

# REGULETTER



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## How Crucial is Regulatory Independence?

Independent sectoral regulatory agencies are autonomous public bodies empowered to regulate specific industries. The institutional structure of sectoral regulatory agencies, in many ways, can be compared with that of competition authorities. However, the scope of the discussion is confined to sectoral regulation.

Predictably, the approaches towards regulation vary worldwide, yet the basic premise is to minimise the possibility of a 'capture' by interest groups.

Independence, in this context, specifically means that the regulatory agency is protected from undue influences, particularly from short-term political interference. Independence from the political establishment is primarily meant as a commitment to provide for a stable regulatory framework over time. For investors, such a commitment serves as an effective measure to minimise the risk associated with political uncertainty.

In a deregulated environment, the wide spread assumption is that independence from the political establishment contributes to regulatory goals such as growth, investment, enhancing transparency and competitive neutrality of regulation, particularly when some of the utilities are publicly owned. Yet, regulators are meant to be independent not just from the political establishment, but from the market players as well. In several cases, independence from political establishment has led to a capture by stakeholders (read investors).

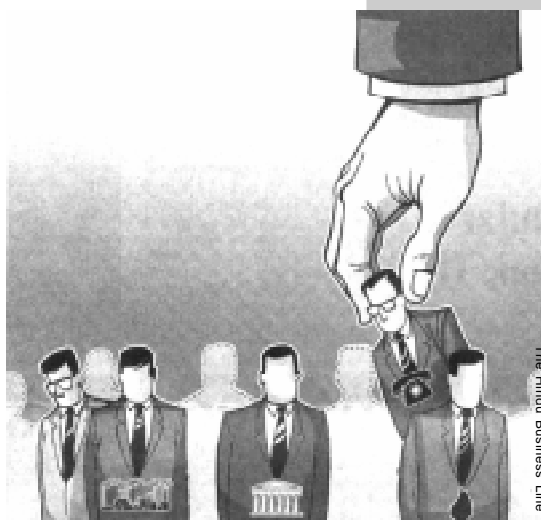
The models of institutional design being followed the world over, can be distinguished on the basis of the extent to which, a government is involved in the process. Though the recent trend is of setting up specialised bodies outside of government domain to regulate a sector,

yet the extent to which independence of a regulator would impact upon regulatory efficacy remains to be established.

The institutional structure that is popular, is of setting up specialised independent bodies, governed by people who have definite tenure. The mandate of such agencies varies across countries and sectors. For instance, regulatory agencies in the US, the UK, Canada, and Australia have a broader mandate for regulating a sector and may act on almost all regulatory and competition policy issues. However, the scope of a mandate is a lot narrower in other countries.

The other model followed is that where the 'line ministry' performs the regulatory functions. This approach has been adopted in many of the Organisation for Economic Co-operation and Development (OECD) countries, including Germany, Japan, New Zealand, and Switzerland. The 'light-handed approach' of regulation in New Zealand, and the maturity with which the government in Germany is regulating various sectors, are some of the examples, which are widely considered as effective regulation.

Another approach embodies that of a middle path. Independent Advisory agencies have been established to advise the ministry and undertake the responsibility for monitoring and arbitration – however, no definite regulatory powers have been granted to them. Belgium, Greece, Luxembourg, and



The Hindu Business Line

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Spain are some of the countries, where this approach is being implemented. The Telecom Regulator Authority of India (TRAI) is another characteristic example of this approach, which is widely considered as effective, despite being given limited powers to regulate.

The ministerial agencies are specialised bodies equipped with the necessary wherewithal.

Having looked at various institutional arrangements, the issue arising is that of the relationship between the degree of independence from the political establishment and regulatory efficacy. Does independence essentially mean greater effectiveness? Can a line ministry achieve the objectives usually meant for independent regulators?

There are, as yet, no definite answers. Still, given the experiences with the various regulatory structures, the assumption that incremental insulation from political establishment is a necessary precondition for effective regulation, may not hold well always.

In some cases, the government or its subordinate agencies are performing better. For instance, in Vietnam, it is the line ministry that regulates the telecom sector. The results are striking: sharp reduction in tariffs, rapid growth in telecom services, and massive investments flowing in. Not surprisingly, Vietnam's telecom sector has been rated by the International Telecommunication Union as the second fastest-growing telecom market in the world after China. At the other end, in several cases, regulatory agencies that have been imparted with adequate independence are not performing up to the expectations. Electricity regulators in India and energy regulators in Bangladesh are in this category.

Therefore, increased insulation between the government and the regulatory agency may not necessarily have an impact upon the efficacy of regulation, though it may be so in certain instances.

It appears that, what matters most is the level of maturity and the degree of impartiality with which institutions conduct their affairs, be it the ministry or a regulatory agency. Ability of an institution to deliver consistent regulatory environment over time and a level-playing field for all stakeholders appears to be a crucial determinant of regulatory efficacy.

Indeed, in certain situations, independence can be one of the determinants of regulatory efficacy, yet, it needs to be noted that the other factors such as institutional capacity and accountability mechanisms, are equally vital. Lack of an appropriate mechanism to hold a regulator accountable, can result in under-performance, irrespective of the degree of independence that the body may well possess. Lack of capacity can be a bottleneck even for an independent regulator.

Hence, regulatory efficacy is an outcome of the interplay of several determinants. There is a need to undertake research, both intensively and extensively to establish the extent of sensitivity, in the relationship between independence and regulatory efficacy. Till then, to state conclusively on the supremacy of one structure over the others, would be inappropriate. Perhaps, the focus should be on the stakeholder model of regulation i.e. rather than focusing on 'who' regulators are, emphasis should be placed on 'how' they regulate.

## We Don't Need a Competition Law!

There is a contrarian view held by many countries that because of the type, size or structure of the market, they do not need a competition law. One argument is that the economy is dominated by the informal sector, where market forces ensure competition or where policing will be extremely difficult, making an articulated competition regime futile. Another argument is that in a small economy (Lebanon, Bangladesh), a competition regime will throw their smaller domestic firms out of the market. In Jordan too, there was a similar sentiment until the country adopted a competition law in 2004.

Another reason extended by some countries is that they are at a nascent stage of adopting new regulatory laws, while resources are limited; these resources need to be deployed in priority areas. Tajikistan is one such country, where 80 percent of the

population lives below the poverty line (BPL). Nevertheless, it adopted a competition law in 1993, scrapped it and adopted another one in 2000. However, the policymakers here believe that promotion of investments and businesses have greater priority than regulating them through competition.

In many countries, business has opposed the adoption of a competition law for several reasons. Some are augured well, but the primary fear is that it could become another millstone around their necks. This issue is common to many developing countries. In Egypt, Malawi, Mauritius etc., business opposition resulted in several drafts of a competition law going through the public acceptance process. After failing to scuttle the adoption of a law, the business community then trained its guns on the implementation. Thailand offers a typical example, where

opposition by the business community resulted in them finding seats on the competition authority and thus ensuring that it does not work. In Taiwan, there was a similar situation, but better sense prevailed on the government after lobbying by consumer groups and academics. India adopted a new competition law in 2002, but its implementation has since been caught up in judicial tangles. The adoption of a new, forceful law has met with opposition even in Japan, though the competition authority prevailed, finally.

Some vested interests oppose a competition law, as it would reduce their influence over the undertaking. This situation was seen in Vietnam and in many former socialist countries in Europe and Central Asia. Even if the law is passed, efforts will be made to blunt the bite, hence maintaining the *status quo*.

### Draft Policy for Botswana

The long awaited draft competition policy was proposed before the Parliament in Botswana. The members of the Parliament hailed the introduction of the draft policy, saying it would safeguard and promote growth and development of citizen-owned small and medium enterprises (SMEs). This draft policy will avert the abuse of market dominance, monopolisation and cross border anti-competitive practices.

There was a lot of hope among government circles that, if enacted into a law, this policy would help protect consumer rights and interests. This draft policy came at a time when the government was aggressively reviewing regulations and policies to attract the much needed foreign investment. (allAfrica.com, 05.08.05)

### Australia Introduces Markers

Australia's Competition and Consumer Commission (ACCC) has overhauled its leniency policy to bring it more in line with international norms. The new policy allows companies to put down markers, effectively reserving their place in the leniency queue. Companies are ranked according to when they approach the authority and how many others have already approached it.

ACCC would offer immunity to applicants even if the market in question is under investigation. The first company to self-report can claim full immunity from fines and prosecution.

According to sources, the new policy increases the convergence between the Australian immunity policy and the policies of leading jurisdictions.

In 2006, Australia is expected to increase fines applied to cartelists, which would be 10 percent of the turnover, or AU\$10mn (US\$7.4mn), whichever is greater. This round of reforms is also expected to introduce criminal sanctions with prison terms up to five years for individuals. (GCR, 07.09.05)

### Bid-rigging; an Offence

Cartel activity that affects the outcome of a public procurement procedure has been proclaimed a

criminal offence in Hungary from September 2005. A perpetrator will not be punished if he or she notifies the authorities about such activities before they become aware of it.

Such a decision follows discoveries of collusion among firms tendering for motorway and other road contracts. The competition authority has penalised the construction companies in question. (GCR, 21.07.05)

### Swiss Define SMEs

Switzerland's Competition Commission is having a second go at when agreements between small and medium sized businesses will be deemed unproblematic and therefore, exempt from competition rules. In theory, such entities have less capacity to affect markets.

The new approach introduces a *de minimis* that applies across the board, which is 10 percent for horizontal and 15 percent for vertical arrangements, the same used by the EC. (GCR, 27.07.05)

### Advertising in Latvia

The Competition Council of Latvia started a new practice in the exercise of its rights as laid down in the Advertising Law. One of the tasks of the Council is to ensure that market players comply with the rules of the Advertising Law, in order to promote fair competition.

Under this Law, comparative advertising is permitted if the advertisement objectively compares the related materials with verifiable and characteristic features of the relevant goods or services.

The Law further provides that advertising is prohibited if it is or could be directly or indirectly misleading and if, due to its misleading character, it affects the economic behaviour of a person or is harmful to a competitor.

The Advertising Law empowers the Competition Council to impose fines up to •720 (US\$851) on legal entities for breach of the rules, while •14,500 (US\$17,138) may be imposed for the provision or distribution of prohibited advertising. (ILO, 18.08.05)

### New Cartel Act in Austria

The new Cartel Act 2005 of Austria will take effect from January 1, 2006, bringing domestic cartel law in line with the European Law. Important amendments include the abolition of various categories of cartels, special rules for vertical distribution agreements and changes in rules relating to merger notifications.

The rules of procedure in cartel proceedings closely follow rules laid down in the EU Regulation 1/2003. However, the Parliament did not follow the Federal Cartel Authority's (FCA) request to give it the power to issue binding decisions on information requests. The FCA has been enforcing domestic and EU cartel laws with an increasing effort and effectiveness since its establishment in 2002.

Although the new Cartel Act is, to a great extent, a copy of the EU cartel law and does not fundamentally change the domestic law, it introduces some interesting details that may have a considerable practical impact. (ILO, 28.07.05)

## Peer Reviewing for Taiwan

It has been confirmed that Taiwan will have its competition regime reviewed by the Organisation for Economic Co-operation and Development (OECD). The OECD said that a task force has been convened, but declined to name the other competition authorities acting as 'peers'.

Reviews of this nature usually entail scrutiny by an OECD team, with aid from two competition agencies. One agency is often from the same region as the subject of the review.

A report should be completed within three months of inception, the OECD said. (GCR, 31.08.05)



www.bionnet.com

## Turkey Revises Act

Turkey has revised its Competition Act to appease its appellate court. The Law has dispensed with the condition that half of the board's working members be competition specialists. The board will, therefore, shrink from 11 to 7 people.

The changes include the doing away of a need to notify agreements that are covered by block exemption, a smaller competition board and longer individual exemptions. Earlier, such exemptions expired after five years. The changes will allow the agency to focus more on cases that directly harm the competitive market process, rather than wasting time with exemption applications. (GCR, 27.07.05)



www.library.thinkquest.com

including improvements in merger notifications. It also includes a vital provision on exclusionary practices.

This plan to strengthen Mexico's competition law has received wide political support. According to Mexican Competition Commissioner, Rodriago Morales, the reforms also allow for a leniency programme. The Congress may pass the law within three months, though the looming Presidential election may affect legislative work. (GCR, 21.07.05)

### Bill Offers More Power

A draft bill modifying the Antitrust Law of Argentina has been submitted to the National Congress that amends certain articles of the Law. The proposed changes grant more power to the Secretariat of Technical Coordination of the Ministry of Economy. The Secretariat will have the right to oppose transactions involving industries such as mining, defense and energy.

The bill also amends the concept of tacit approval if no decision is issued by the tribunal, as this must now be passed to the secretariat, which will have to issue a decision within a certain time limit.

Although it is not known when the bill will be considered by the two chambers of the National Congress, it is expected to be approved soon.

(ILO, 15.07.05)

### Politics in Merger Control

The government of Argentina has proposed an amendment to the national competition act that threatens to increase political influence in merger review. Under the revised system, certain mergers could be sent for an additional review if they affect the national general interest. The review would be by the Ministry of Economy and would occur after the competition review has been completed.

In 1999, Argentina enacted a law that transferred powers to an independent anti-trust tribunal. The tribunal is yet to be activated and the new round of amendments propose that a majority of the members be appointed by the government, until 2009. (Latin Lawyer, Sep. 05)

### Anti-cartel Activity on the Rise

Anti-cartel enforcement activity in New Zealand is set to increase after the recent announcement of additional government funds and the implementation of new leniency and cooperation policy tools. The National Competition Authority announced two new weapons in its fight against cartels.

Consistent with many foreign jurisdictions, the new leniency policy focuses on cartels and targets whistleblowers by offering immunity from proceedings. The proceedings offer immunity to the first person involved in a cartel and another who comes forward with information and cooperates fully with the authority.

A new cooperation policy goes beyond the authority's enforcement work under competition legislation to industry specific regulation in the dairy and electricity sectors. It allows the Authority to take a lower level of enforcement action in exchange for information and complete cooperation.

(ILO, 21.07.05)

### Empowering SMEs

The Office of Fair Trading (OFT), UK is calling on SMEs to recognise anti-competitive practices in their markets, and to collaborate with the OFT in taking action against companies who break the competition law.

Research findings from the OFT reveal that nearly a quarter of SMEs across Britain believe they are harmed by unfair practices such as price fixing

and collusions to set tender prices. It found that one in three SMEs are aware of anti-competitive activities in their industries and one in five feel they have been victims of such behaviour.

The OFT's research shows that many SMEs may be missing out on the benefits from fair and competitive markets. The survey also shows that more than half of the businesses feel that the industry could increase its competitiveness and more than a third think that new companies face difficulty in entering markets.

(OFT News, 21.07.05)

### New Merger Thresholds

Belgium has adopted a set of significantly higher merger thresholds. As per the new threshold, merging parties need to notify their plans to the authority if their businesses have a combined turnover of •100mn (US\$119mn) or more in Belgium, and if two of the parties have an annual turnover in Belgium of at least •40mn (US\$47.3mn) each.

These higher merger thresholds are intended to cut the burden of merger control on the Belgian Competition Authorities so they can concentrate on tackling restrictive practices.

(GCR, 21.07.05)

### Mexico Mends Law

A draft bill submitted to the Mexican Congress amends some articles of the competition law that have been ruled unconstitutional,

### Concrete Conspiracy

The US Department of Justice (DOJ) has imposed a fine of US\$29.2mn on Irving Materials Inc., the supplier of concrete for fixing the price of ready-mixed concrete in the Indianapolis metropolitan area between 2000 and 2004. The price-fixing compelled consumers to pay more than what they should have for nearly four years. The fine levied is till date the largest in a domestic American anti-trust investigation.

Irving Materials Inc. pled guilty to conspiracy charges, as did four of its executives who have agreed to pay fines. All three will serve reduced jail sentences in return for assisting the DOJ in the on-going criminal investigation. (GCR, 06.07.05)

### Tall Tales of Genealogy

The office of the Fair Trading (OFT), UK, has stopped the misleading claims of the Dutch company, Historique, trading as William Pince Publishers, which claimed to produce individualised family trees for UK consumers with unusual family names, giving the impression that research was conducted specifically into the customer's family history and that the compilations were collated from rare sources. What consumers received fell far short of this and on occasion, the consumer received nothing at all.

After receiving a number of consumer complaints, OFT acted and obtained undertakings from the sole director of the company that it will not mislead consumers and will abide by distance selling laws. If the undertakings are breached, the OFT could seek a court injunction and may impose a substantial fine.

(www.ofi.gov.uk, 20.07.05)

### Cement Collusion Chastised

Argentina's Anti-trust Commission, the *Consiglio Nazionale dei Dottori Commercialisti* (CNDC), has fined a cartel of five cement companies operating between 1981 and 1999, a record US\$107mn. One of the companies, Loma Negra received a fine of US\$48mn, the highest ever given to a single company by the CNDC. There is now enough political will in Argentina for an aggressive anti-trust

policy, at least in certain sectors.

The agency benefited from a whistleblower, who was a former employee of one of the companies. It also conducted unannounced raids on the companies' premises. As Argentina is without a leniency policy, no immunity or reduction in fine will be granted.

The companies are appealing against the decision, meaning it may be years before the sanctions are final.

(GCR, 03.08.05)

### Bringing Home Illegal Bacon

The Slovak anti-trust office, PMU, has imposed a fine of SKK1.69mn (US\$527,262) on 43 Slovak farmers for having participated in a cartel agreement in the wholesaling of pork. This decision is a revision of an earlier harsher decision, wherein the PMU had fined 46 farmers. However, after hearing the arguments of the farmers the PMU decided that three of them were not guilty.

A representative for the fined farmers disagreed with the PMU's verdict claiming that a cartel price was not reached and that an appeal to the Supreme Court was being considered.

(GAW, July 23-29, 05)

### Oxygen Cartel Busted

Argentina's anti-trust authority has fined liquid oxygen companies, Air Liquide, Praxair, AGA and Indura, a

whopping US\$24.2mn for operating a cartel, which conspired to increase prices and block competitors from the market in the years between 1997 and 2002.

Authorities had raided the four companies following an investigation into price increases by the Ombudsman of Buenos Aires.

The fines levied on the companies were aggravated by the cartel's duration, the participation of top-ranking executives and because some of the consumers were public hospitals buying medical oxygen.

(GCR, 05.08.05)

### A Bitter Aftertaste

The Federal Court of Canada has imposed fines totaling C\$1.67mn (US\$1.42mn), for fixing prices of nucleotides (used as flavour enhancers in soups and other foods) in Canada. The conspiracy spanned from 1992 to 1996.

The representatives of Ajinomoto of Japan and CJ Corp of Korea had communicated with other producers and agreed on prices for sale of nucleotides, in Canada.

Ajinomoto Co. Inc. and CJ Corp both pleaded guilty for participating in this conspiracy in violation of section 45 of the Competition Act under which an agreement to fix prices or share markets is a criminal offence.

(Competition Bureau Press Release, 30.08.05)

## Devious Dentists

Portugal's Competition Authority has fined the dentist's association of the country •160,181 (US\$187,679) for setting a maximum and minimum fees. The veterinarians' association, too, was recently fined for a similar infringement.

The dentist's code included a formula for calculating fees, and those who broke it risked being disqualified from practice. The authority ordered the offensive articles of the code dropped.

A competition specialist has commented that once again, the authority feels there has been an infringement of Article 81 of the EC treaty as well as of national rules. In its decision, however, the Portuguese law does not provide for any specific sanctions for infringements of EC rules. The sanctions are only for infringement of national rules. (GCR, 14.09.05)



## Vengeful Coach Company

In France, a group of women, who organised a car-sharing scheme to get to work, are being taken to court by the coach company, Transports Schicchet Excursions (TSE). TSE runs a bus service, which the women earlier used to avail of to reach work. The company now accuses the women of unfair competition and wants them to be fined and their cars confiscated. Previously, a business tribunal threw out the company's case, which is now pursuing the women in a higher court, claiming that their action has amounted to losses of •2mn (US\$2.34mn).

The women explained that they were highly discontented with the services of TSE and found the car-sharing scheme far quicker, cheaper and satisfactory. TSE is also suing the women's employer for inciting the car scheme, although the employer has denied having anything to do with the mode of transport adopted by employees. The court case will be heard in January, next year.

*(Guardian Newspapers Limited, 11.07.05)*



excess of the cap. The ACCC was satisfied that the risk of anti-competitive outcomes would be avoided due to the narrow scope of the arrangement and the limited nature of competition amongst providers with or without such an arrangement. It was satisfied that the practice would deliver a net public benefit.

*(GAW June 25-July 02, 05)*

### Olympian Struggles

The European Commission (EC) has announced that Olympic Airlines would have to repay the Greek government as much as US\$663m received in illegal state aid. The EU has drafted guidelines, which set out rules for financial support from airports and regional governments for airlines starting new routes. They seek to ensure strict compliance with the principles of transparency, non-discrimination and proportionality. The EC said that the market investor principle – whether in similar circumstances a private investor would make the same decision – is a key test for granting aid.

In the Olympian Airlines case, the EC left the door open for further negotiations with the government on details pertaining to the reimbursement and also clarified that the decision was not an attempt to ring the death knell for the airline; it might, in fact, make its planned sale easier, by giving them all the facts and helping potential investors make up their minds.

The preferred bidder in the sale of the airlines, Olympic Investors, reaffirmed its commitment to buying Olympic in spite of the EC decision.

*(FE, 15.09.05)*

### Probe against PepsiCo

Russia's Federal Anti-monopoly Service has opened an investigation into PepsiCo Inc., the food and beverages company, claiming that PepsiCo prevented its downstream retailers from selling competing products. An official from the Anti-monopoly service said that the case would cover several Russian regions.

A representative from Pepsi said that the company had not been notified of the probe.

*(Dow Jones International News, 26.08.05)*

### Colgate Caught in Romania

Romania's Competition Council has fined Colgate Palmolive and four of its distributors •4.2mn (US\$4.9mn) for fixing minimum resale prices from 1999 to 2003. The distributors were charged with forming a cartel and Colgate was charged with vertical price fixing and implementing the agreement. Colgate had to pay a bulk of the fine - •3mn (US\$3.5mn).

The investigation was launched when a former distributor Prestige Trading SRL filed a complaint. It said Colgate offered better terms to cash and carry operators than to traditional distributors. Colgate had notified its distribution arrangements in 2004.

The Competition Council has also banned Colgate from having the recommended and mandatory resale price lists.

*(GCR, 27.07.05)*

### South African Airways Fined

South African Airways (SAA) has been hit with a record fine of US\$7mn for abusing a dominant position in the market for airline tickets bought from travel agents in South Africa.

The case was filed in 2000 when a competitor of the airline complained to the Competition Commission, which was able to prove dominance and then liability.

Although the fine is the highest ever to have been imposed by the competition authorities, it is less than the airline could have faced. The

Commission based the fine on turnover in only the relevant market. Further, the Commission gave SAA a concession, because the behaviour was not 'hard core' and had caused no direct loss to customers and competitors. Nationwide, the original complainant may seek private damages. South African Airlines will be appealing against the fine.

*(GCR, 14.09.05)*

### Is Posco Price-fixing?

South Korea's anti-trust regulators are investigating Posco, the world's most profitable steel maker, along with three other local steel makers on charges of collusion to fix prices for cold-rolled steel.

This puts further pressure on the Korean steel makers, who are suffering a slowdown in profits as steel prices fall, while costs for raw materials rise.

If the companies are found guilty, the competition authorities will ask them to correct the wrongdoing or fine them up to 10 percent of their sales during the price collusion period.

*(FE, 09.09.05)*

### Feather in ACCC's Cap

The Australian Competition and Consumer Commission (ACCC) has granted authorisation to the Canberra After Hours Locum Medical Services (CALMS) to employ a capped fee structure in providing after hours care in the Australian Capital Territory.

CALMS doctors may not charge in

### Wal-mart on the Move

The world's largest retailer, Wal-mart is heading towards a dominant position in Central America. It has bought a stake in the region's largest retailer, the Central American Retail Holding Company (CARHCO) from Ahold, the Dutch retailer that operates 38 supermarkets in Central America. The one-third stake that would be acquired through this deal will later expand to majority ownership.

Ahold has been pursuing asset sales since it was hit by an accounting scandal in 2003. It also sold its Bompreco stores in Brazil to Wal-mart in 2004 for US\$300mn.

Wal-mart said it imports more than US\$350mn annually in clothing from five countries where CARHCO does business. (FT, 21.09.05)

### Concentrated Baby Foods

A deal that concentrates 90 percent of Italy's baby food market in only four companies has been approved by the country's anti-trust authority after second phase review. Koninklijke Numico has been permitted to acquire Mellin with conditions that the latter would make two particular brands of milk and sell them at lower prices. This merged entity, Numico-Mellin, together with Plada, Nestly and Humana – dominate Italy's baby food market and distribute their product to pharmacies.

The authority hopes that the conditions it has imposed on the merger will catalyse the sale of baby milk in supermarkets, where the competition is fierce. (GCR, 08.07.05)

### Lord of Generic Drugs

Teva Pharmaceutical Industries regained the title of the world's biggest maker of generic drugs, when the Israeli group agreed to acquire Ivax of the US for US\$7.4bn in cash and stock.

The deal – the largest acquisition to date by an Israeli company – would create a group with annual sales of more than US\$7bn. It would give Teva a coveted respiratory disease-related business, boost its position in branded prescription drugs and expand its pipelines and global reach in generics.

Competition in the pharmaceutical sector is fierce, with new entrants and

pricing pressure. Moreover, many generic companies including Teva and Ivax are working to develop their own high margin branded pharmaceuticals. (FT, 26.08.05)

### Merger, a Survival Strategy

Singapore-based budget airlines Valuair Ltd. and Jetstar Asia have merged in an effort to stay afloat in Asia's cutthroat low-cost airlines market. Australia's Qantas Airways Ltd. owns a 49 percent share in Jetstar. The carriers had been suffering because of soaring jet fuel prices. Valuair, the first budget carrier in the city-state has yet to turn a profit.

As 16 new budget airlines have started functioning in the region in the last two years, competition in the sector has become intense. The Singapore government urged the industry to rationalise to survive competition, as the price of jet fuel surged to record highs. (ET, 20.07.05 & TS, 25.07.05)

### Regulator Holds up Merger

The merger of Japanese banking units, Mitsubishi Tokyo Financial Group Inc (MTFG) and UFJ will be delayed by three months. The reason behind this delay is a debate over the speed with which the merged banks will be able to develop and operate their computer systems.

The banking regulator, Financial Service Agency (FSA), played a role in encouraging the banks to delay the merger, fearing a possible repeat of a system collapse at Mizuho, which left customers unable to conduct normal banking services. This highly

undermined the confidence in Japan's shaky banking system. (FT, 13.8.05)

### Leader in Household Goods

Whirlpool and Maytag have announced a US\$2.7bn merger, a move that will create the world's largest household appliance maker by sales, provided it gets approval from the US anti-trust authorities. The combination would control 74 percent of the electric dryer market, 72 percent of the washer market and 81 percent of the gas dryers market.

Anti-trust experts said that the company could face significant divestiture requirements, either of manufacturing or of brands. The company's four largest customers – retailers Sears, Lowes, Best buy and Home Depot are also likely to weigh in on the matter as part of the broad regulatory review. (FT, 23.08.05)

### Conditional Takeover

The European Union's (EU's) executive commission cleared the US health conglomerate Johnson & Johnson's takeover of Guidant, the US medical services maker on the condition that some businesses are sold.

After an in-depth investigation to see if the merger would harm competition in the sector in Europe, EU regulators concluded that the US\$23.9bn deal could go ahead on the condition that the two companies sell either J&J's or Guidant's endoscopic vessel harvesting products, plus Guidant's endovascular business and J&J's steerable guidewires business. (BL, 26.08.05)

## Emerging Brewer Giant

SABMiller has confirmed to buy Bavaria, South America's second-largest brewer in a US\$7.8bn deal. Bavaria dominates the beer market in Colombia, Peru, Ecuador and Panama. This gives the UK based brewer exposure to some of the world's fastest growing markets. The acquisition will allow for a diversification in the company's earnings away from slower growth markets in Western Europe and North America, where the beer market has been losing to both wine and spirits.

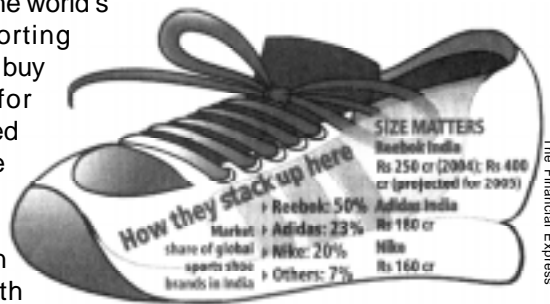
According to analysts, SABMiller is now the best-positioned brewer to take advantage of the world's most profitable beer markets. The acquisition leaves SABMiller as the clear leader in terms of geographic platform.

(FT, 20.07.05)



## Adidas Laces up!

Adidas-Salomon AG, the world's second largest sporting goods company agreed to buy Reebok International for US\$3.8bn. Germany based Adidas is fast narrowing the gap with Nike Inc: the combined company will have about US\$11.1bn in sales, as compared with Nike's US\$13.7bn.



The purchase will double Adidas' sales in the US, Nike's home market and give Adidas 28 percent of the global athletic shoe market, rivaling Nike's 31 percent. It will also get Reebok's clothing business and license to outfit League and National Basketball Association. Following the fierce competition between Adidas and Nike in the run-up to the 2006 World Cup in Germany, Adidas has formed a 100-member team to plan for the event. (FE, 04.08.05)

### Novartis Cleaning up!

Novartis, the Swiss pharma giant, announced its plan to buy out shareholders in Chiron, the US biotechnology company. Novartis already owns 42 percent of Chiron shares and has offered US\$40 each for the remaining 112 million.

Analysts said the planned takeover looks more like a clean-up operation than a further manifestation of Novartis' strong belief in a consolidation of the world's pharmaceutical industry through acquisitions. Chiron, seen as unfocused in its business ranging from vaccines to blood testing and biopharmaceuticals, will offer Novartis considerable potential through stronger management and clearer direction. (BS, 01.09.05)

### Bid Rivalry

China National Offshore Oil Corp's (CNOOC) is under pressure to increase its US\$18.5bn bid for Unocal, after Chevron raised its offer by about 5 percent to US\$17.1bn, retaining the backing of the US oil and gas group's board.

Chevron's move raised the stakes in a high-profile takeover battle that has triggered a wave of protests in the US Congress and is threatening to sour commercial and diplomatic relations between China and the US. CNOOC has to pay more than Chevron to compensate Unocal and its

shareholders for the risk that its bid might be blocked by the US government. However, the Unocal board would continue to back Chevron, after the US oil major increased its bid. But any fall in Chevron's share price would increase the gap between the two bids, which currently stands at 6 percent in CNOOC's favour.

(FT, 21.07.05)

### Global Shopping Spree

Bharat Forge Limited (BFL) has announced a US\$9.1mn all cash acquisition of the assets of Federal Forge Inc, a Michigan based designer and manufacturer of forged steel components for the automotive industry. This is BFL's third international acquisition, giving it a presence in the heart of North America's automotive industry and a strong foothold in the passenger car and light truck market.

BF America Inc, the new company, will take over the 150 strong staff of Federal Forge, which had revenues of US\$60mn. It was clarified that there was no baggage, no losses, it was a clean acquisition. (ET, 25.06.05)

### Bank of America on a Roll

The Bank of America (BoFA) struck a deal to buy Maryland Bank North America (MBNA) for about US\$35bn in cash and stock, making it one of the top credit card issuers.

The purchase will create a formidable competitor for JPMorgan

Chase and Citigroup, giants that dominate the US credit cards market. An MBNA official said this sale would give it new markets, customers, products and opportunities for expansion. MBNA has grown from a small regional player to an industrial giant in a little over 20 years. It has a loyal customer base, thanks to 'affinity cards' linked to brands such as Major League Baseball. (FT, 01.07.05)

### Vietcombank Seeks Partner

Vietcombank, one of Vietnam's four main state-owned commercial banks, wants to sell a strategic stake to a foreign partner as part of its planned privatisation.

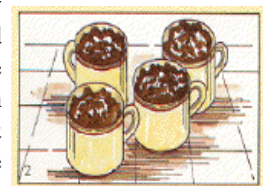
Ngaon, the bank's General Director informed that they would seek an internationally recognised institution that is a 'cultural fit' to the bank. The investor will help the bank change fast and change its corporate governance mechanism.

However, the process would not be completed until the end of 2006 or early 2007 and the government would definitely initially retain up to 70 percent of the equity. Banking sources report that Vietcombank had approached potential investors, but the institutions' asset quality is a concern. The due diligence would probably take time. (FT, 14.07.05)

### A Big Bite for Cadbury

Cadbury has acquired all of the shares in Green & Black's. The parties now have a combined UK share of supply in block chocolate of around 37 percent. The activities of the parties overlap primarily in the supply of chocolate confectionary and cocoa-based beverages.

In chocolate confectionary, Cadbury remains the largest supplier in the UK and the increment to its share is very small. The parties' products are not close substitutes. Further, there remain a number of strong competitors to contend with. The Office of Fair Trading, UK has approved the merger, as it did not find any competition concerns. (OFT, 14.09.05)



### Home Truths for Samsung

South Korea's conglomerate pride, Samsung, controlled by the family of Lee Kun-Hee, Chairman of Samsung Electronics, is now facing growing criticism over its ownership and control arrangements. The Centre for Good Corporate Governance said that the ownership and control structure at Samsung are not for the shareholder's profit, but only to retain the family's grip over the group.

The Lee family owns 4.4 percent and has 31 percent voting rights. This is enormous as compared to the European Union (EU) 1-1 ratio of ownership to voting rights.

Korea's ruling party backed by the country's Fair Trade Commission, is supporting two laws, which aim to reform corporate governance and increase transparency in South Korea.

(FE, 09.09.05)

### 'Big Four' for Competition

PricewaterhouseCoopers' (PwC) UK Chairman said that there is no need for the 'big four' auditors (Deloitte & Touche, Ernst & Young, KPMG Audit Plc and PwC) to be augmented by another large accountancy firm. The statement came in the wake of the recent concerns over the concentration level of the global auditing industry, intensified by a fraud case committed by KPMG, which admitted its fraudulent sale of tax avoidance schemes, and paid a fine of US\$456mn.

The industry seems satisfied about the US Government's decision not to prosecute KPMG, since a contrary one might have been a fatal blow to the firm, due to loss of client confidence. Still having four firms seems a more desirable scenario, which means the firms will continue to operate in a fiercely competitive market. The destruction of such a big accountancy firm through legal action could have paralysed corporate reporting.

(FT, 13.09.05)

### Companies Work towards MDGs

Representatives from the private sector, in the first ever UN General Assembly Hearing with civil society groups held in New York, in June 2005, submitted that companies were deeply committed to a sustainable development policy and that they were

ready to invest considerable resources in order to assist in achieving the Millennium Development Goals (MDGs).

About 200 participants from a broad and balanced cross-section of the civil society, NGOs and the private sector, both high-level leadership and grassroots membership, attended the Hearing and presented their views.

Several reform measures were also recommended to increase poor people's participation in the local markets and to attract greater flow of foreign investment into developing countries. These measures are expected to benefit both multinationals and local small and medium enterprises, which form the backbone of developing countries' economies.

(www.wbcsd.org, 28.06.05)

### CG: The Chinese Experience

Researchers under an Australian Research Council Discovery Grant Funded project highlighted the inefficiencies experienced in the corporate governance (CG) and regulation in China, as per the result of their fieldwork conducted on 100 Chinese listed companies.

The first and the foremost difficulty in regulating these companies was that the state is the dominant shareholder. Second, the Chinese Communist Party dominates in making senior management appointments and strategic decisions in the companies. Third, the position of the minority

stockholders and 'independent directors' is weak, while the Chinese stock exchanges and the China Securities Regulatory Commission are ineffective in seeking improved corporate governance standards within these companies.

Lastly, the legal system in China is poorly developed and there is a lack of willingness to comply with the corporate governance standards.

(www.regnet.anu.au, 19.09.05)

### UK Firm in Trouble in India

UK-based mining company, Vedanta Resources Plc, India's biggest producer of zinc, second largest producer of copper and third largest producer of aluminium, is facing a series of allegations by a group of dissident shareholders for its operations in India.

The company was accused of abusing the constitutional rights of the tribal people, contravening orders of India's Supreme Court, trespassing on protected foreign land, ignoring basic health, safety and environmental standards, and exploiting contract labour.

These allegations, based on in depth research carried out between March and July 2005, were presented as a detailed report by minority shareholders at the Annual General Meeting of the company. The report received strong support from human rights and environmental action groups.

(www.minesandcommunities.org, 02.08.05)

## Oiling Transparency

Soaring oil prices will make it harder to persuade oil-producing developing countries to enforce transparency in their oil and mining industries, according to the head of an advocacy group pushing for such rules.

Transparency International's anti-corruption campaign has made much progress in encouraging countries to audit and publish their oil and mining payments – traditionally regarded as a locus of corruption. But it was admitted that high oil prices were making everybody more greedy.

According to officials involved in the Extractive Industries Transparency Initiative (EITI), led by the UK government, there has been mixed progress towards enforcing transparency in the oil and mining industries. Some countries with a long tradition of opacity and corruption, such as Nigeria and Azerbaijan, have made big strides in auditing their accounts, while other signatory countries, such as the Republic of Congo and Ghana have lagged behind in implementing transparency rules.

(FT, 27.08.05)



BIC UOI/ANU WWW

## US Trails Asia on Accountability

US companies are the worst at managing and accounting for their social and environmental impacts, lagging behind both their European and Asian competitors, according to a ranking by the Fortune Global 100.

Wal-Mart, AIG, Time Warner and Berkshire Hathaway score among the lowest 20 in the ranking, which seeks to measure how seriously companies take non-financial factors in running their business.

They are generally less open because of perceived legal constraints and a culture of not disclosing or auditing anything not required by law, according to AccountAbility, an international think-tank that compiled the ranking along with CSRnetwork, for Fortune magazine. *(FT, 22.09.05)*

Accountability rating			
Out of 100*	Rank	Company	Rating
1	1	BP	78
2	3	Royal Dutch Shell	72
3	9	Vodafone	71
4	45	HSBC	63
5	5	Carrefour	60
6	23	Ford	58
7	6	Tokyo Electric Power	57
8	22	EDF	56
9	10	Peugeot-Citroen	56
10	27	Chevron	55
91	99	AIG	6
92	89	Amerisource Bergen	6
93	91	Cardinal Health	5
94	100	Generali	5
95	74	Time Warner	5
96	97	Costco	4
97	84	State Farm Insurance	4
98	90	Dai-ichi Mutual Life	3
99	98	Berkshire Hathaway	2
100	-	State Grid	-

\* extent to which companies have built responsible practices into the way they do business. *Source: Fortune*

### Doubtful Returns on Tangibles

Regulators, insurers and consumer groups are alarmed at the rapid growth of two trading companies in Spain that have encouraged hundreds of thousands of Spanish investors to place their savings in stamps.

The lure was the high annual returns of up to eight percent offered by Afinsa and Forum Filatelico, the duo which dominate the Spanish market for collectables.

The two companies have some 35,000 clients in Spain and have never defaulted on a repurchase contract. But with more than €5bn invested in stamp schemes, Spanish regulators are worried about the guarantees being offered to investors, as these private trading companies fall outside the regulatory purview of the Bank of Spain or the National Stock Market Commission (CNMV). CNMV has posted a warning on its web site saying: "...Beware of offers that promise quick profits or return". *(FT, 27.09.05)*

### Information vs. Investigation

The Supreme Court of Netherlands has ruled that in a corporate acquisition, the seller's duty to disclose certain relevant information voluntarily, prevails over the purchaser's duty to investigate the target.

Over the past years, the Supreme

Court has developed a doctrine, which clarifies that when the purchaser is a professional party, it is deemed to be able to obtain sufficient information by performing an investigation. Therefore, the seller's duty to disclose information is reduced.

There are still no clear-cut rules establishing the relationship between the duty to inform and the duty to investigate. This remains to be decided on a case-by-case basis, though some rules of thumb have been formulated. *(ILO, 10.08.05)*

### Corp Responsibility Hot in China

A presentation pack by the World Business Council for Sustainable Development explores why sustainability should matter to the business world in China and what individual managers can do to make their companies responsible.

The growth of China's population, shortage of resources, record on pollution and an increasing number of natural disasters, partly triggered by sheer scale and pace of economic development, create a peculiar business environment in China. Smart businessmen must turn these risks into opportunities by improving resource use efficiency, managing relations with local authorities, responsible redundancy programmes, strategic community development, etc.

The private sector in China is being held to account as never before and greater national and global scrutiny is on the way. *(Eldis-CSR Reporter, 16.08.05)*

### Better Environment Promised

Foreign capital has become a sensitive issue in South Korea as investors, attracted by cheap assets and the potential for growth after the 1997 financial crisis, began to cash in their holdings. Foreign companies, who own about 45 percent of the shares in Korea's listed companies, are becoming increasingly concerned that regulation is becoming a political rather than a financial issue.

The country's Finance Ministry was planning to tighten tax rules, so that foreign funds registered in tax havens can be retrospectively charged capital gains duty. Ideally, tax administration should be applied to domestic and international investors.

The Ministry has assured foreign investors of a congenial business environment in the country, where foreign capital is both welcome and needed. Though Korea has dramatically overhauled its corporate governance since the crisis, it still has more work to do. *(FT, 09.09.05)*

### CG Reforms for Merger

The London Stock Exchange's (LSE) largest customers are urging that the UK Competition Commission should 'hard-wire' corporate governance reforms into the rules of the LSE, if it is allowed to be taken over by either Deutsche Borse or Paris-based Euronext.

The London Investment Banking Association (LIBA), which has been battling to influence the Commission's deliberations, argued that neither bid should be allowed to proceed without clear remedies to prevent abuse of monopoly-like powers. The duty of exchanges to pursue single-mindedly the interests of their shareholders must be balanced by an equal obligation to promote the interests of market users.

Euronext shareholders said they had been contacted by LIBA, warning that the Commission was leaning towards imposing restrictions on a merger that would give customers a say in governance. *(FT, 27.07.05)*

**Botswana Mauritius Agreement**

Botswana has signed a bilateral investment treaty with Mauritius – a step that is expected to increase trade volume between the two countries.

Although the treaty includes expropriation and/or nationalisation of business assets as well as infringement of intellectual property rights, Moroka, Botswana’s Minister of Trade and Industry reiterated that both countries are committed to fair and equitable treatment of investors. Accordingly, each country has undertaken to “allow each other’s investors free transfer of funds relating to their investments and returns in accordance with relevant laws”.

*(Mmegi Business News, 30.08.05)*



buyers that fit this criterion, since Shell and Opet are primarily petroleum distribution companies, only conditional approval is likely.

Between themselves, the companies have agreed to pay US\$4.1bn for Tupras, an oil refinery. The groups triumphed after 11 rounds of bidding, which opened at US\$2.7bn.

*(GCR, 28.09.05)*

**Europe on a Sell-off Spree**

The Italian government will sell off property worth US\$18.7bn in the next few years, leading real estate bankers predict. Such a wave of disposals is considered inevitable amid pressures on governments across Europe to cut budget deficits. Several German cities are in the process of selling billions of euros of property, while France, Belgium and the UK are following suit.

The Italian government is under pressure to sell assets, given that its public debt is about 106 percent of GDP, the highest in Europe, barring Greece. In Germany, close to US\$62.33bn of property, mostly residential, could be sold in the coming years. Three public portfolios worth US\$112.46bn are to be sold in the months ahead.

*(BS, 08.09.05)*

**Indonesia – Promises to Keep**

Foreign investment in Indonesia rose by 70 percent in the first six months of the year. The country’s Investment Coordinating Board informed that foreign companies invested US\$3.4bn in the first half itself.

Yet, the composition of the first-half FDI figures indicates that the country has quite a way to go in attracting the labour-intensive manufacturing projects that fuelled its mid-1990s boom. A hostile climate is still prevalent. A recent survey by the World Bank stated that it takes 151 days to open a business in Indonesia. Seven more weeks added to the above is the time generally taken for foreign investments to receive government approval. A European Commission guidebook unveiled at a forum for EU companies has advised against investment in Indonesia. The amount in question, is a public and private infrastructure investment of US\$145bn planned over the next five years.

*(FT, 14.07.05)*

**Ministry Unfazed by Slump**

China’s FDI stagnated in the first five months of 2005 after several years of steady growth. The amount of utilised FDI fell by 0.8 percent to US\$22.4bn in this period, compared with the same period last year.

“The reason behind the decline (in FDI growth) is multifaceted, but we are not overly concerned. The slowing FDI growth in recent months could not be attributed directly to the government’s macroeconomic controls on investment and lending”, commented a senior official from the Ministry of Commerce.

China, among the world’s top recipients of FDI, is attempting to moderate overall investment growth – a move Beijing hopes will ensure its economic expansion in the long term.

*(FT, 13.07.05)*

**Deutsche Post Goes Global**

Deutsche Post (DP) will have the biggest logistics service in the world to call it’s own, with the acquisition of the UK rival Exel. By paying US\$6.7bn in cash (about 72 percent of the acquisition price) and the balance in new shares, the German mail group will truly be creating a global logistics giant.

The deal, largest in DP’s history, follows acquisitions of DHL in 2002 and the US company, Airborne Express in 2003. It will create the world’s biggest logistics, sea and airfreight group and enhance DP’s position with a 7.4 percent share of the global contract logistics market. The company’s closest competitor in this market, the TNT of the Netherlands, is half its size.

*(GCR, 23.09.05)*

**Probe Follows Privatisation**

Turkey’s competition authority expects to have to investigate the gas distribution market, following one of the country’s largest privatisation. An investigation was almost certain if buyers of a major refinery were in the gas distribution business, said Mustafa Parlak, Chair of Turkey’s Competition Authority.

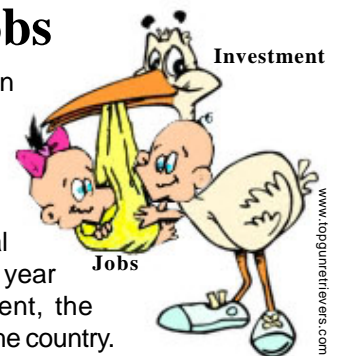
The Koc Holding-Aygaz-Opet consortia and the consortia led by Shell of Turkey are the two successful

**Investments Bring Jobs**

The number of jobs created by foreign companies in UK rose by more than half last year, as the country once again emerged as the most popular destination for foreign direct investment in Europe. Foreign owned businesses created 39,600 jobs in the financial year 2004-05 compared with 25,500 in the year before, according to UK Trade & Investment, the government agency promoting investment in the country.

The general openness of the UK economy and its proximity to the US generated a steady stream of large mergers, such as last year’s US\$10.3bn purchase of Amersham, a research equipment maker by General Electrics. A US\$16.5bn acquisition of Abbey National, the UK mortgage bank, by Spain’s Santander Central Hispano Bank, also contributed to the success.

*(FT, 29.06.05)*



## FDI Prospects Promising

FDI will continue to grow over the short and medium term, FDI experts, transnational corporations (TNCs) and investment promotion agencies predicted in the Global Investment Prospects Assessment (GIPA) by the United Nations Conference on Trade and Development (UNCTAD).

“The findings suggest that countries need to seize the investment opportunities but also pay attention to the quality of FDI, given the fierce competition for investment”, observed Dr. Supachai Panitchpakdi, Secretary-General of UNCTAD.

Responses from experts		Most Attractive Global Business Locations in 2005-2006	Responses from INCS	
1. China	- 85%		1. China	- 87%
2. USA	- 55%	2. India	- 51%	
3. India	- 42%	3. USA	- 51%	
4. Brazil	- 24%	4. Russia	- 33%	
5. Russia	- 21%	5. Brazil	- 20%	
6. UK	- 21%	6. Mexico	- 16%	
7. Germany	- 12%	7. Germany	- 13%	
8. Poland	- 9%	8. UK	- 13%	
9. Singapore	- 9%	9. Thailand	- 11%	
10. Ukraine	- 9%	10. Canada	- 7%	

Source: UNCTAD FDI Prospects, 2006-2008

There were surprises galore in investment locations selected as most attractive. Half of the top 10 countries ranked by experts and TNCs are from the developing world. China was considered an attractive location by 87 percent of TNCs and 85 percent of the experts – 30 percent ahead of the next best. The other top five were the US, India, the Russian Federation and Brazil.

(UNCTAD Press Release, 05.09.05)

### Telecom Sale on Hold

Malawi President, Bingu wa Mutharika ordered the immediate suspension of the controversial privatisation of the state-run telecommunications firm. The suspension comes after Directors raised objections to the sale. Ken Msonda, who heads the board of directors, said the price set for the firm was not high enough.

“Malawi Telecom Ltd. invested over US\$200m in projects between 1999 and 2005 and it cannot be sold for US\$30.7mn”, said Msonda. He said the company had assets worth more than US\$60mn, and that it was a lucrative and profitable entity, worth nearly US\$ 750mn.

Msonda accused the Privatisation Commission of fixing the price tag. The value and the procedure undertaken by the Commission is a matter of doubt, he alleged.

(BBC News, 06.08.05 & The East African Standard, 07.08.05)

### Post Privatisation

The Japanese Prime Minister Junichiro Koizumi narrowly won Parliamentary backing for his plan to privatise Japan Post, the world’s largest financial institution. This involves an expenditure of US\$3.6tn.

The Cabinet had announced on September 2003 that they plan to divide

the company into four – postal services, postal savings services, postal life insurance services and window networks (post offices) – and had called for privatising each in April 2007.

Opponents claim that this move would result in the closure of post offices and in colossal job losses. However, proponents contend that privatisation would allow for a more efficient and flexible use of the company’s funds that would help revitalise Japan’s economy. Koizumi calls the privatisation a major part in his efforts to curb government spending and the growth of the national debt.

(The Economist, 05.07.05)

### Manila Approves First Foreign Mine

The Philippines has approved plans for commercial production at the first wholly foreign-owned large-scale mining venture since the country’s independence in 1946. The commercial launch of the gold and copper project in northern Luzon, owned by Climax Mining of Australia, signalled a renewed interest in attracting foreign mining investment. The project was expected to pay taxes of about US\$131mn during its commercial life, said the Environment Secretary, Mike Defensor.

It got the go-ahead after the Supreme Court in December upheld a 1995 law allowing foreigners to own 100 percent of large-scale mining ventures, reversing an earlier ruling.

Government economic planners are hoping that higher mining investment will sustain growth amid record-high oil prices and renewed political uncertainty stemming from allegations of electoral fraud against Gloria Macapagal Arroyo, the Philippine President.

(FT, 23.08.05)

### Telecom Row in Taiwan

Taiwan’s top telecom firm Chunghwa Telecom Co. and its labour union collaborated to ease tension over the state-run firm’s planned privatisation, but failed to remove the threat of further strike action.

The government plans to sell 15 percent of Chunghwa, worth up to US\$2.9bn via American Depositary Receipts, in a bid to free the company from legislative oversight and allow it to move faster to fend off stiff competition that is denting profits.

“We hope to be able to reach an agreement that the union can sign off on”, said Chunghwa, Vice President, Hank Wang.

(BS, 22.06.05)

### FDI Policy in for Change

Major changes in FDI rules and policies in India could be on the anvil, with the Investment Commission meeting Finance Minister, P Chidambaram to discuss simplification of policies and procedures.

The Commission has analysed FDI policies and procedures both at the national and sectoral levels in the past few months. It focused on specific projects and the emergent hurdles in setting them up, instead of following the umbrella approach.

The Panel also met Prime Minister Manmohan Singh and held meetings with industry associations like the Confederation of Indian Industry.

(ET, 25.09.05)



www.bionet.com

**Suez's Argentine Pullout**

Suez, the French Utility, is pulling out of Argentina after failing to reach an agreement with the government on the renegotiation of its contract to supply water and sanitation services to more than 10 million people in Buenos Aires. The decision was taken after talks between Suez and the government collapsed over levels of tariff increases and future investments. Suez's exit would raise serious questions about Argentina's ability to attract foreign investment.

The move will end a dispute, which started with the 2001 Argentine crisis, when the government froze utility tariffs and converted them from dollars to pesos, making Suez's contracts unprofitable.

More than 30 companies responded to perceived foot-dragging by taking Argentina to the World Bank's international arbitration tribunal with an estimated US\$17bn in claims.

*(FT, 12.09.05)*

**Big Four Fight Back**

The big four accounting firms – Deloitte, Ernst & Young, KPMG and PwC – are pressing the Public Company Accounting Oversight Board (PCAOB) to abandon its proposal to discipline individual accountants who, through negligence, cause their firms to breach laws.

The companies felt that the negligence proposal presented too low a threshold to justify disciplinary action. KPMG noted, that this would expose thousands of individuals to the risk of severe sanctions for negligent actions that may violate the Sarbanes-Oxley accounting and governance act, or the securities laws. Accountants should only face disciplinary action if they knowingly caused the firms to breach the law.

*(FT, 18.07.05)*

**Comp Bureau Aids Regulator**

Canada's Competition Bureau has sent a detailed submission to the national telecom and broadcasting regulator on how competition in the sector should be analysed. The submission is a comprehensive analysis of emerging markets covering issues like market definition and competitive effects.

Canada has yet to deregulate the local telephone market, but steps seem to be taken in that direction. There is also a panel of experts looking into the role of efficiencies in competition analysis.

*(GCR, 06.07.05)*

**Watchdog Bites**

South Korea's financial regulator, Financial Supervisory Service (FSS), has warned Deutsche Bank and BNP Paribas against improper trading in derivatives. Barclays Capital and Hermes Investment Management were also hauled up for investigations. There has been a general unease over growing foreign influence in the country's financial sector, which, overseas investors said, has prompted a tougher line against international players. They were asked to suspend a branch manager, cut pay for some employees and warned about stricter investigations in the future.

FSS said the foreign banks failed to adequately advise to state run companies about the risks of derivatives products. The state-run companies had still not incurred losses because the deals were long-term contracts, but big losses may come in the future.

*(FT, 23.07.05)*

**Infringement Weighs Heavy**

The South Korean Fair Trade Commission (FTC) has fined four

telecom firms – Dacom Corp, Hanarotelecom Inc, KT Corp and Onse Telecom – about KRW 25.7bn (US\$25mn) for fixing long distance and international call prices.

There was also evidence of misbehaviour in Internet provision, though FTC refrained from imposing further fines; it ordered the firms to reform their practices instead. It estimated that the infringement might have cost the customers a total of KRW 932bn (US\$910mn).

*(GAW, Sep 10-16, 05)*

**Finnish Rail Liberalisation**

Finland's Competition Authority gave its view on the national railway policy. Finland is working toward liberalising its national freight rail-market in 2007. The authority said that the policy of introducing competition in railways should extend beyond national freight. Its recommendations include routes to Russia, metropolitan transport services and signalling and training services.

The government proposed that signalling and training services remain with the state-owned rail company, VR Group. The competition authority is concerned that rivals will be unable to access these services on equal terms and asked for safeguards on access to essential facilities and systems.

*(GCR, 14.09.05)*

**Japan's Policies Prick**

A representative of a US drug industry association has warned that Japanese policies on drug development and approval are hurting the competitiveness of the country's pharmaceutical industry and delaying the availability of treatment to its patients. This is largely due to the reluctance of the Japanese drug regulator to rely on foreign clinical data for approving medicines and treatments developed overseas, and the high cost and time involved in conducting the necessary clinical trials in Japan.

The Japan-based Pharmaceutical Research and Manufacturers of America called on the Japanese regulator to invest more in basic science and develop a robust clinical trial system, provide sufficient rewards for innovation, otherwise Japan could end up like France and Germany, who both decimated their pharmaceutical industries domestically.

*(FT, 22.07.05)*



www.morris.um.edu

## Initiating Postal Reforms

China embarked on a long awaited campaign to shake up its sprawling postal system with its tens of thousands of offices and quarter of a million employees – a decision arrived at after years of internal debate. While other arms of the government have modernised, China Post has remained an opaque and bureaucratic hybrid of the roles of regulator, mail deliverer and one of the country's biggest financial institutions. It struggles to make money, in spite of its status as sector regulator.



“The management system of our nation's postal sector can no longer meet the needs of a market economy, and deepening its reform has become one of our most important and pressing tasks,” concluded a meeting of China's State Council.

The State Council plans to turn the postal savings system quickly into a real bank – China's fifth largest – while dividing the rest of China Post into a regulatory department and a commercial group. Such separation offers the hope of a more open market for foreign companies. *(FT, 12.08.05)*

The four producers argued that the directive required the same burden of scientific proof to license naturally occurring supplements, as it did for chemically processed ones, which is hurting competition by favouring large companies with well-funded research and development programmes.

The European Court of Justice upheld the directive saying it assisted the free movement of these goods across Europe. However, the court qualified the directive's remit, stating that it should only apply to vitamins and/or minerals derived by chemical processes. Supplements in their natural form are exempt – the result the producers had effectively sought. *(GCR, 22.07.05)*

### Common COMESA Network

High on the hopes for boosting trade relations, a regional telecommunication network, known as Comtel, is to be established for the Common Market for Eastern and Southern Africa (COMESA) region. The project, which will cost around US\$240mn, is the result of a report by Telia Swedtel on interconnectivity and tariff harmonisation in the area, and was financed by the African Development Bank.

Comtel's core business will be to provide a high-quality carrier system for regional tariff and charges will be competitive. Leased circuit facilities will be available on a regional and national basis for the national telecommunications operators, increasing access to telecommunications services for rural population. *(Tralac Newsletter, 12.07.05)*

### Regulator Gets Face-lift

The Financial Services Authority (FSA), UK's main financial regulator acknowledged substantial shortcomings to enforcement and announced proposals to overhaul the way it pursues those suspected of breaking rules.

A report recommends beefing up the FSA's regulatory decision committee, which reviews the proposed cases, hears evidence, and decides whether or not to press ahead. The Regulatory Decisions Committee (RDC)

will be given a small legal staff to review evidence prepared by FSA's enforcement division. The RDC will be shrunk from 24 members to 16. It also pledged to give companies and individuals more details of the case being made against them. *(FT, 20.07.05)*

### No More Bailing out Banks

The Financial Services Agency (FSA) ordered Sumitomo Mitsui Financial Group, without penalties, to improve its operations after the group posted a loss of more than US\$2bn due the high costs of clearing problem loans. Japan's long ailing banks have been recovering, but Sumitomo Mitsui has been slower than its competitors.

FSA requires banks that have received public funds to post net profits no more than 30 percent lower than targets set in business plans submitted to the government. Sumitomo Mitsui was already bailed out once in the late 1990's when it posted huge losses instead of the planned profits. *(FE, 23.07.05)*

### Health Food Registration

Four European health food producers challenged a EU directive regulating the sale of food supplements. To discriminate between products that may threaten health and those that are safe, the directive had required all food supplements sold in the EU to be registered – a system known as 'positive listing'.

### Green Signal to Airline Merger

Lufthansa's planned acquisition of Swiss International Airlines moved a step ahead after the European Commission (EC) and US anti-trust authorities backed the deal.

Swiss and Lufthansa said they had agreed to the EC's condition that some take-off and landing slots be renounced if necessary. The concession involves 12 European and seven inter-continental routes, on which the Commission judged the two airlines might have market dominance. *(FT, 06.07.05)*

### NMa Rules on Energy

The Netherlands's Competition Authority, NMa, proposes to change how energy suppliers and network operators transact. If the proposals are accepted they might remove the need to break up large integrated energy companies.

Presently, energy suppliers have to provide network operators with a financial guarantee. Without the guarantee, suppliers would be barred from offering customers the convenience of a single bill.

The NMA proposes removing the guarantee system in its entirety. Instead, network operators will hedge against the risk of insolvency by charging a slightly higher tariff to all customers.

There had been complaints about this system tilting the balance in favour of integrated companies. *(GCR, 31.08.05)*

# Competition Concerns in the Sugar Sector in Pakistan

– By Mukhtar Ahmad Ali<sup>1</sup>

## Introduction

The agricultural sector in Pakistan accounts for 23 percent of the gross domestic product (GDP) and 42 percent of total employment<sup>2</sup> of the country. Major crops include cotton, wheat, rice, sugarcane and maize<sup>3</sup>. Cotton and rice constitute the major agricultural products, which are exported raw or with some value addition. Wheat and sugar are mostly consumed within the country.

The shares of sugarcane in the value added in the agriculture sector and in GDP are 3.6 percent and 0.8 percent respectively<sup>4</sup>. It is cultivated on about 1000 hectares of land in various parts of Pakistan, and is the main raw material for producing sugar, which is one of the primary consumer items. The total sugar production capacity of Pakistan in the year 2004-05 was 5.5 million tonnes<sup>5</sup>.

## Legal Framework

Sugarcane and sugar production in Pakistan are governed by laws on the organisation of the agricultural sector, imports and exports, price controls, monopolies and unfair trade practices. The most important laws are the Sugar Factories Control Act (SFCA), 1950 and the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO), 1970.

SFCA provides for the establishment of an overall Sugarcane Control Board, with each province headed by a Sugarcane Commissioner. Provincial governments can also appoint district co-ordination officers as additional cane commissioners. SFCA empowers the Sugarcane Commissioner and additional cane commissioners to:

- issue or cancel an order declaring any area as reserved for supply to a particular factory in a particular crushing season;
- ensure that the cane grown in a reserved area shall not be sold by any person other than a cane grower or a Cane Growers' Co-operative Society, though either of them may deliver through a carrier and
- ensure that a factory, for which an area has been assigned, shall enter into an agreement with the cane growers/society on such terms as may be prescribed by the Cane Commissioner.

The provincial government, after consultation with the Board may determine the minimum price to be paid by factories or agents in that area. Violators may be imprisoned for two years, or fined a sum twice the price of the sugarcane.

The salient features of the MRTPO are as follows:

- It defines and prohibits undue concentration of economic power, unreasonable monopoly and restrictive trade practices;

- The law provides for the constitution of a Monopoly Control Authority (MCA) to administer the law and
- A penalty of PKR 100,000 (about US\$1725) can be imposed for violation of its provisions and non-compliance with the orders of the MCA. In case of continuing failure to comply with the orders of the Authority, an additional penalty of PKR 10,000 (about US\$172) may be imposed for every day after the first. However, the decisions of MCA are challengeable in High Courts.

## Value Chain of the Sugar Sector

The value chain of sugar in Pakistan, which is quite loosely organised, consists of a large number of actors, such as sugarcane growers, line departments providing technical expertise to farmers, middlemen purchasing sugarcane from farmers, sugar mills, wholesalers and retailers. Sugar mills are the most important actors in the value chain – largely due to their economic power, ability to act as an organised group, and resourcefulness to provide credit, inputs and expertise to sugarcane growers and middlemen, and hence, dictate terms to other actors. For these reasons, the sugar sector offers an ideal case of 'producer-driven value chains'.

Sugarcane growers constitute a diverse group of large and small farmers who are least organised and have limited capacity to bargain with the sugar mills. Very little information is available about the organisation of wholesalers. It is generally believed that wholesalers are hand-in-glove with the sugar mill owners who are involved in unfair trade practices.

The retail sector is very competitive in Pakistan. Since the end of government-controlled rationing in sugar supply to consumers in the early 1980s, the retail market has grown substantially, and consists of thousands of actors including small shopkeepers, general stores and big supermarkets. Rules governing entry and exit in this sector are quite flexible, that are seen as pre-conditions for competitiveness. Competition, however, is still lacking in terms of variety and value added sugar products, which may be partly because of an under-developed consumer sector.

## Competition Issues

The main competition issues in the context of the sugar value chain are briefly summed up below:

- The sugar industry in Pakistan, comprising of 77 mills, is organised into the Pakistan Sugar Mills Association (PSMA), which is often blamed for engaging in collusive and unfair trade practices, with the primary aim of price-fixing of sugarcane and sugar. Sugarcane growers and consumers, who are many and unorganised, are the direct victims of such practices.

<sup>1</sup> Mukhtar Ahmed Ali is working as Executive Director with Centre for Peace and Development Initiatives, Pakistan (CPDI-Pakistan). See [www.cpd-pakistan.org](http://www.cpd-pakistan.org)

<sup>2</sup> Economic Survey of Pakistan 2004-05.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Annual Report 2004, Islamabad: Pakistan Sugar Mills Association, p. 4.

- Wholesalers are also relatively small in number and frequently criticised for collusive and unfair price-fixing. It is alleged that, in collusion with sugar mills, they indulge in hoarding, speculating and restricting supplies in the market, in order to manipulate prices and make unfair profits.
- The MCA, which has full jurisdiction on the sugar sector to check unfair and collusive trade practices, is a very weak organisation. It lacks expertise, resources and powers to hold the powerful vested interests to account, and promote a culture of free and fair competition.
- The government frequently uses various provisions of the SFCA, and imposes conditions on sugarcane growers and sugar mills. This use of the Act, however, is often arbitrary, non-transparent and based on political considerations – rather than aimed at promoting competition, and protecting the legitimate interests of the actors in the value chain;
- The policy of de-zoning has benefited sugarcane growers, as they can now sell sugarcane to whichever sugar mill offers them a better price *vis-à-vis* having to sell to mills in their zone only. It, however, has two pitfalls. Firstly, it does not benefit small holders, who do not have access to correct, and timely information, and the ability to transport their produce to far off mills offering better prices. They remain vulnerable to exploitation by middlemen. Secondly, with de-zoning, sugar mills see little incentive in offering credit, inputs and technical expertise to sugarcane growers. This has had a negative impact on the development of capacities in the value chain, through positive, backward and forward flows of information, resources and expertise; and
- The government frequently uses its controls over import and export of sugar with the primary aim of maintaining price stability and protecting domestic consumers. Decision-making, however, is flawed and non-transparent. It is often based on wrong assessments of existing stocks or production estimates. As a result, decisions made for imports or exports often create further distortions, and adversely affect the sector.

### The Role of the Government

The Pakistani government regulates many aspects in the sector, including mill construction, trade and prices and farmers' crop decisions. This is largely because of the political importance of sugar, which is one of the major consumer items. It is also the second most important cash crop in Pakistan after cotton. The government is looking to achieve self-sufficiency in sugar.

Despite measures taken in the context of liberalisation, the government still retains significant controls in determining who sets up a sugar mill and where. There is still a need to develop a set of criteria. Such decisions are also influenced by government controls on nationalised banks in deciding the conditions and timings of loans for new mills. These controls, however, have weakened in view of the privatisation of national banks, and the entry of a

large number of foreign banks in the Pakistani financial market.

The government also interferes in the market in order to achieve its goal of self-sufficiency in sugar production for domestic needs. In pursuance of this policy, the government has been offering a waiver on domestic excise tax for any sugar produced above the average for the previous two years. But the waiver only applies, if the mill functions continuously for at least 160 days. This has often resulted in mills benefiting by starting early, running late, or running below capacity to meet the criterion. The government also has the power to impose start and end dates for the crushing season through the SFCA

The government has placed huge restrictions on the import and export of sugar. Export is only allowed if the government has determined that there is an exportable surplus. Imports, when allowed, to meet domestic needs and to maintain price stability in the domestic market, come mostly from India, Brazil, China and Thailand. China and Thailand are the countries that are generally able to provide large-grain sugar, which some consumers prefer. In the past, decisions regarding the export of surplus sugar required subsidies, as the domestic sugar industry was not competitive in the world market.

The government regulates the minimum price of sugarcane in Pakistan. The Ministry of Agriculture calculates the cost of production and sets a minimum price, which is announced in the form of a support price every year. However, in recent years, owing to competition among mills after the de-zoning and building of more sugar mills, these minimum prices have been lower than the prices that mills actually pay.

The government also regulates the price of sugar through its controls on imports and exports. On many occasions, the import of cheap sugar significantly suppressed the domestic price of sugar, and hence, harmed both the mills and the sugarcane growers. In the absence of a total liberalisation of international trade in sugar, government controls need to be absolutely transparent and must protect the legitimate interests of all the actors in the value chain.

### Conclusion

Despite significant liberalisation measures taken in Pakistan over the last 20 years, the sugar sector still suffers from unnecessary government controls and policies that hinder open and free competition. Policies need to be made such that small farmers are not trampled upon by large mill owners or government procurement officers. They need appropriate credit at competitive interest rates and extension services designed for their needs.

The civil society also needs to assume an important role in promoting co-operative initiatives among smallholders engaged in sugarcane production. Formation of co-operatives would contribute to their efficiency, as well as bargaining power *vis-à-vis* the powerful actors in the value chain.

# Competition Law and Intellectual Property Rights in Vietnam

– Nguyen Thanh Tu \*

## Background

The interaction between competition law and intellectual property rights (IPRs) is a vexed issue, subject to various legislative solutions and wide debate. The World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) permits member-states to apply their national competition laws to prevent abuse of IPRs by intellectual property (IP) holders and practices that adversely affect international technology transfer<sup>1</sup>. However, problems remain as to how to rightly determine the balance between competition law and IPRs as well as to formulate IPR-related competition provisions. This applies not only for developing countries but also for the developed ones.

## Vietnam Competition Law

The Vietnam Competition Law (No. 27/2004/QH11: VCL) was promulgated on December 3, 2004 after a four-year drafting process involving 15 drafts. The overall goal of the VCL is to protect the interests of the state, enterprises and consumers and to promote socio-economic development.

The scope of the VCL is large and ambitious. It applies to not only anti-competitive practices such as: (1) anti-competitive agreements, (2) abuses of dominant and monopoly positions and (3) competition-restricting economic concentration (merger and acquisition), but also to unfair competitive practices. The VCL prohibits different types of anti-competitive agreements, specifies the market share thresholds for merger enquiries, defines terms such as relevant markets, dominant position and indicates when abuse of such dominance is said to have occurred.

## The IPR Connection

After the VCL comes into effect, anti-competitive practices relating to IPRs in general, and licensing agreements in particular, will be regulated within its ambit, though it does not have specific provisions on this issue. Some areas of concern include:

- All kinds of non-competition clauses and exclusive licensing agreements are *per se* illegal, even if the parties have a low market share in the relevant market, as they may exclude potential licensors or licensees from entering the market. However, such agreements may also have pro-competitive effects, like, dissemination of technology by reducing the risk of misappropriation. Thus, they are considered under the *rule of reason* in many jurisdictions (US, EU). The strict application of the VCL to exclusive licensing agreements and dealings, bites deeply into the rights granted by the IP law, and may hinder technology transfer in Vietnam.

- Anti-competitive licensing agreements other than market entry foreclosure agreements may not be prohibited by the VCL if the combined market share of the parties is less than 30 percent in the relevant market. If the market ceiling is exceeded, the parties can still get an exemption, as licensing agreements encourage the dissemination of technology. Thus, the parties may legally incorporate restrictions such as price fixing, limitation of output, allocation of market, into agreements, provided such practices do not constitute abuse of a dominant position<sup>2</sup>.
- There is no clear distinction between horizontal and vertical restrictions in the VCL; anti-competitive licensing agreements in both cases are subject to the same scrutiny. Furthermore, the term ‘combined’ market share in the VCL may mean that the provisions relating to anti-competitive agreements apply only to horizontal agreements. All vertical agreements could then only be investigated under provisions relating to abuse of dominant position.
- According to the VCL, technological ability and IPRs are factors to be considered in determining the ‘ability to restrict competition considerably’, which can lead to a dominant position. Although IPRs confer the power to exclude, there will often be close substitutes to prevent the exercise of market power. Even if IPRs do confer market power, that market power, by itself, does not offend the competition law because it is ‘a consequence of a superior product, business acumen or historic accident’<sup>3</sup>. If the Vietnam competition authority does not take into account such aspects of IP, they may limit and infringe the IP law.

## Conclusion

Neither the competition law, nor the IP law of Vietnam can untangle reasonably the relationship between competition and IPRs. These issues are quite new to the Vietnamese jurisdiction. Therefore, building the IPRs-oriented competition law and achieving a balance between the two is a difficult task for legislators. How Vietnam can use the competition provisions in TRIPS in applying its competition law to IPRs is an important legal, economic and political matter, considering its WTO and other international commitments.

In order to deal with IPRs and related anti-competitive practices, the following solutions could be considered:

- The strengthening of IPRs should run parallel to the development of competition law;
- The government should enact a Decree on the application of the VCL to categories of technology transfer agreements that would scrutinise cases under the rule of reason and
- Compulsory licensing due to anti-competitive practices of IP holders should be regulated.

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<sup>1</sup> See Article 8(2) and Article 40 of TRIPS.

<sup>2</sup> If there are agreements between two, three or four competitors, they are still legal if the combined market share does not exceed respectively 50 percent, 65 percent or 75 percent of the relevant market. See Article 11 of the VCL.

<sup>3</sup> US Guidelines 1995, § 2.2. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), and *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

## International Cooperation Key to Promoting Competition Globally

*Fifth Review Conference of the UN on Competition Policy, Antalya, Turkey November 14-18, 2005*

Delegates from over 70 countries around the world, on the invitation from the United Nations Conference on Trade and Development (UNCTAD), attended the *Fifth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, to discuss the impending issues in the realm of competition policy and law during November 14-18, 2005 at Antalya, Turkey.

This year's review of the UN Set was unique on two grounds. It was for the first time that it was held outside of Geneva, the home of UNCTAD, and secondly, the conference agenda included a discourse on the outcomes from a voluntary peer review exercise that examined the state of competition administration in two countries – Jamaica and Kenya. Many considered the process of undertaking peer review and then discussing the outcomes with a large audience, to be a step in the right direction by UNCTAD to promote a healthy competition culture.

Opening the conference, the Secretary General of UNCTAD, Dr Supachai Panitchpakdi announced '*Building New Bridges*' as the theme of the conference and emphasised the need to explore ways of building bridges between competition policy, trade liberalisation and development. He hoped that the meet would strengthen national competition regimes, especially in countries that have only recently embraced competition legislation.

### Book Releases

Two books were released during the conference, which deserve special mention. One was a publication by UNCTAD titled, '*Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*'. Dr Supachai's welcome address recognised the importance of promoting and encouraging agreements that strengthen competition. The book showcases work by leading competition experts and practitioners from around the world.

The second publication – the joint work of CUTS International and the International Network of Civil Society Organisations on Competition (INCSOC)<sup>1</sup>, was a book titled, '*Competition Regimes in the World – A Civil Society Report*'. The book is a compilation of competition regimes from 117 countries. Delegates observed that the book's uniqueness lies in the fact that it analyses the competition process in the informal sector that comprises a significant part of the economy in many developing countries. Observers asserted that the book was indispensable for all competition scholars and would surely become one of the most referred books in competition literature.

### Future Course of Action

Some of the issues raised during the conference are:

- UNCTAD would, in the future, concentrate on studying competition issues in specific sectors e.g., the commodity and the distribution sector.

- The importance of international co-operation in curbing anti-competitive practices that have cross-border implications was recognised by many speakers. Hence, participants recommended encouraging and promoting agreements at all levels to enhance competition.
- The number of competition authorities presently exceeds 100, and many of them are young institutions, which require substantial technical assistance and capacity building.
- It is essential that politicians play an active role in strengthening competition regimes, and therefore, there is a special need in developing countries to enhance understanding and awareness on competition policy and regulatory issues.
- Jordan has initiated a process of training judges on competition aspects to prepare them for hearing competition cases, and the other developing countries would do well by emulating this practice.
- The international community realised the need for a set of rules at the global level, to tackle international cartels and trans-national mergers and acquisitions. (something that the delegate from China termed as '*Unified International Anti-monopoly Rules*'). The point was reinforced in the submission by the Indian delegation, which highlighted the need for a multilateral competition law framework.
- Competition authorities acknowledged that the civil society needs to play a proactive role in competition awareness and advocacy, and appealed to civil society organisations (CSOs) to collaborate with them for accomplishing the mission of developing functional national competition regimes.
- The conference also agreed on the provisional agenda of the forthcoming 2006 session of the Intergovernmental Group of Experts on Competition Law and Policy and decided that the Group would deliberate on four specific competition policy issues: sectoral regulators, hardcore cartels, cooperation and dispute settlement mechanism and subsidies.

### Limitations

One of the limitations, however, was the low-level of civil society participation in the conference. Some participants suggested that, there should have been a separate session on the 'role of CSOs in strengthening competition regimes'. UNCTAD ought to take note of this demand, and make provisions for an increased participation of CSOs in the forthcoming Inter-governmental Group of Experts meeting on competition policy.

<sup>1</sup> Refer to [www.incsoc.net](http://www.incsoc.net), for details on INCSOC. Briefly, it is a network of organisations and individuals interested in competition issues, with a current membership of 105 members from over 50 countries. There is no membership fee. An organisation/individual interested on competition issues can become a member by writing a letter to [incsoc@incsoc.net](mailto:incsoc@incsoc.net).

## Competition Law in Chile

Chile, along the southwestern coast of Latin America, is a market-oriented economy, characterised by a high level of foreign trade. Chile has the highest competitiveness ranking in Latin America and one of the highest Economic Freedom Index in the world. In 1998, due to balance of payments (BoP) complications, Chile had to adopt tight monetary measures, lowering its growth rate. The country also suffered because of instability in other Latin American countries. Although unemployment rates are high, the prospects for gross domestic product (GDP) growth are over 4 percent, foreign direct investment (FDI) is picking up and export earnings are growing.

Since the restoration of democracy in 1990, Chile has served as a model for other developing nations, especially the East European countries that are attempting to make a similar transition to democratic government and free-market economy.

Chile has increasingly assumed regional and international leadership roles befitting its status as a stable and democratic nation.

### Competition Law and Institutions

Over the last 30 years, Chile has been a quiet pioneer in the field of competition law and policy in South America. The Chilean competition policy was based on its Anti-monopoly Law, 1959, enacted a year after an international mission recommended abandoning price controls, enacting a competition law, and managing customs tariffs when prices rose too much. Since 1959, Chile has had regulations in support of free competition.

The 1959 law was enforced by Preventive and Antitrust Commission comprising of the Supreme Court Judge, the Superintendent of Corporations, Insurance and Stocks Markets and Superintendent of Banking.

Owing to several drawbacks in the 1959 Competition Law, it was reformulated as the Law for the Defence of Free Competition and adopted in 1973 as part of a programme to roll back the previous government's steps towards a government-owned and planned economy.

As competition issues became more complex, the need for a new enforcement system was felt. Subsequently, Law No. 19.911 was officially published on November 14, 2003 and has come into effect since May 13, 2004, focusing more on the creation of a new institutional framework and which amends the prior competition law by creating a new Competition Tribunal.

With the changes, the head of the competition enforcement entity, the National Economic Prosecutor, has

been given new powers, including the authority to enter into agreements with domestic agencies and foreign entities.

According to Chile's Competition Law, anyone executing or entering into, individually or collectively, any event, act or agreement tending to impede free competition in economic activities within the country, both those of a domestic nature and those involving external trade activities, shall be liable to punishment by a short prison term in any of its degrees.

Decree 211 of the current legislation created the National Economic Attorney along with the creation of a three-tiered institutional framework:

1. A number of Preventative Commissions (one central and various regional)
2. A special tribunal, the Antitrust Commission
3. An enforcement agency, the Prosecutor's Office

The Preventative Commissions are administrative bodies, which accomplished an important task, in the transitional period, of educating firms and entrepreneurs on competition affairs. The Antitrust Commission is a judicial body in the Chilean competition system. Its main function is to decide cases brought by either the Prosecutor's Office or private complainants. The National Economic Prosecutor's Office, on the other hand, has powers to investigate and prosecute anticompetitive conduct.

### Future Scenario

The application of a competition law is increasingly important in dealing with the efficient operation of markets and actualising the effective benefits from a globalised economy, to assure transparency, nondiscrimination, comprehensiveness and accountability. Chilean government regards its competition law as an instrument to promote economic efficiency with the expectation that in the long run this would

maximise consumer welfare.

Despite amendments, the Chilean Competition Law faces a more complex market structure than what it was designed to address. It does not cover economic concentration where such concentration does not reduce, harm or prevent competition.

Although the Chilean Competition Law is not very strict, it is distinctly improving in efficiency; the quantity of fines has increased, and the new juridical organ has received more power. The Tribunal is expected to play a bigger role in carrying out its advocacy functions, including promoting competition principles.

Thus, free competition in Chile is being facilitated not only by a strong economical basis but also by an efficient administrative structure in place.

### Unique System Protecting Consumers

The protection of consumers in Chile is organised in a system that comprises the state, through the National Consumer Service (SERNAC) and the regulatory organs in utility markets. The basic legal framework that SERNAC enforces is the Consumer Protection Act of 1997.

Unlike authorities such as the US Fair Trade Commission, SERNAC only takes care of consumer protection whereas other bodies like the Office of the National Economic Public Prosecutor and the Court of Fair Competition take care of the protection of competition.

SERNAC undertakes missions to inform, educate and protect consumers, including mediation and a voluntary settlement of disputes between the parties. The role of SERNAC in the resolution of conflicts takes the form of administrative/voluntary mediation.

Professor Sanjaya Lall, who died of a heart attack at the age of 64, was a professor of development economics at Oxford University and an authority on industrial development. He was schooled in Patna, Bihar, graduating with a first class in economics from St. Stephens College, Delhi University, after which there was no looking back. He began his illustrious professional career at the World Bank and went on to do research at Oxford.

CUTS had the enviable opportunity to interact with Professor Lall, who graced the advisory committee of the Investment for Development (IFD) Project. He had a profound impact on the lives and careers of those he associated with and this loss will be felt deeply.



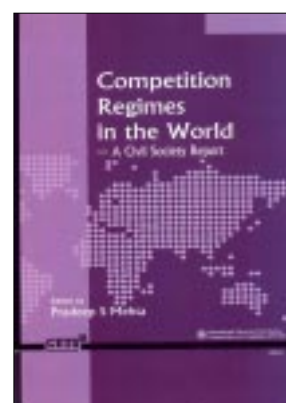
**Sanjaya Lall**  
(1940-2005)

## Publications

### Competition Regimes in the World – A Civil Society Report

This report is an attempt to map out competition regimes around the world from the civil society perspective. It covers 117 countries, most of whom have a competition regime; while some are in the process of adopting one. The compilation is primarily based on voluntary contributions from the members of the International Network of Civil Society Organisations on Competition (INCSOC) and other experts.

A whole new world of technical information has been presented in a very simple language and style. It will serve as an almanac for researchers, policymakers, different groups of stakeholders and civil society members. The book was launched at the Fifth Review Conference of the UN on Competition Policy held at Antalya, Turkey on November 16, 2005. (Price: Rs 1500/US\$150)



### Investment for Development – Civil Society Perceptions

The Investment for Development (IFD) Project implemented by CUTS during 2001-03, conducted a survey on the civil society's views on foreign direct investment (FDI) in seven select countries representing different geographical, political, social and economic scenarios. This briefing paper summarises the findings of this survey and draws some striking conclusions.

It has been found, that the civil society is largely positively oriented towards FDI in all the countries studied. The important role of this section of society in shaping public opinion is recognised. Insofar as public opinion shapes long-term economic policy, it is important to adopt sustained communication strategies to reach out to the civil society, take their views on board and bring in transparency in their operations.

### Foreign Direct Investment and Competition Policy

The second half of the last decade has experienced a rapid increase in FDI, with an increasing share of it coming through mergers or acquisitions (M&As) of existing firms in the host country. With many countries adopting competition laws recently, and many of these laws having M&A provisions, more FDI now has to undergo scrutiny from competition authorities.

This briefing paper explores the synergy between investment liberalisation and the effective application of competition policy. It recommends that an empowered competition authority can play a significant role in removing anti-competitive practices that act as entry barriers, and advising the government on related policy issues.



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