

# 1. Introduction

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The political economy environment within which competition policy and law has to operate is a subject that is not always given sufficient attention by academic lawyers and economists from developed jurisdictions, that enjoy robust democratic institutions, and the rule of law. This essential institutional infrastructure is often deficient in developing countries. This book suggests that nation-specific environmental factors are vitally important when considering and explaining the reasons why a country adopts a competition policy or law, the nature of the substantive legal instrument, the architecture of the enforcement machinery, the remedies provided or applied and, ultimately, whether the law can and will be enforced effectively in order to achieve the accepted benefits of a more competitive economy. Commentators from developed liberal democracies sometimes overlook the vitally important role of representative and accountable government, the rule of law, an efficient and effective public service, and low levels of corruption in governmental and business affairs. The contributors to this book consider that they are essential prerequisites for the creation and effective operation of a pro-competition policy and law.

It is the proposition of this book that the environmental circumstances within which a competition policy is created, and then a competition law is drafted and enforced, are critical in determining whether or not competitive conditions in a domestic economy are substantially affected and improved by the adoption of a notionally pro-competitive system.

In the last 20 years, the number of jurisdictions that have enacted a competition law has increased exponentially to over 120.<sup>1</sup> Most of these legal regimes accept the need to prohibit the abuse of a dominant position, anti-competitive agreements and overly concentrative mergers as being

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<sup>1</sup> UNCTAD (2013). 'National Competition Legislation'. Retrieved from <http://unctad.org/en/Pages/DITC/CompetitionLaw/National-Competition-Legislation.aspx> (last accessed 17 April 2013).

inimical to competitive business activity. Most jurisdictions also accept, at least theoretically, that more vibrant competition in domestic markets produces superior economic efficiency through innovation and greater consumer choice at the lowest viable prices. However, the difference between jurisdictions that have more effective pro-competition regimes that do deliver these outcomes and those jurisdictions that do not, is determined, to a large extent, by the latent political economy features of the specific jurisdiction.

The political economy environment of nations is determined by a complex interplay of history, culture, geography, climate, politics, economic, social and legal determinants. Each country studied in this book exhibits very different characteristics and it is the thesis of this book that it is essential to understand these issues in some depth when assessing the likely success or failure of a competition law achieving pro-competitive outcomes beneficial to the inhabitants.

External factors also play a part in determining the scope and nature of competition regime in any particular country. Sometimes, a pro-competition regime can be required by outside agencies as a result of the need for an economic rescue package (arguably Indonesia and Thailand) or for accession to bilateral free trade agreements (Singapore) or as a pledge of commitment to opening internal markets as a result of achieving membership of the World Trade Organization (WTO) (Vietnam). Other types of external pressure can be even more direct such as where an occupying power imposes a law on a defeated adversary (Japan). Changes in the intellectual climate of a country as a result of a major change in political system (South Korea and arguably Indonesia), or as a result of the advance of academic research or empirical evidence demonstrating competitive inefficiencies in the domestic economy, which directly persuade politicians that improving the competitiveness of the whole economy is both necessary and desirable (arguably Australia, India and China). Attempts to create a unified internal market can also be a factor in influencing the removal of internal public regulatory barriers to domestic trade and the adoption or improvement of a competition law (China and Australia).

Attempts to create a regional trade bloc (ASEAN) where external barriers to trade between nations are to be reduced may also induce the need to adopt a competition law to reduce internal trade barriers, whether public or private, to allow greater market access in formerly protected national markets.

Cynics (or some would say realists) might argue that the true reason some countries adopt competition laws is either as a window-dressing exercise or in response to international political or academic fashion. They would also maintain that there may be no genuine intention to enforce the

law with vigor as powerful domestic stakeholders within those societies, including incumbent private or state owners of industries and the local bureaucracy, may be highly resistant to any change of the status quo as this would adversely affect their vested interests. Competition law in such cases might, adversely be used as a protective mechanism. Enforcement action may be taken selectively to protect incumbent monopolists or cartel operators or favored state enterprises or vociferous small enterprise lobbies, rather than to promote competition.

The inception of this book was the common view of the contributing authors that these issues should be subject to greater study and research, particularly in the Asian region, as the jurisdictions covered by this book account for a significant and increasing portion of world trade and inward and outward investment flows. The dramatic economic reform and development that has taken place in Asia in the last five decades is of global significance and the perceptible shift in economic power from West to East appears to have strengthened in the last five years since the onset of the global financial crisis in 2007. India, China and ASEAN are the regions that the world now relies upon to stimulate the flagging global economy. The adoption of competition laws by Asian countries may hopefully assist in expanding those economies and in promoting deeper economic reform. This will help to sustain growth in the imports of those countries upon which many Western exporters increasingly rely, given the stagnation and ongoing financial woes of the European Union and the sluggish recovery in the economic fortunes of the United States.

This volume attempts to add to the stock of academic research in relation to the political economy environments of a number of Asian countries. Each of the authors is a prominent academic or practitioner who lives and works in the region and has an intimate knowledge of the jurisdictions discussed. Broadly speaking, the chapters follow a common format and seek to comprehensively discuss the most important factors that collectively form the political economy environment of each jurisdiction, determining the actual or expected success or failure of the competition regime currently in force or proposed.

The core research question that each chapter attempts to discuss is whether or not the competition regime is currently effective, and then to discuss expected future developments in the respective regimes. The authors also attempt to predict whether the respective competition regimes may become more effective and, if not, the reasons and obstacles to progress are identified and discussed. The research question is addressed in the context of the political economy factors identified above and the authors seek to form a reasoned opinion as to whether or not the respective jurisdictions are achieving, or failing to achieve, the optimal

benefits that can be derived from a well-functioning and competitive domestic market.

The book is structured so that each country is considered individually. In Chapter 2, Professor Takigawa provides a detailed examination of the origin and specific features of the Japanese competition system as well as an assessment of the principal features of the current legal regime. Japan has Asia's oldest comprehensive Antitrust Statute which was imposed by the United States occupation government in 1947 and was fundamentally based on the United States Sherman Act of 1890. However, shortly after regaining sovereignty, the Japanese government diluted the anti-cartel provisions of the law and a collaborative industrial policy based on export promotion was prioritized over domestic competition. The effectiveness of the Japanese law has only significantly increased in the last 20 years when Japan moved to strengthen the law and its enforcement subsequent to the bursting of the property and stock market bubbles in the late 1980s. Professor Takigawa provides an overview of these developments and the particular stipulations of the Japanese law. He explains the unique characteristics of Japan's socio-political milieu that have caused these shifts in competition policy and identifies likely future developments.

Chapter 3 considers the case of South Korea. Professor Lee examines the development of the South Korean antitrust system which has been progressively strengthened as a result of democratization and economic crises, especially as a result of the near implosion of the South Korean economy in 1998 which was considered to be substantially caused by the activities of indigenous South Korean conglomerates – the *chaebol*. The South Korean law has specific provisions that target *chaebol* operations and organizations, which are, to some extent, unique to South Korea. The enhanced role of the South Korean Fair Trade Commission and the increasing sophistication of its analysis in competition cases, coupled with substantially increased levels of penalties, have been the hallmarks of the South Korean system. Whether these more aggressive pro-competition policies will be pursued is open to question as a result of political shifts. Professor Lee considers the law and its application and discusses how South Korea's system is likely to develop.

The unique case of China and its transformation towards a more market-oriented economy is discussed by Professor Williams in Chapter 4. The radical economic reform undertaken since 1978 by the world's largest Communist state has arguably had the greatest impact on the global economy. The transformation of a Soviet-style planned economy to one in which market forces play a greater role has been the subject of both academic and political fascination for at least the last two decades. This chapter seeks to explain the key aspects of the reform process and

the rationale for the adoption of a pro-competition statute in a nominally Communist state. However, the often-repeated nostrum that China is a 'transitional economy' and will inevitably develop into a fully market-oriented system along Western lines is disputed. China's current policy appears to be one of maintaining the dominance of the domestic economy by corporatized, but majority state-owned, firms in all major sectors of the economy. The domestic private sector and the access of foreign invested enterprises to many sectors of the domestic economy is effectively proscribed by this policy and there is no indication, at present, that the Chinese state, as organized and controlled by the Communist Party, has any intention of relinquishing its leading role in China's domestic economy. Recently, a joint report by the World Bank and the Chinese Academy of Social Sciences entitled 'China 2030' has examined the structure of the Chinese economy and assessed existing policies.<sup>2</sup> The joint report concluded that China was in danger of being trapped in the middle-income bracket as a nation unless economic reforms were widened and deepened. Professor Williams considers the particular characteristics of China's political system and its relationship to economic competition. The role of government is discussed in some detail because of the overwhelming influence of a single dominant political party that exercises extensive direct control over much of the domestic economy.

In Chapter 5 David Fruitman details the progress of competition policy in Vietnam. Vietnam and China are the only two officially Communist states discussed in this volume. Vietnam began the reform of its command economy a decade later than China, in 1986, and has understandably not advanced as far as China towards a more market-oriented domestic economy. The Vietnamese domestic market is still heavily influenced by the state and dominated by state-owned enterprises. Market systems, whilst operational, are not sophisticated. Notwithstanding the relative immaturity of the market system, Vietnam's economy has grown very substantially and has become relatively open to foreign direct investment, thus boosting exports and the country's impact on international trade in selective sectors. This expansion in its export trade has been significantly enhanced by its acceding to membership of the WTO in 2007. A new Enterprise and Investment Law and a Competition Law were also introduced as part of the accession process, although adoption of a

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<sup>2</sup> 'China 2030, Building a Modern, Harmonious and Creative High-Income Society' (2012), The World Bank and the Development Center of the State Council of the People's Republic of China. Retrieved from <http://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf> (last accessed 30 March 2012).

competition regime was not a requirement of WTO membership. These twin measures, however, did seek to reassure existing WTO members that Vietnam's opening of its domestic market was motivated by a genuine desire to promote a more market-oriented system. Mr Fruitman provides a thorough analysis of the Vietnamese political economy system, as well as examining a number of decided competition cases.

Chapter 6 analyses the particular circumstances of the Philippines. Ms Jalit and Professor Williams provide a comprehensive discussion of various political economy issues, including history, geography, colonization, the impact of an intertwined politico-economic oligarchy, weak state institutions, corruption and religion with respect to the development of the Philippine economy. The unique features of Philippine politics, which exhibit significant instability and, in some respects, semi-feudal characteristics, are considered. A small oligarchic clique of prominent families continues to dominate the political system and the domestic economy despite the reintroduction of democracy in 1986. The nation's relative underperformance in economic development and poverty reduction compared to its neighbors has a number of complex causes, which include many years of autocratic government, the close relationship between economic and political elites and the reluctance of successive governments to undertake effective domestic economic reform, including the adoption of a competition law. At the time of writing (July 2012), the Philippine legislature was still discussing the enactment of its first comprehensive competition statute. The chapter discusses the complex political economy factors that have led to this state of affairs and considers whether it will be possible to effectively enforce the law, once adopted, and to introduce significant competition into the many monopolized and cartelized markets that are common features of the domestic economy.

The competition regimes of Malaysia and Singapore are considered together in Chapter 7 by Professor Cheong and Ms Lee. Both Malaysia and Singapore share a common heritage as former British colonies and, for a short period in the 1960s, were united in one country. However, the two nations have radically different political economy environments which reflect differences in geographic size and natural resources. The receptiveness of each country to international trade and investment in many respects is founded upon ethnic sensitivities and nationalism. The chapter outlines the respective histories and separate economic development policies of each nation, which have had substantial effects on the competitive environment in the two countries. Both nations have significant sovereign investment entities which own substantial economic assets in each country and also invest overseas. For the last four decades Malaysia has had a preferential economic policy that favors

ethnic Malays. This has had significant economic consequences both in terms of inward investment and in relation to economic equity between racial groups. Singapore, as a city-state with a small domestic economy, exhibits high concentration ratios in many capital-intensive industries which represent high or insurmountable barriers to entry. This phenomenon is compounded by high levels of indirect government ownership in many economic sectors and specific legislation that prevents entry to sensitive sectors such as the media. However, Singapore has always been substantially more open to foreign investment, particularly in the petrochemical, manufacturing, financial and transport services sectors, where products and services are predominantly aimed at export markets. The Singaporean government has a reputation for integrated policy solutions with the explicit aim of boosting international competitiveness, at which it has been extremely successful, although domestic competitive conditions may not match this external competitiveness. Singapore's strategic geographic location has been a major factor in its remarkable economic success despite, or perhaps as a result of, being surrounded by potentially antagonistic neighbors.

Singapore's adoption of competition law was primarily a response to its entering into Free Trade Agreements with the United States and Australia, both of which mandated that Singapore enacts a competition statute. Malaysia's enactment of a competition law has been precipitated by the looming creation of the ASEAN Free Trade Area in 2015. All of these issues and the legal provisions are fully discussed by the authors.

In Chapter 8, Professors McEwin and Thanitcul explain the particular circumstances surrounding the development of competition policy in Thailand, which was the only Asian nation not to be wholly or partly colonized. The Philippines and Thailand share some common features in their political economy landscape. Both have suffered from endemic political instability and both have a political economic system that is dominated by an oligarchic elite. However, Thailand's economic performance has been substantially better than that of the Philippines in the last 40 years. It is a country that has great economic potential and has achieved a significant degree of economic development in recent decades. Thailand, along with the Philippines and Indonesia, exhibits the common characteristic of the influence of ethnic Chinese in the economic sphere. This phenomenon is discussed in the chapter along with Thailand's political system and its adoption of a pro-competition law which came about partly as a result of the 1997/8 Asian financial crisis. Despite having a competition law for almost 13 years, effective enforcement of the law has been disappointing. The authors discuss the reasons for this lack of effectiveness and consider whether it is likely that the situation will improve.

An overview of competition law in Indonesia is outlined in Chapter 9 by Professor Sirait. She explains the range of factors that influence the development and application of competition law in this large archipelago that straddles the equator. Indonesia's geographic characteristics and ethnic diversity have had a profound influence on the degree of economic development throughout the various islands. A former Dutch colonial possession, it still retains a Roman-Dutch civil law tradition, which has influenced the nature of the competition statute and the interrelationship between the enforcement agency and the court system. Indonesia adopted a competition law as part of the International Monetary Fund (IMF) funded economic bailout that followed the onset of the Asian financial crisis, although such a statute had been under consideration for some time prior to the crisis. Indonesia has also undergone a substantive democratization process since the fall of the autocratic Suharto regime in 1999, but remnants of the crony-capitalism system still have significant influence in parts of the Indonesian economy. Professor Sirait examines the contribution that a pro-competition policy is making to Indonesia's continued economic development and considers the roadblocks that prevent further progress.

In Chapter 10 Mr Mehta discusses the experience of adopting, and the initial stages of implementing, a new competition regime in India. As Asia's second incipient economic superpower, India's progress towards opening its domestic markets and making full engagement with the international trading system has been slower than that of China. This is partly explained by the fact that India is a democracy and the government is constrained by opposing political opinions as to the desirability and speed of embracing pro-market economic reforms which may have short-term negative consequences. India adopted its new competition law in 2002, but it was then challenged in the Supreme Court on a legal issue and was only amended and implemented in 2008. As a result, India's experience of enforcing a modern competition statute is limited and Mr Mehta examines both the political economy features peculiar to India and considers future developments.

The Australian experience of implementing a pro-competition policy is considered by Ms Healey in Chapter 11. Australia has often been seen by the international community as a paradigm example of how to shift an economy that has been subject to intrusive and protective regulatory intervention and anti-competitive practices toward being more open and competitive, so enhancing international competitiveness. Ms Healey provides a thorough and detailed exposition of Australia's political economy and the process of public consultation by which Australian society was informed about, and consequently lent support to, the reform of the

traditional protected economy. Public opinion accepted that the previous system was unsustainable. This realization was the catalyst for radical change that required a thorough process of evaluation and reform of anti-competitive regulations and the strengthening of the competition statute, coupled with more effective enforcement. Australia undertook a comprehensive review of existing statutes and regulations in all sectors. Any anti-competitive rule was subjected to a vigorous analysis to ascertain whether the restriction of competition could be justified on legitimate and compelling grounds that outweighed the anti-competitive effects. This process substantially enhanced Australia's domestic competitive environment and its international economic performance. At the same time, the competition law was strengthened and more rigorously enforced. Ms Healey also examines the implementation of the law, including enforcement policies and various leading cases.

The Australian experience is often seen as a blueprint for countries that are committed to substantially improving the competitiveness of their economies. Consequently, Chapter 12 provides a unique insight into the political economy processes that a regulator faces in implementing a competition regime and advocating improvements to the existing law and the pursuit of a vigorous enforcement policy, coupled with a strategy for ensuring that the general public understands and supports those policy decisions.

Professor Fels, a former Chairman of the Australian Competition and Consumer Commission, provides an important perspective of how an incumbent regulator can shift the 'authorizing environment' towards accepting legal reform and the enhancement of competition law, especially in dealing with cases where substantial harm is being inflicted on the economy by serious anti-competitive practices. Professor Fels speaks from his direct experience of interacting with the various stakeholders in the Australian politico-economic system. As a vigorous democracy, with a well-developed system of political lobbying, competition regulators in Australia have to develop a keen sense of what is achievable given the significant political influence of the various lobbying groups and vested interests who seek to promote their own agendas. The Australian experience illustrates how the various forces in a liberal democracy affect the law making process and the implementation of competition rules and demonstrates that a modern regulator, in such an environment, must exercise good political judgment in balancing sectoral interests and overcoming unjustified opposition.

In the final chapter, the editor attempts to draw some tentative conclusions about the adoption and prospects for competition policy and law in the region in the coming decade.

The authors hope that this book will provide readers with useful information and insights into the political economy of the various countries discussed and the challenges that face the creation and enhancement of more competitive markets in this large and diverse region, which, in the future, will become ever more important to the global economy.