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**MODEL COMPETITION LAWS:
THE WORLD BANK-OECD AND
UNCTAD APPROACHES
COMPARED**

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Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared

1. INTRODUCTION

The number of countries that have implemented competition law has risen significantly in the past two decades. More than half of such countries enacted competition laws within the 1990-1999 period – the decade of extensive economic reforms. The drafting of competition laws in these countries benefited from the experiences of some of the more developed countries or communities such as the United States, Japan, Germany and the European Community. There is, in fact, a discernable legal lineage in the competition laws of some countries (Table 1). For example, Thailand, in drafting its own competition law, borrowed from South Korea which, in turn, was influenced by the competition laws of Japan and Germany. It is well known that both Japan and Germany implemented their competition laws during the occupation period by the United States.

Table 1: Country Influence in Competition Law Design

Country	Influence From
Japan (1947)	USA (1890)
Australia (1974)	USA (1890)
South Korea (1980)	Japan (1947), Germany (1957)
Taiwan (1992)	Japan (1947), Germany (1957)
Thailand(1999)	South Korea (1980)
Indonesia (1999)	USA (1890), Japan (1947), Germany (1957), EC

International aid and development agencies such as OECD, World Bank and UNCTAD have also been influential in prompting developing countries to implement competition laws. Both Indonesia and Thailand implemented their competition laws as part of their commitments in the structural adjustment programs in the aftermath of the Asian financial crisis in 1997/98. Similarly,

South Korea made significant reforms in its competition law under similar circumstances.

Such international agencies have also played another important role, namely in providing technical assistance in the drafting of competition laws. An aspect of this is the formulation of 'model competition law' that serves as a template for developing countries that are drafting their competition law. The World Bank published one such model in 1999 while the UNCTAD's latest version was published in 2003. The Commonwealth Secretariat has also issued its own model competition law in 2002.¹

There are very few discussions on the similarities and differences between these model competition laws. This gap in the comparative competition law literature is surprising given their importance as potential templates for countries drafting their own competition laws. This paper attempts to address this gap by comparing the two major model competition laws published by the OECD-World Bank and UNCTAD. Aside from discussing the similarities and differences between these two model laws we also draw implications for policy makers involved in the drafting of competition laws.

The outline for the rest of the paper is as follows. A comparison between the model competition laws of World Bank – OECD and UNCTAD is undertaken in Sections 2 to 8. We focus our discussions on the objectives of competition law, its scope and definitions, restrictive agreements, abuse of dominance and merger controls. Section 9 concludes. The relevant excerpts of the model laws are provided in the appendices.

2. THE WORLD BANK-OECD AND UNCTAD MODEL COMPETITION LAWS

There are some standard features of competition laws that are usually present in almost all competition laws that have been enacted (**Table 2**). These include the following:

- A statement on the objectives of competition law;
- A delineation of the scope of the law and definitions therein;
- A list of prohibited agreements and arrangements;
- Abuse of dominance; and

- Merger controls and notification.

Table 2: Basic Structure of Model Competition Laws

Main Areas	World Bank-OECD(1999)	UNCTAD(2003)
Objective	Chapter 1	Chapter 1
Definition	Chapter 2	Chapter 2
Restrictive Agreements	Chapter 3	Chapter 3
Abuse of Dominance	Chapter 5	Chapter 4
Merger Controls	Chapter 4	Chapter 5

The discussions on the above points in each document are quite distinctive. The World Bank-OECD provides a more broad-based and foundational discussions on each item with occasional references to the experiences of a few developed countries such as the United States, Canada and France. The UNCTAD document, on the other hand, devotes a considerable amount of space to detailing the various countries' experiences including many developing countries. One gets the impression that the World Bank-OECD approach is generally more substantive (in the basic foundational sense) while UNCTAD is more inclusive (recording a wide range of experiences). This is consistent with perceptions on the modus operandi of the two organizations – the former seeks to influence policy implementation directly (e.g. financial aid with structural reform requirements) while the latter more persuasively (via advisory technical assistance). In the rest of this section, we compare the recommendations from both the World Bank-OECD and UNCTAD model competition laws.

3. OBJECTIVES OF COMPETITION LAW

The objective of competition law is stated in the World Bank-OECD (1999) in the following manner:²

“This Law is intended to maintain and enhance competition in order ultimately to enhance consumer welfare.”

Similarly, in UNCTAD (2003) as:³

“To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic and international trade or economic development.”

The World Bank-OECD's approach is to define the objective of competition law in a broader terms, namely to protect and enhance the competition process. UNCTAD focuses on the actions that are needed to achieve this. These two statements are in a sense, different sides of the same coin. This is recognized in the World Bank-OECD (1999):⁴

“The most common of the objectives cited is the maintenance of the competitive process or of free competition, or the protection or promotion of effective competition. These are seen as synonymous with striking down or preventing unreasonable restraints on competition.”

Despite such similarities, there are differences in the rest of the definition statements in the two documents. These refer to the ‘ultimate’ targets or beneficiaries of competition law enforcement. For World Bank-OECD, the ultimate objective is the enhancement of consumer welfare. Some may contend that this may be too restrictive, preferring social welfare instead.

UNCTAD's approach to defining the ultimate beneficiaries of competition policy is somewhat broader, emphasizing on domestic and international trade and economic development. A consequence of this broader approach is that the ultimate beneficiary in UNCTAD's definition is vague or can even be interpreted as left undefined.⁵

This has the advantage of implicitly incorporating a wide range of objectives such as consumer welfare, social welfare, economic efficiency, protection of small business etc. The disadvantage of being able to do so is that some of these implicit objectives may conflict with each other.

There is a general consensus amongst economists that one of the potential benefits of competition is economic efficiency. However, economic efficiency may also be consistent with non-competitive situations for example in cases involving natural monopoly, network effects and innovation (dynamic efficiency).

As we shall see later, the choice between narrow and broad statement of competition law objectives may have implications on the instruments, criteria, and legal and economic standards in administering and enforcing competition law.⁶

How should countries frame their statement on competition law objectives? Should they adopt the more focused but narrow approach of WB-OECD or the broader but more vague approach of UNCTAD? A brief survey of 23 countries (**Table 3**) indicates that the enhancement of competition (19 countries), elimination/prevention of RBPs (11), economic efficiency (10), consumer welfare (8) and economic freedom (6) are the five most cited objectives of competition laws in the countries surveyed.

Table 3: Competition Law Objectives in Selected Countries

Country	Promote Competition	Eliminate RBPs	Economic Efficiency	Economic Freedom	Consumer Welfare
Algeria	X		X		X
Armenia	X				X
Canada	X		X		
Denmark	X		X		
Estonia	X	X			
Gabon		X		X	
India	X	X		X	X
Hungary	X		X		
Mongolia	X	X			
Norway	X		X		
Panama		X	X		X
Peru		X			X
Russia		X	X		
Spain	X			X	
Sweden	X				
Switzerland	X	X			
USA	X		X	X	
Taiwan	X				X
Tunisia	X	X		X	
Ukraine		X			
Venezuela	X		X	X	X
Zambia	X	X	X		X
EC	X				
Total	19	11	10	6	8

4. SCOPE OF COMPETITION LAW

The scope of competition law specifies the entities (enterprises, natural persons etc.) to which the law applies to. It can also specify any exclusion from the law. Excerpts from the WB-OECD and UNCTAD model competition laws are presented in **Appendix A**.

Typically, competition law covers all commercial economic activity in its myriad forms. These include actions, transactions, agreements and arrangements involving goods, services and intellectual property. Both the WB-OECD and UNCTAD model laws have this basic statement.

There are some interesting differences between the two model laws. The WB-OECD model law includes acts done outside the country but have substantial effect in the country. It also excludes workers and employees union-related activities.

In its model competition law, UNCTAD includes 'natural persons' (as distinct from and in addition to enterprises) as a separate entity to which the law applies to. Such natural persons include owner, manager or employee of enterprises. UNCTAD also excludes all acts of the State and State-related agencies from the application of the competition law. The discussions in UNCTAD (2003) seem to suggest that whether this includes state-owned enterprises may differ from country to country.⁷

The extra-territorial element in the WB-OECD model law is an interesting one. While relevant, it remains to be seen how such provisions can be enforced particularly in small developing countries. Unlike UNCTAD, WB-OECD defines 'firms' as including natural persons. The exclusions related to the State that are provided for in the UNCTAD model law also require careful considerations. Developing countries may pursue development strategies that require significant state intervention in the economy that may compromise competition (at least in the short and medium term). Even if such strategies are to be pursued and State-related acts are excluded in the competition law, some mechanisms of consultation (with the competition authority) should be implemented, at the very minimum.

5. DEFINITIONS IN COMPETITION LAW

The importance of definitions in competition law becomes apparent in the process of enforcing a competition law. Characterizations and measures of market structure depend on the definitions employed in the law. Definitions can be set out either as either general type of definitions in the initial part of the statute or more specifically in the relevant sections of the statute such as mergers and abuse of dominance.

Appendix B sets out some of the basic definitions in the model competition laws of both WB-OECD and UNCTAD. Both the WB-OECD and UNCTAD are in agreement on the choice of two major definitions in competition law, namely firms or enterprises and (relevant) market.

WB-OECD uses the term 'firms' in a more broad sense to include "any natural or legal person, government body, partnership or association in any form engaged directly or indirectly in economic activity". UNCTAD defines 'enterprises' in similar way that WB-OECD's meaning of the term 'firm'. Both the WB-OECD and UNCTAD also agree on the two elements in the definition of market / relevant market. These are substitutability of goods (product market) and geographic delineation (geographic market).

In addition to the above, the WB-OECD's model competition law also defines very basic terms such as 'competition' and 'good'. UNCTAD, on the other hand, provides a specific definition on 'dominant position of market power'. WB-OECD also defines dominant position but in the subsection pertaining to abuse of dominant position. We compare these two definitions in a later section. Overall, both model competition laws agree on the basic definitions used in competition laws.

6. RESTRICTIVE AGREEMENTS

Transactions between firms are often governed by implicit or explicit agreements amongst themselves. These agreements can be classified as either horizontal or vertical agreements:⁸

- Horizontal Agreements –

- are concluded between firms engaged in the same activities;
- Vertical Agreements – are concluded between firms at different stages of the manufacturing or distribution process (i.e. between an upstream firm and a downstream firm).

Such agreements tend to be `restrictive' in the sense of reducing the independence of firms involved to undertake alternative business decisions. When such agreements significantly lessen competition, they are said to be `anticompetitive'. The five major types of restrictive agreements identified in both the WB-OECD and UNCTAD model competition laws are as follows:

- Price Fixing (Includes tariffs, discounts, surcharges and any other charges. See WB-OECD, p.144);
- Quantity Fixing;
- Market Allocation (Includes geographic and customer allocation);
- Refusal to Deal (Comprising both refusal to purchase and refusal to supply); and
- Collusive Bidding / Tendering;

With the exception of collusive bidding, all the above agreements can take place either horizontally or vertically. The term `vertical restraints' is also used to denote the various types of restrictive vertical agreements such as retail price maintenance (a form of price fixing), quantity forcing (quantity fixing), exclusive dealing (manufacturing firm prohibits distributor firm dealing with competing products or distributors, subject to threat of refusal to supply), and tying (also subject to threat of refusal to supply).

While both the WB-OECD and UNCTAD model competition laws are in agreement on the types of restrictive agreements, there are some differences in terms of the provisions for :

- Horizontal vs. vertical restrictive agreements; and
- Per se vs. rule of reason prohibitions.

The WB-OECD model law makes an explicit distinction in their model law between prohibitions subjected to per se illegality and rule of reason. In

the model law, horizontal restrictive agreements (i.e. agreements between competitors) that are subjected to per se illegality include:

- Price Fixing;
- Quantity Fixing;
- Market Allocation;
- Refusal to Deal;
- Collusive Bidding / Tendering; and
- Elimination of actual or potential sellers or purchasers from the market.

Restrictive agreements other than those listed above are subjected to rule of reason.

The application of rule of reason comprise two elements (WB-OECD, p.144.):

1. Threshold criteria:

- (i) for competing firms (i.e. horizontal agreement) – the restrictive agreement cannot be found to significantly limit competition unless shares of the firms participating in the agreement collectively exceed 20 percent of a market affected by the agreement.
- (ii) for non-competing firms (i.e. vertical agreement) – the restrictive agreement cannot be found to significantly limit competition unless:
 - (a) at least one of the parties holds a dominant position in a market affected by the agreement (Elsewhere in the model law, dominance is defined as a firm having at least a 35 percent of relevant market share. See WB-OECD, p.142); or
 - (b) the limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

2. Cost-benefit comparison between 'the effects of any limitation on competition that result or are likely to result from the agreement' and 'gains in real as opposed to merely pecuniary efficiencies', applying

either a total welfare standard (giving equal weight to consumers and producers) or a consumer welfare standard. (WB-OECD, pp.144-145.);

The rule of reason also relates to the exemption of such restrictive agreements with the provision that “the burden of proof lies with the parties seeking the exemption”.

The treatment of restrictive agreements is somewhat simpler in UNCTAD's model competition law. There is a list of restrictive agreements that are prohibited but any of these may be exempted or authorized if it can be shown that it will produce ‘net public benefit’ (UNCTAD, p.19). As a result of UNCTAD's emphasis on exemptions, there is an extensive discussion on exemptions and authorizations in its model competition law document.

Even though the UNCTAD's model law does not make the distinction between horizontal and vertical agreements and between per se and rule of reason, such differences are discussed in the context of selected country experiences.

Some of these experiences are summarized in **Table 4**.

Table 4: Prohibitions on Restrictive Agreements

Type of Agreement	Per Se Illegal	Rule of Reason
Market Allocation	USA, UK	
Refusal to Deal	Australia	India
Collusive Bidding	USA, Kenya	

In general, restrictive horizontal agreements tend to be considered more serious than restrictive vertical agreements. Thus, restrictive horizontal agreements particularly cartel agreements tend to be considered per se illegal in some countries (e.g. in the United States) while restrictive vertical agreements are mostly subjected rule of reason. This is reflected in the WB-

OECD model law but not in the UNCTAD (even though the later document contains discussions on these issues).

In addition, the WB-OECD considers the distinction between cartel and non-cartel horizontal agreements to be an important one (WB-OECD, p.143):

“Certain types of horizontal agreements, collectively described as cartel agreements, are subjected to stricter control than other types. In many countries this distinction is not found in the law itself but in enforcement practice and regulations. Countries that are first adopting competition laws, however, are better off making the distinction explicitly in the law.”

Presumably, this concern over cartel agreements is dealt with in WB-OECD model law via per se approach to horizontal restrictive agreements. In such cases, fines and even imprisonment may be the appropriate forms of sanctions. This aspect is, however, not dealt with in both of the model competition laws.

7. ABUSE OF DOMINANCE

Abuse of dominance occurs when a `dominant firm' in a market undertakes an action that significantly lessens competition in that market. The two basic provisions on abuse of dominance are:

- definition of dominance or dominant position; and
- a listing of actions by a dominant firm that are considered to be abuses of dominance.

Defining Dominance

There is a difference in the treatment of (1) between the WB-OECD and UNCTAD model laws. WB-OECD has a quantitative dimension in their approach to dominance while UNCTAD adopts an entirely qualitative approach. In defining dominance, the WB-OECD model law adopts `a necessary but insufficient condition' in a form numerical market share threshold of 35 percent. In contrast, UNCTAD merely defines `dominant position of market power' as “a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to

control the relevant market for a particular good or service or group of goods or services” (See UNCTAD, p.14.).

Which is more commonly adopted in competition laws around the world? In a survey of 50 countries, World Bank noted that 28 out of 50 countries surveyed have qualitative definition of dominance while the remaining 22 countries adopt quantitative benchmarks (see World Bank (2002), p.140). In the latter group of countries, there is significant differences in the level of quantitative benchmarks adopted for dominance (see **Table 5** below).

Table 5: Quantitative Benchmarks of Product Market Dominance

Country Group	Market Share of Firm
<i>Developing and Transition Countries</i>	
East Asia	50% - 75%
Eastern Europe & Central Asia	30% - 40%
Africa	20% - 45%
<i>Industrialized Countries</i>	
United States	≥ 33%
European Union	40% - 50%

World Bank (2002) suggests that, for developing countries, quantitative benchmarks may be easier to apply than qualitative approach of dominance – the later requiring sophisticated information and human resource capacity. This may be true to some extent but there is still the question of the benchmark level which appears to be quite arbitrary.

Types of Abuse of Dominance

The WB-OECD model law does not specify a list of behavior that constitutes abuse of dominance. This is probably because the types of behavior associated with abuse of dominance are not necessarily always anticompetitive. Furthermore, firms that behave in such manner may not have any criminal or anticompetitive intent. Nevertheless, there are discussions on the specific types of behavior associated related to abuse of dominance in World Bank-OECD (1999) (Chapter 5). In this regard, WB-OECD makes a distinction between:

- Exploitative abuses – in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices.
- Exclusionary abuses – in which a firm attempts to suppress competition – for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices.

Due to the ambiguity of most exploitative abuses, World Bank-OECD (1999) suggests that the focus should be on preventing dominant firms from engaging in exclusionary abuses (World Bank-OECD (1999), pp.72-73).

The UNCTAD model law provides a list of abuse of dominance behavior but does not make a distinction between the two classes of abuse of dominance behavior. **Table 6** summarizes the list of behaviors associated with abuse of dominance in the UNCTAD model and those inferred from World Bank-OECD (1999).

Table 6: Behaviors Associated with Abuse of Dominance

Main Areas	World Bank-OECD(1999)	UNCTAD (2003)
Price Discrimination	X	X
Tie-ins	X	X
Refusal to Deal	X	X
Predatory Pricing	X	X
Raising Rivals' Costs	X	
Vertical Restraints	X	X
Price Fixing		X

While there are similarities in both model laws in terms of the list of behavior identified as normally associated with abuse of dominance, the two model laws differ slightly in terms of their treatment of behaviors that are not anticompetitive. The WB-OECD excludes such actions if they are brought about by increase in efficiency levels of the firm involved or if the benefits of such efficiencies are passed on to consumers. In contrast, UNCTAD

provides for authorization or exemptions via notification that a more open-ended approach rather than focus on efficiency and consumer welfare.

Finally, unlike the UNCTAD model law, the WB-OECD provides for remedial measures to be taken in abuse of dominance cases. These measures are listed as the reorganization and division of the firm(s).

What can we make of the differences between the two model laws in their treatment of abuse of dominance? The trade-off between a qualitative and quantitative approach to the dominance benchmark is a difficult issue to address. It is obviously easier for competition agencies to apply a quantitative dominance benchmark in assessing dominance. However, the complexity of behaviors associated with abuse of dominance requires a careful case-by-case analysis. The two aspects need not be inconsistent with each other since the dominance benchmark is merely a necessary but insufficient condition. However, since it is a necessary condition the benchmark should not be set too high as to automatically exclude too many cases.

8. MERGER CONTROLS

Mergers occur when two independent companies combine into one. Mergers can be either horizontal mergers or vertical merger. Mergers can be horizontal mergers or vertical merger. Horizontal mergers involve firms that are actual or potential competitors while vertical mergers involve firms at different levels in the chain of production (See World Bank-OECD (1999), p.42).

Mergers change market structure by reducing the number of independent firms in the market. It also results in the merged entity having a market share than each of the two merging firms before the merger. Thus, some mergers can result in a dominant firm (where none exists prior to the merger) or/and it can increase the merged entity's market power. Both can be detrimental to consumers if the merged entity abuse their dominant position or exercise their market power. Merger controls are put in place to prevent such situations from arising. While most merger controls are

preventive in the sense of being pre-merger controls, competition agencies are sometimes given the post-merger powers to rectify mergers that are not beneficial to society by dissolving such mergers. Thus, pre-merger controls are primarily structural in nature while post-merger controls can be structural or behavioral in nature.

A basic component of pre-merger controls is the pre-merger notification process. Both the WB-OECD and UNCTAD model laws contain pre-merger notification. However, they differ in terms of the application of pre-merger notification. The WB-OECD model law sets a transaction size threshold, below which mergers are exempted from notifying the competition agency. In the UNCTAD, there are no suggestions on threshold provisions in its model law.

Pre-merger notification thresholds are used in a number of developed countries (see **Table 7**). However, there seem to be neither agreement on the appropriate type of threshold to be adopted (assets or turnover) nor on the level of threshold to be applied.

Table 7: Pre-Merger Notification Threshold in Selected Countries

Country	Type of Threshold	Size of Threshold
United States	Assets	US\$200 million
Canada	Assets or Turnover	C\$50 million \approx US\$38 million
Germany	Turnover	€ 25 million \approx US\$31 million
Rep.Korea	Turnover	KRW 100 billion \approx US\$86 million
Japan	Asset Turnover	¥10 billion \approx US\$90 million ¥1 \approx US\$9 million
Brazil	Turnover	R\$400 million \approx US\$133 million

Source: Global Competition Review

While both the WB-OECD and UNCTAD model laws include post-merger remedies, such provisions in WB-OECD's model law are more detailed compared to the ones observed in the UNCTAD model law. WB-OECD also spells out in a detailed manner, circumstances that can justify an exemption from the law. These may include industry consolidation that increases real efficiency gains or prevents actual or potential financial failure.

9. CONCLUSIONS

There are some differences between the WB-OECD and UNCTAD model competition laws but are these differences important? UNCTAD's model competition law incorporates broader developmental objectives while the WB-OECD are more likely to focus on economic efficiency and consumer welfare objectives. In addition, WB-OECD uses quantitative benchmarks and thresholds extensively while UNCTAD eschews discussions of quantitative benchmarks and thresholds.

Developing countries that are drafting competition laws face difficult choices. There may be trade-offs between ease of enforcement with 'accuracy' of enforcement. Per se illegality is relatively easy to enforce but runs into the risks of penalizing an optimal business practices. Quantitative benchmarks and thresholds have similar effects – they may be easy to use but can be wrongly applied. There is also no consensus on how the levels of these quantitative measures be computed.

It could be that the appropriate choice may be determined by the capacities of the competition agency. The irony is, of course, the broader and the more qualitative the objectives of a competition law are, the more difficult it may be to enforce such a law.

References

UNCTAD (2003) *Model Law on Competition*. Geneva: United Nations.

World Bank (2002) *World Development Report 2002*. Washington, D.C.:
World Bank.

World Bank and OECD (1999) *A Framework for the Design and
Implementation of Competition Law and Policy*. Washington, D.C.:
World Bank and OECD.

Appendix A:

Scope of Competition Law in Model Competition Laws

A.1 WB-OECD

1. This Law shall be enforceable on the whole territory of the Republic of X and applies to all areas of commercial economic activity. The Law shall be applicable to all matters specified in [section(s) of the law containing the prohibitions of restrictive agreement, abuse of dominance, and merger review], having substantial effects in the Republic of X, including those that result from acts done outside the Republic of X.
2. This Law does not derogate from the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trademarks, and copyrights. It does apply to the use of such property in such a manner as to cause the anticompetitive effects prohibited therein.
3. This Law shall apply neither to the combinations or activities of workers or employees nor to agreements or arrangements between two or more employers when such combinations, activities, agreements, or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment.

A.2 UNCTAD

1. Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.
2. Applies to all natural persons who, acting in private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by law.
3. Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which

are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

B. Definitions in Competition Law

B.1 WB-OECD

Competition – the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in the market.

Firm – any natural or legal person, governmental body, partnership, or association in any form engaged directly or indirectly in economic activity. Two firms, one of which is controlled by the other, shall be treated as one firm. Two or more firms that are controlled by a single firm shall be treated as one firm. The competition office shall adopt a regulation setting out what constitutes control.

Good – all property, tangible and intangible, and services.

Market – a collection of goods among which buyers are or would be willing to substitute, and a specific territory, which could extend beyond the borders of the Republic of X, in which are located sellers among which buyers are or would be willing to substitute.

B.2 UNCTAD

Enterprises – means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

Dominant position of market power – refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is

in a position to control the relevant market for a particular good or service or group of goods and services.

Relevant market – refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify group of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.

C. Restrictive Agreements

C.1 WB-OECD

Prohibited agreements between firms

1. An agreement, concluded in any form including by concerted practice, between competing firms (including firms that could easily become competitors) is prohibited if such an agreement has or would likely have as its principle effect:
 - (a) Fixing or setting prices, tariffs, discounts, surcharges, or any other charges;
 - (b) fixing or setting the quantity of output;
 - (c) fixing or setting prices at auctions or in any other form of bidding, except for joint bids so identified on their face to the party soliciting bids;
 - (d) dividing the market, whether by territory, by volume of sales or purchases, by type of goods sold, by customers or sellers, or by other means;
 - (e) eliminating from the market actual or potential sellers or purchasers; or

- (f) refusing to conclude contracts with actual or potential sellers or purchasers.
2. An agreement, other than those enumerated in Section 1 of this article, concluded in any form including by concerted practice, is prohibited if it has or would likely have as its result a significant limitation of competition.

(a) An agreement among competing firms, including firms that could easily become competitors, other than those agreements enumerated in Section 1 of this article, cannot be found to significantly limit competition unless the shares of the firms participating in the agreement collectively exceed 20 percent of a market affected by the agreement.

(b) An agreement solely among noncompeting firms cannot be found to significantly limit competition unless:

- (i) At least one of the parties holds a dominant position in a market affected by the agreement; or
- (ii) the limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

3. (a) An agreement prohibited under Section 2 of this article is nonetheless legal if it has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the agreement.

or

An agreement prohibited under Section 2 of this article is nonetheless legal if it has brought about or likely to bring about such large gains in real as opposed to merely pecuniary efficiencies that consumer well-being is expected to be enhanced as a result of the agreement.

(b) The burden of proof under this section lies with the parties seeking the exemption, and includes demonstrating that if the agreement were not implemented it is not likely that the relevant efficiency gains would be realized by means that would limit competition to a lesser degree than the agreement.

C.2 UNCTAD

1. Prohibition of the following agreements between rival or potential rival firms, regardless of whether such agreements are written or oral, formal or informal:

- (a) Agreements fixing prices or other terms of sale, including in international trade
- (b) Collusive tendering;
- (c) Market or customer allocation;
- (d) Restraints on production or sale, including by quota;
- (e) Concerted refusals to purchase;
- (f) Concerted refusals to supply;
- (g) Collective denial of access to an agreement, or association, which is crucial to competition.

2. Authorization or exemption

Practices falling within paragraph 1, when properly notified in advance, and when engaged in by firms subject to effective competition, may be authorized or exempted when competition officials conclude that the agreement as a whole will produce net public benefit.

D. Abuse of Dominance

D.1 WB-OECD

Abuse of Dominance

1. Dominant Position – a firm has a dominant position if, acting on its own, it can profitably and materially restrain or reduce competition in a market

for a significant period of time. The position of a firm is not dominant unless its share of the relevant market exceeds 35 percent. A firm having a market share exceeding 35 percent may or may not be found to be dominant depending on the economic situation in that market, including the firm's market share, competing firms' market shares and their abilities to expand those shares, and the potential for new entry into the market.

2. Actions of a dominant firm – including creating obstacles to the entry of competing firms or to the expansion of existing competitors or eliminating competing firms from the market – that have or may probably have as their result a significant limitation of competition are prohibited.
3. Section 2 of this article does not prohibit actions by a firm that create obstacles to the entry of new firms or reduce the competitiveness of existing firms solely by increasing the efficiency of the firm taking those actions, or that pass the benefits of greater efficiency on to the consumers.

Power to break up a firm abusing its dominant position

1. When a firm has abused its dominant position and no other remedy under this law or under an applicable regulatory statute would be likely to rectify the situation or prevent recurrence of the abuse, the competition office may reorganize or divide the firm provided there is a reasonable likelihood that the resulting entity or entities would be economically viable.
2. The power to reorganize or divide contained in this article shall be exercised in a manner designed to minimize any increases in costs of providing the good.

D.2 UNCTAD

1. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power.

A prohibition on acts or behavior involving an abuse or acquisition and abuse of a dominant position of market power:

- (a) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;
- (b) Where the acts or behavior of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

2. Acts or behaviour considered as abusive:

- (a) Predatory behavior towards competitors, such as using below cost pricing to eliminate competitors;
- (b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
- (c) Fixing the prices at which goods sold can be resold, including those imported and exported;
- (d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;
- (e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or services:
 - (i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

- (ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
- (iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
- (iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

3. Authorization or exemption

Acts, practices or transactions not absolutely prohibited by the law may be authorized or exempted if they are notified, as described in article 7, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

E. Merger Controls

E.1 WB-OECD

Review of Concentrations

Definition

1. "Concentration" shall be deemed to arise when:
 - (a) Two or more previously independent firms merge, amalgamate, or combine the whole or a part of their businesses; or
 - (b) one or more natural or legal persons already controlling at least one firm acquire, whether by purchase of securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other firms.

2. "Control" for the purpose of this article, is defined as the ability to materially influence a firm, in particular through:
 - (a) Ownership or the right to use all or part of assets of an undertaking;
or
 - (b) rights or contracts that confer decisive influence on the composition, voting, or decisions of the organs of a firm.

Notification

3. When an agreement or public bid will produce a concentration larger than the minimum size as provided in regulations issued pursuant to section 7 of this article, the parties to the agreement or bid are prohibited from consummating such concentration until _____ days after providing notification to the competition office, in the form and containing the information specified in regulations issued pursuant to section 7.
4. Before the expiration of the _____ day period referred to in section 3 of this article, the competition office may issue a written request for further information. The issuance of such a request has the effect of extending the period within which the concentration may not be consummated for an additional _____ days, beginning on the day after substantially all of the requested information is supplied to the competition office.
5. Parties to an agreement or public bid not subject to the notification requirement in section 3 of this article may voluntarily notify and, if they do so, be subject to the same procedures, restrictions, and rights as are applied to cases of compulsory notification.
6. If, before consummation of a concentration, the competition office determines that such concentration is prohibited by section 8 of this article and does not qualify for exemption under section 9 of this article, the competition office may:
 - (a) Prohibit consummation of the concentration;
 - (b) prohibit consummation of the concentration unless and until it is modified by changes specified by the competition office;
 - (c) prohibit consummation of the concentration unless and until the pertinent party or parties enter into legally enforceable agreements specified by the competition office.

Regulations regarding concentrations

7. The competition office shall from time to time adopt and publish regulations stipulation:

- (a) The minimum size or sizes of concentrations subject to the notification requirement in section 3 of this article;
- (b) the information that must be supplied for notified concentration;
- (c) exceptions or exemptions from the notification requirement of section 3 for specified types of concentrations;
- (d) other rules relating to the notification procedures in sections 3,4, and 5 of this article.

Permitted and prohibited concentrations

8. Concentrations that will probably lead to a significant limitation of competition are prohibited.

9. Concentrations prohibited under section 8 of the article shall nonetheless be free from prohibition by the competition office if the parties establish that either:

- (a) The concentration has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more that offset the effects of any limitation on competition that result or are likely to result from the concentration; or
- (b) one of the parties to the concentration is faced with actual or imminent financial failure, and the concentration represents the least anticompetitive uses for the failing firm's assets.

The burden of proof under this section lies with the parties seeking the exemption.

A party seeking to rely on the exemption specified in(a) must demonstrate that if the concentration were not consummated it is not likely that the relevant efficiency gains would be realized by means the would limit competition to a lesser degree than the concentration.

A party seeking to rely on the exception specified in (b) must:

- (i) Demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the failing firm's assets;
- (ii) fully describe the results of that search.

10. The competition office may determine, within three years after consummation, that either a non notified concentration or a notified concentration in which the provisions of sections 3-5 of this article are not fully complied with, has led or will probably lead to a significant limitation of competition and does not qualify for either of the two exemptions set out in section 9 of this article. If it so determines, the competition office may:

- (a) Undo the concentration by dissolving it into its constituent elements;
- (b) require other modifications of the concentration, including sale of a portion of its operations or assets;
- (c) require the surviving firm or firms to enter into legally enforceable agreements specified by the competition office and designed to reduce or eliminate the competition-limiting effects of the concentration.

11. Notifiable concentrations that the competition office determines are prohibited by section 8 of this article and do not qualify for exemption under section 9 may subsequently be authorized by a published decision of the Government of \hrulefill for overriding reasons of public policy involving a unique and significant contribution to the general welfare of the citizens of \hrulefill.

E.2 UNCTAD

Notification, examination and prohibition of mergers affecting concentrated markets

1. Notification

Mergers, takeovers. Joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when:

- (a) At least one of the enterprises is established within the country; and
- (b) The resultant market share in the country, or any substantial part of it, relating to any product or service, is likely to create market power, especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by firms whose conduct is under scrutiny.

2. Prohibition

Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when:

- (a) The proposed transaction substantially increases the ability to exercise market power (e.g. to give the ability to a firm acting jointly to profitably maintain prices above competitive levels for a significant period of time); and
- (b) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

3. Investigation Procedures

Provisions to allow investigation of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, which may have competition could be set out in a regulation regarding concentrations.

In particular, no firm should, in the cases coming under the preceding subsection, effect a merger until the expiration of a ... day waiting period from the date of the issuance of the receipt of the notification, unless the competition authority shortens the said period or extends it by an additional period of time not exceeding ... days with the consent of the firms concerned, in accordance with the provisions of Possible Elements for Article 7 below. The authority could be parties and from enterprises in the affected relevant market or lines of commerce, with the parties losing additional time if their response is late.

If a full hearing before the competition authority or before a tribunal results in a finding against the transaction, acquisitions or mergers could be subject to being prevented or even undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant part of the relevant market within the jurisdiction.

Notes

¹ The author thanks Shila for bringing this to his attention.

² WB-OECD (1999), p.142.

³ UNCTAD (2003), p.13.

⁴ WB-OECD (1999), p.2.

⁵ Interestingly, there is also contrasting differences between the 'positive statement' approach of the World Bank-OECD (i.e. 'enhance') and the 'negative statement' approach of UNCTAD (i.e. 'adversely affecting'). This difference is an outcome of the choice of earlier objective statement:

Competitive process → enhance consumer welfare

Restrictive business agreements / abuse of dominance → adverse effects

⁶ See WB-OECD (1999), p.7.

⁷ UNCTAD (2003), p.17.

⁸ See UNCTAD(2003), p.20.