking that competition policy and laws are designed only for rich and urban societies, or that competition law is designed to impose forms of capitalism at the expense of the poor and the weak. In fact its functions are, if anything, the very reverse.

Competition law builds and sustains public confidence in institutions, and so, in the end, can help underpin the stability of democracies. It is the key to an effective market economy. If, as many now believe, the route to development for the world's poorest nations lies by way of private sector activity rather than through the largely-failed government-led commercial initiatives of the past, a sound competition policy can provide the bedrock for a country's development. When the institutions designed to promote competition policy are weak, corruption can flourish, which is why those who would fight corruption should see the role they are playing against this broader background.³

In many ways, a well-thought out "competition policy" in its totality can give substance to a country's vision of what it wants to be.

The objectives of competition policy

A core objective of competition law is to create an open and well-regulated economy for the benefit of all the people in a given country through:

- regulating market excesses and restrictive trade practices (outlawing price-fixing, predatory pricing designed to drive a competitor out of business, fraudulent advertising, the formation of cartels etc.);
- providing efficient and effective regulation of banking and of stock exchanges;
- reducing the scope for mergers and the development of "market dominance" which are contrary to the public interest;⁴
- reducing the scope for monopoly profits in such fields as infrastructure, transport and communications;
- providing a framework for the protection of intellectual property (patent, trade marks and copyright); and

3 This is not, of course, to imply that all who fall foul of regulatory agencies are necessarily corrupt, nor that they are seeking to abuse the economic power they may have. The mechanisms work as a protection for all against potential abuses, as well as actual ones.

4 In the discussion of the media, the dangers of a country's privately-owned media falling into too few hands was highlighted. Competition policy is the tool used to prevent undue aggregations of newspapers and electronic media outlets.

- providing protection (through regulating the activities of financial institutions and pension funds).

Effective procurement laws (discussed earlier in this Source Book) are just one, if highly important, example of competition policies put into practice.

A sound competition policy can help the development of a country by rendering it more attractive to investors, usually by increasing investor confidence. But competition policy and competition law may be ineffective unless they are developed within the wider context of regulation and legal frameworks relating to the business environment. Issues of corporate governance, contract enforcement, the judicial system and dispute resolution mechanisms are also important.

The reform of competition policy and laws should go hand in hand with the strengthening of corporate governance and the development of appropriate codes of conduct.

Some of the more black-and-white mapractices which competition policy seeks to restrain include:

- *Tied selling*: Forcing a buyer to purchase greater quantities of goods and services than they need, or to buy the full range of products in a particular category or other products they neither need nor want.
- *Pyramid selling*: Franchises to sell products are granted on the basis that the franchisees will bring in further tiers of franchisees beneath them ad infinitum. Eventually the bubble bursts, those at the top disappear with the takings and those at the bottom, who thought they were buying business opportunities, find themselves left with nothing – a phenomenon which in various guises has laid waste to Albania.
- *Resale price maintenance*: The supplier dictates the price that the seller can charge and makes it a condition of supply that the price be no lower.
- *Exclusive dealing*: Creating local monopolies by agreeing to divide markets into regions whether geographically or by category of goods.
- *Refusal to deal*: Forcing a purchaser to act under instructions from the supplier under threat of the withdrawal of products or services. (This usually occurs where there are limited options for alternative supply.)
- *Differential pricing*: A supplier charges different prices to different buyers on a basis other than those of quality or of quantity ordered.
- *Predatory pricing*: The charging of artificially low prices to undercut a competitor with the aim of driving it out of business.
- *Cartels*: Groups of firms acting together to gain a dominant market position from which they can manage prices to artificially high levels.⁵

Competition policy and the role of the state

There were times in the recent past when some economists attacked the notion of the state playing an economic role, asserting that governments should withdraw from the market-place entirely, privatising as they go, abandoning the old control and command economies they had been practising, and leaving the private sector more-or-less in sole charge.

Most have now rejected the more extreme elements in this minimalist view. The state is seen

⁵ Adapted from Phillip Evans and Pradeep S. Mehta, *Competition Policy in a Globalising and Liberalising World Economy*, (Con-

sumer Unity and Trust Society, Calcutta, India, Briefing Paper No.4, May 1996.)

rather as having a crucial role in ensuring that the principal players in the economy abide by well-defined and appropriate rules. This in turn demonstrates the absolute necessity of a strong state, well-equipped to protect the public interest and to regulate areas of the private sector susceptible to corruption and other forms of abuse.

It is obviously nonsensical to suggest that such critical strategic activities as banking, the management of pension funds, and insurance could ever be left free to operate entirely as they please. Indeed, the absence of effective banking regulation was one of the major factors behind the collapse of the "Asian Miracle". In an ideal world, self-regulation might be effective: in the real world it tends to fail.⁶

One may be able to agree that government intervention in the economy should, to the extent possible, be restricted to setting the ground rules for fair competition, to providing a conducive environment for efficient production and provision of goods and services, and to regulating market excesses. At the same time the state must also be strong and properly equipped to be able to perform each of these functions. This may also take some time to achieve. Where the state has been deeply involved in the economy through state-owned enterprises, the government itself may well have become a monopoly, and it can take also quite some time for a competitive market to take responsibility for all of a government's commercial activities.

Distortions in a domestic market, too, can often be the result of government interventions, such as protectionism of inefficient local industries producing sub-standard and over-priced goods. These interventions may also work against the interests of the poor in particular, by denying them access to cheaper goods of better quality, and need to be addressed in the context of competition policy.

Competition policy and developing countries

As noted, competition policy is not just for rich developed countries. At the national level, competition policies and laws are found in countries in all stages of development. History suggests that competition policy is actually a means for accelerating development by casting off the shackles of anti-competitive and anti-consumer practices.

The legislation of Canada, the United States and the United Kingdom, for example, dates back to the end of the nineteenth century, when all three had many of the less attractive features of today's developing economies. There were small cliques of powerful private sector interests (oligarchs) which did not hesitate to manipulate markets at the expense of the public interest. Likewise, bribes and kickbacks flourished in the private sector. The responses to the challenges these interests posed can now be seen as marking an emerging recognition of the need for competition policy.

It was not that policymakers in these countries necessarily had a very clear concept of what they were trying to achieve, or of where their reforms would ultimately lead. The measures introduced were piecemeal, not comprehensive. In the US, for example, the law was developed

6 E.g. "As the players in the Internet economy today formed new alliances and demonstrated their commitment to self-regulation as an effective scheme to protect consumer privacy, a new report suggests that such measures aren't effective. The study, "Surfer Beware II: Notice is Not Enough," from the Electronic Privacy Information Center (EPIC) shows that an attempt by the Direct Marketing Association to get members to abide by privacy guidelines has so far failed. According to EPIC's research, only a handful of the association's new members are observing

the group's privacy practices. "The Direct Marketing Association, after making a pitch for self-regulation and privacy, doesn't seem to be doing a very good job of getting new members to follow", Study: Self-Policing Fails, by Chris Oakes writing in Wired News, 22 June 1998. In the United Kingdom, the self-regulation of the medical profession has been called into question following major scandals involving doctors who were allowed to practise long after they had demonstrated their lack of competence, and others who had provided false references.

progressively and in response to differing problems. First, the Sherman Act of 1890 rendered conspiracies in restraint of trade a criminal offence, but it recognised no role for the state in actively regulating what was taking place (Canada had done so a year earlier, in 1889). Then came the Clayton Act of 1914, still the primary tool for the control of anti-competitive mergers and joint ventures in the US. At the same time, the Federal Trade Commission Act created the Federal Trade Commission and so introduced the element of active regulation. These countries, and other developed economies, are constantly modernising their legal framework, the United Kingdom as recently as in 1998, with its Competition Act.⁷

So it is that elsewhere today, countries such as Thailand and South Africa are enacting competition laws addressing unfair and unjustifiable dominant market conduct; mergers that may lead to monopolies or unfair competition; monopolies and the reduction of competition as a result of mergers; and unfair and restrictive trade practices.⁸

Competition policy works against cartels, and those who would manipulate positions either through being the sole provider of essential products, or through combining with others in a conspiracy against competition, and against the public interest. Many countries have been victims of cartels over the years - the areas of vitamins, cement and heavy electrical engineering being among the best-known. In the field of heavy electrical equipment, for decades collusive behaviour artificially inflated infrastructure costs around the world. Manufacturers closed down their cartelization in countries where they were prosecuted, but elsewhere - largely in the developing world - they continued where regulatory agencies did not exist or were powerless to intervene.⁹ Without doubt, suspicion of cartels fuels much of the contemporary hostility within the contemporary globalisation debate.

In retrospect, too, we can see that one of the root causes of the chaos in the transition process in Russia stemmed from a failure to recognise from the outset the need for a competition policy that would have acted as a brake on the "winner takes all" free-for-all that in fact developed. The need for Russia to have a sound regulatory framework within which competition can take place is all too stark today.¹⁰

Independent regulators and Competition Authorities

Competition policy and law does not operate simply by banning certain types of behaviour. It does much more than this. It establishes mechanisms which oversee and regulate the various activities for which they are responsible. In some instances a Competition Authority is established to oversee and enforce the whole gamut of pro-competition policies and laws; in other instances, specific regulators are appointed to regulate defined areas of activity (e.g.

The challenge of chaebol reform in Korea

In the history of the chaebol, Korea's huge business conglomerates, 28 July 2000 was an important day. The nation's top economic policy-makers agreed on a number of points that mark the beginning of the second phase of chaebol reform. They agreed to strengthen the supervisory powers of the Financial Supervisory Commission and the Fair Trade Commission. The FTC's power to investigate financial transactions of firms, which was due to expire in February 2001, will be extended for another year, and the FSC will gain the right to investigate the financial transactions of firms involved in workout programs. To date, the FSC's activities have covered only the banking sector.

The government was given expanded regulatory powers to assess responsibility for financial failure and punish illegal financial deals. Further measures to streamline bankruptcy procedures and strengthen the rights of minority stockholders were also announced.

The second phase of chaebol reform, as the government calls it, has begun with an expansion of government regulatory powers over business. The power struggles and financial problems in the Hyundai Group are timely reminders of the deep-seated problems in corporate culture.

Even the largest chaebol are essentially family businesses that lack professional management at the top. Strict regulatory supervision over such firms is the easiest way to force accountability and punish corrupt business practices...

For government intervention to work, however, people must believe that the government is fair. If the government is feckless and corrupt, people lose trust in it, and intervention only exacerbates the market insecurities. The overriding concern then becomes the protection of existing property rather than adaptation to market changes, as it should be. Capitalists sometimes use their wealth to purchase protection from the government, which magnifies the problem of corruption.

The problem of chaebol reform is obvious: markets in Korea are too weak to influence chaebol behaviour. The more the government intervenes in the private sector, the weaker markets become. The less the government intervenes, the weaker markets become as the chaebol reassert their dominance.

The pendulum swings, as it has since the economic boom began in the 1960s, from periods of government intervention followed by periods of chaebol consolidation, leaving little room for strong markets to develop. The swings closely mirror the cycle of reform and corruption that has marked previous administrations.

The government's get-tough measures are reassuring because they indicate that it is attempting to break from the cycle of reform and corruption...

Korea Herald, 2 August 2000.

The writer is an associate professor at Kagoshima University in Japan.

His e-mail address is heungbob@han mail.net.

7 S. Chakravarthy (2000), *Competition Regimes Around the World: Monographs on Investment and Competition policy*, #3 (CUTS Centre for International Trade, Economics & Environment, Jaipur, India.)

8 Thailand's Competition Act, 1999. South Africa's Competition Act, 1998.

9 Unattributable contribution to the discussions at the Round Table Forum on Competition Policy and Law - Their Role in Pro-

Poor Development, London, 24 July 2000 organised by the (UK) Department for International Development.

10 This is not to suggest that the faults were wholly on the part of the Russian administration. It was encouraged by a rash of economists from the US, all enthusiasts for the "free market" who urged on what was clearly a headlong plunge into chaos. By way of contrast, the step by step process being adopted in China appears to be designed to avoid these pitfalls.

telecommunications; electricity; water).¹¹

The regulators should be independent of government, otherwise they can simply become further centres of potential corruption, cronyism and mismanagement. The regulators should understand and work in with the competition policies of the government of the day. The regulators themselves should be accountable and required to give reasons for their decisions. The legality of their decisions should be subject to review by the courts.¹²

Regulators also have a major role in promoting transparency and higher levels of public understanding of how the economy of their country functions.¹³

For instance, the Australian Competition and Consumer Commission has been able to publicise and explain price fixing, has conducted studies on telecommunications demonstrating to the public the significant savings which they have enjoyed as a consequence of competition, and it has tried to address the belief that competition leads to reductions in services.¹⁴ The Commission works closely with civil society, even to the point of making its country-wide video conference facilities available to consumer groups, an invaluable gesture where the groups are spread over vast distances.

How the poor are protected by regulators

Ways in which a regulatory framework can benefit the poor consumer include:

- Requiring utilities to provide services, so that even at a loss they will have to supply services to the poor and to far flung areas at the lowest cost or else provide budgetary support for a utility to subsidise supplies to the poor;
- Overseeing the consistent supply of the service, benchmarking it as to both quality and quantity;
- Providing a window for public participation in policy formulation and tariff setting;
- Reducing corruption and arbitrariness in the system;
- Providing an easily-accessible complaints system for the resolving of the grievances of the poor (e.g. providing local consumer courts where lawyers are not needed); and
- Increasing overall efficiency, thus furthering welfare gains.

Adapted from Pradeep S. Mehta and Ujjwal Kumar, Competition Policy and the Poor, (CUTS Centre for International Trade, Economics & Environment, Jaipur, India, Viewpoint, July 2000.)

In Thailand, a Competition Commission has been established, comprising politicians, civil servants and representatives of the private sector, and guidelines are being developed. The law there is not an attempt to impose a “quick fix” remedy, but cuts across the omnipotent monopolies and majority ownerships that feed poor corporate governance, minority shareholder abuse and manipulation. In the absence of experience and in the face of a market obviously lacking competition, which is monopolistic or oligopolistic in structure, the task for the Commission is as daunting as it is necessary. Added to this, monopoly businesses are in state hands but undergoing privatisation.¹⁵

A prime difficulty for many developing countries is simply one of a lack of experienced people to serve as independent regulators and a dearth of strong institutions to service them. The questions individual regulators encounter are often highly technical and call for considerable experience and wise judgement. Yet while looking for such a cadre of professionals to emerge, developing countries have little time to lose. The best starting point might be for new competition agencies to give priority to fostering greater public understanding of precisely what “competition” means, its benefits, and who its beneficiaries are.

Financial institutions, regulation and corruption

Many developing countries have suffered grievously through a lack of competition policy in the area have of banking regulation. Much of the blame for corrupt practices which have degraded the economies of a number of developing countries can be laid squarely at the door

11 Many countries have competition regulators by whatever name. For an up-to-date list see <http://www.usdoj.gov/atr/contact/otheratr.htm>.

12 A decision by regulators in the United Kingdom to exclude the present licence-holder, Camelot, from further negotiations in connection with the granting of the licence to run the country's national lottery when the present licence expires is presently under judicial review in the UK courts. The process is described in the chapter on Administrative Law.

13 Space does not permit an exhaustive discussion of the role of regulators in different countries and economies. The point made here is to flag their importance as a major player within a national integrity system.

14 This perception has been hard to shift, particularly in rural areas.

15 See, *Development of Competition Policy and Law in Thailand*, paper presented to the Round Table Forum on Competition Policy and Law - Their Role in Pro-Poor Development (no author indicated), London, 24 July 2000 organised by the (UK) Department for International Development.

of the banking system. Banks have been inadequately supervised so that politicians have been able to raise loans for political, not economic, reasons. Institutions have been brought to the threshold of insolvency, at times impoverishing small savers.

Now euphemistically described as “non-performing loans”, enormous sums have been drawn from banks by the politically well-connected in developing countries from Asia to Africa, seemingly without the slightest intention of ever paying them back.

Some countries, too, have suffered from the depredations of “pyramid schemes”, in which massive frauds have been perpetrated through financial operations that have involved the acceptance of deposits from the public at artificially high interest rates. The interest has been paid for a time, but out of fresh deposits being received. As the schemes gained a unmerited reputation for good performance, new deposits flowed in and before long the promoters were nowhere to be found. In Albania and Romania such schemes created major public unrest.

Globalisation and intellectual property

The struggle to strike a fair and justifiable “balance” between the competing claims of those who have developed intellectual property and those who need to have the benefits of it, seems likely to be a dominant feature of the globalisation debate.

A ferocious battle is being waged in the field of intellectual property - what degree of protection should a country afford to the “owners” of intellectual property, and what (if any) limits should be placed on the rights of its “owners” to exploit their positions.¹⁶

The debate has become particularly fierce as companies try to extract what to many seem to be unjustifiably high returns on investments in the development of new drugs - such as drugs to treat HIV-AIDS - and particularly when they seek to do so at the expense of the sick of the developing world.¹⁷

Even trade mark provisions have been used to derail national public health programmes, for example Canada’s programmes to discourage smoking and Guatemala’s legislation to guard against the aggressive marketing of breast-milk substitutes.¹⁸ Could those drafting the international Conventions that deal with patents, trade marks and copyright ever have foreseen that their work would be misused in such a manner?

Consumer groups also oppose attempts to “fix” prices across borders. Trademark or patent

16 There is a raft of international conventions on the subject of intellectual property. The “Paris Convention” dates from 1883 (the International Convention for the Protection of Industrial Property) covering patents, industrial designs, trademarks and unfair competition. The “Berne Convention” (the Convention for the Protection of Literary and Artistic Works) deals with authors’ rights and royalties dates from 1971.

17 The very public argument between President Mbeki of South Africa, the US authorities and the suppliers of drugs to assist AIDS patients is a recent example. It is simplistic to argue that a country should exhaust its entire health budget on expensive drugs for a comparatively small number of its population. Indeed, many argue that rather than purchase these drugs at all it would be better to concentrate resources on the provision of clean water and improved education as a means of increasingly longevity. A perceived failure to provide such drugs can, however, lay a government open to emotion blackmail by the pharmaceutical industry no less than by its political opponents.

18 A Canadian parliamentary committee was warned that the government faced trade sanctions and huge fines if it pursued a no-smoking initiative that would result in cigarettes being sold

in plain packaging, rather than with distinctive tobacco company trade marks. Guatemala’s implemented the International Code of Marketing of Breast Milk Substitutes by law in 1983. This outlawed the aggressive marketing of much-criticised breast-milk substitutes by banning the use of pictures of babies on baby food for children of under two years of age. A Swiss-owned company threatened trade sanctions through the US government if it was denied the use of its distinctive trademark - a fat, chubby, blue-eyed westernised baby. Less controversially, US trade sanctions were also deployed to force China to enact stronger intellectual property laws and to close down factories making counterfeit movies and CDs. More than two million tapes and CDs were destroyed, and 30,000 counterfeit computer discs confiscated. See other instances cited in James Packard Love (Center for Study of Responsive Law) A Consumer Perspective of Prospects As They relate to Risks Regarding Intellectual Property, Comments for the Working Group on Intellectual Property Rights, Third Trade Ministerial and Americas Business Forum, Belo Horizonte, Brazil, May 1997: <http://www.cptech.org/pharm.belopaper.html>.

“owners” claim the right to charge more for the same goods in one country than they do in others. This is seen as an unjustifiable manipulation against the interests of consumers in the markets where higher prices are demanded. Hence battles also rage over so-called “grey imports”, or “parallel importations”. Importers by-pass local franchised suppliers of well-known goods and import them directly from suppliers in other countries, where the prices are lower.¹⁹ Defenders of the manufacturers deny that this is market manipulation – and so a corrupt practice – claiming that “orderly” marketing through designated sales outlets assures quality, after-sales service and product development in line with specific country needs.

For years, many developing countries have been “free riding”, and denying protection to intellectual property owners either generally or by category. Weak patent laws have been part of the economic planning of Taiwan, Singapore, Hong Kong and Korea. Governments of India, Thailand and Brazil have been highly selective.²⁰ Some countries, particularly in Latin America, have imposed systems of “mandatory licensing”, granting protection but affording the right to local manufacturers to be granted licences at fixed maximum royalty rates.

In recent times “intellectual property rights” have become a burning issue, especially for countries who have substantial trade with the United States. Although the US was for generations among the “pirates” of the intellectual property world (it did not sign the 1971 Berne Convention for the Protection of Literary and Artistic Works until as late as 1989)²¹, it has recognised the global power which ownership of intellectual property can confer, and successive administrations have worked assiduously to assert it.

Yet US intellectual property law can itself be quirky. Competition policy analysts are concerned about attempts being made in the US to “copyright” novel business practices, such as ways of avoiding (but not evading) income tax, and forms of financial instruments that have not been used before.²² The US is not alone in this. In Russia, a company has successfully applied to Rospatent for patent rights over the ordinary bottle – having previously “patented” nails and railway tracks!²³ With such maverick developments at the national level there is added cause for disquiet.

The benefits for developing countries to sign up fully to the global intellectual property regime are promoted vigorously by the World Intellectual Property Organisation (WIPO), but others take a more sceptical view and note that intellectual property regimes mean little to countries in sub-Saharan Africa and in Asia where people live on less than one dollar a day, and where less than five per cent of economic activity relates to manufacturing.²⁴

19 The Australian Consumer Association has been pushing for the abolition of import and distribution of software after a survey revealed that consumers were paying too much for software products. Discrepancies as high as \$US600 were apparent in the sale of QuarkXPress between Australia and the US. Australia has introduced parallel import systems for CDs. See Rebecca Munro, Australia to adopt parallel import system for software?, 8 February 1999. <http://www2.idg.com.au>

20 Nicolas S. Gikkas (1996), *International Licensing of Intellectual Property: The Promise and the Peril*, Journal of Technology and Law, Vol.1, Spring 1996, University of Florida.

21 The expression “pirate” is used in Nicolas S. Gikkas, *supra*.

22 James Packard Love, *supra*.

23 Red-faced over all this is Rospatent, a division of Russia's Federal Institute of Industrial Property. They are investigating how the patent was issued, to quell public suspicions that someone in their office is taking bribes. “Russia is a country of miracles,” said Valeri Jermakyan, a deputy director of inspections at Rospatent. “Even ancient inventions can be patented.” The bottle was invented either sometime around 1500 B.C. by Egyptian artisans or in AD 12 by the Chinese Emperor Wu Hezhou. “Russian Idea for Riches: Why Not Patent the Bottle?” by Daniel

Williams, Washington Post Service, 31 July 2000

24 The benefits for a developing country affording a high degree of protection to intellectual property are generally articulated by advocates as including such perceived benefits as: stimulating innovation by providing an environment in which innovation is rewarded; providing lower cost methods of production and distribution of existing products; inviting new, safe and effective products and technology; creating improved goods and services tailored to particular in-country needs through the adaptation and improvement of existing products and technology; creating jobs in the primary industries and in supporting businesses; creating a higher-quality and technically better prepared workforce through on-the-job training associated with authorised transfers of technology; increasing the amount of new capital that can be generated for investment in economic development; creating advances that will contribute to the level of technology throughout the world and in the process, gain revenues from those who benefit from their use; and rewarding creative talent in the cultural industries through systems of royalties and local foreign distribution rights. (National Law Center for Inter-American Free Trade, Intellectual Property Committee, www.natlaw.com/pubs/spmxiip11.htm.)

What seems overdue is a root-and-branch re-evaluation of the global intellectual property regime. It must ensure that it strikes a fairer balance between creators and users. Rewards should be provided for the enterprising to encourage further initiative, but they should not be such as to be able to deny most of the world the benefits of scientific and other advances, at least until patents expire - by which time, of course, science and innovation have moved on.²⁵

Competition policy and globalisation

Quite apart from intellectual property considerations, globalisation brings a new dimension to competition policy. Abuse is not confined within national borders. International cartelization and similar abuse, and other forms of corruption, can impact seriously on international trade, and there is a growing realisation of the need for international guidelines for the control of anti-competitive conduct. These abusive practices do not impact simply on final consumer goods, but also on "input goods" such as steel, fertiliser and energy.

Countries with weak domestic institutions are particularly vulnerable to cross-border restrictive trade practices and international business conspiracies. Integration into the global economy may increase competition, but it does not necessarily ensure it. Cartels, vertical restraints (agreements between sellers and buyers), exclusive dealerships and controls over domestic imports can effectively block people from receiving the development benefits which globalisation should bring. Concern over these vulnerabilities lie at the heart of some of the protests against globalisation presently taking place around the world.

The problem, too, is a growing one as privatisation continues to place more and more previously publicly-owned assets into private hands, thus paving the way for increased levels of international mergers and acquisitions. As the public barriers to competition are removed the private barriers must, correspondingly, be addressed - and the more so with the growth of globalisation.

For regulators there is a growing headache. A merger in the host country of two previously-competing businesses may not result in an adverse reduction in competition there. However, in a foreign country the two firms may have subsidiaries, previously the only two rivals in a particular market. Thus the consequences of a merger going ahead in one country can have very serious consequences for another. Anti-competitive practices can also be imported through foreign direct investment, with international franchisers using local franchisees to source particular products and tie up local distribution chains.

There is also a controversial question to resolve: what is to be the role of the World Trade Organisation in enforcing competition policy at the global level? Is it to be a "global competition policeman"? Is there to be an international framework, perhaps developed at the WTO, to underpin the development of competition policy?²⁶ Would such a framework be a way in which to tackle the provision of increased cooperation to counter abusive and corrupt practices which are adversely affecting international markets, and particularly the economies of developing countries?

25 The "profiteering" charge is also made in developed countries. In the US, several sources document the exploitation of health insurance companies by corporations who over-price their drugs

26 Although it can be said that every country has a policy on competition, even if it is not articulated and amounts to simply let-

ting the status quo remain undisturbed, those who are consciously developing their policies tend to enact competition laws. At present only some 80 countries of the WTO's 135 members has such a law, although as noted in the text, the number is increasing.

Some indicators as to the effectiveness of a country's competition policy

- Has the government articulated a clear competition policy?
- Is such a policy being implemented through law and other reforms of practices and procedures?
- Does the private sector support the development of a coherent and effective competition policy? Do consumer protection organisations support it?
- Are efforts being made to educate the public as to the benefits for them of an effective competition policy (both in terms of lower prices and of protection against abuse)?
- Are there clear and enforceable laws criminalising the creation of cartels and bidding rings, etc.? Is price-fixing illegal?
- Are monopolies or near-monopolies in private hands the subject of regulation?
- Are mergers permitted which give rise to monopolies or create undue market dominance?
- Do local regulators receive the international assistance they require to discharge their roles?
- Are local regulators independent of political interference and protected against corruption?
- Are arrangements made to protect the poor and the most vulnerable against exploitation?