Competition Policy and Economic Growth in Indonesia: A Report on Issues and Options

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FOREWORD

"I sincerely believe that the effective implementation of competition policy is fundamental to sustainable economic growth in Indonesia. Likewise, I am convinced that the faulty implementation of our new competition law could set Indonesia's economic reform efforts backwards, not forward. It is important we do it right."

With this opening statement, Mr. Kwik Kian Gie – then Indonesia's Coordinating Minister for Economy, Finance and Industry – synthesized the content of two international conferences held in Jakarta and Surabaya in May 2000 on the links between competition policy and economic growth in Indonesia. The conferences were organized by the World Bank in collaboration with Germany's Technical Cooperation Agency (GTZ), the United States Agency for International Development (USAID), the Australian Agency for International Development (AUSAID), the Canadian International Development Agency (CIDA), the Asian Development Bank (ADB), and the Ministry of Industry and Trade of Indonesia.

The conferences were timely, following significant competition reforms in Indonesia, including the enactment of Law No. 5/1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition ("Competition Law"), and the creation of the Supervisory Commission for Business Competition (Komisi Pengawas Persaingan Usaha "KPPU"), the government authority in charge of promoting competition and enforcing the competition law.

In that context, the conferences provided an opportunity to exchange views, and share experiences and lessons of different countries to assist Indonesia in the design, formulation, sequencing and implementation of policies aimed at fostering more efficient and competitive markets in Indonesia. The interface of competition policy with related national policies dominated a considerable portion of the conferences, with participants discussing issues such as small and medium enterprise development, consumer protection, regulatory reform, privatization, intra-regional trade, and the international aspects of competition policy.

This report hopes to concisely and accurately convey the spirit of the discussions that took place during the conferences and to stimulate further discussion of the important issues raised. The report draws upon 25 presentations made by senior private and public sector officials, practitioners, and academics from Asia, Europe, North and South America, Australia, and Indonesia, representatives from various international organizations, including the World Bank, the Organization for Economic Cooperation and Development (OECD), the Asian Development Bank (ADB), and the United Nations Conference on Trade and Development (UNCTAD), as well as upon comments from some 200-floor participants who attended the conferences representing various private sector, government, academic, and consumer institutions in Indonesia.

The report was prepared and edited by Luis Tineo (The World Bank) and Maria Coppola (Columbia University Law School), who take sole responsibility for its content. Nevertheless, the editors wish to thank Megawati Sulistyo, W. Bernard Drum, R. Shyam Khemani, Ronald Adams, Eleanor Fox, and Mohammad Iqbal for their valuable comments and logistic support; Theresia Slamet for the translation of the report into Bahasa Indonesia; and Bambang Adiwiyoto for the review of the Bahasa Indonesia version of the report. The contributions of all the conference participants and co-sponsoring institutions are gratefully acknowledged. The publication of this report is possible thanks to the financial support of the Government of Japan.

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The Case for Competition

At the outset of the conference, speakers made a strong case for fostering competition as a key tool for economic development. The arguments laid out are rooted in the belief that competition:

- encourages firms to focus on efficiency, and to meet consumer demand;
- provides goods and services at lower prices, improved quality and with greater choice;
- lowers risk of misguided investments, reduces price distortions, and results in a more efficient allocation of resources;
- fosters greater accountability and transparency in business decision making and in government-business relations;
- strengthens corporate governance, generates opportunities for employment; and
- provides governments with fiscal space to allow them to provide adequate social spending, since it frees up resources which otherwise would be used for state ownership or regulation of economic activity.

Many in the audience agreed that despite progress, Indonesia is still far from achieving these goals. An important lesson emerging from the recent crisis is that the lack of competition in the domestic markets has imposed enormous costs on the economy. In fact, the lack of adequate policy incentives and institutional safeguards for competition has yielded:

- Concentration in product and service markets, which has given rise to market power, resulting in inferior products and fewer choices, to the detriment of consumers, especially the poorest who can least afford to buy expensive alternatives.
- Ownership concentration has also increased, thereby enabling a few large firms or family groups to engage in rent-seeking behavior and wield political influence to shape public policy in their favor.
- With fewer options for investors and fewer places to invest, capital markets have weakened. With insufficient information disclosure and corporate governance, lack of accountability and transparency in business decisions and government-business relations have become the order of the day.
- Opportunities for broad participation in the economy have become limited due to various barriers to entry and preferential treatment.

The growth of monopoly and oligopoly power in recent years was mentioned as a key underlying cause of present economic difficulties. Large conglomerates and cartels increasingly dominated the Indonesian business landscape. Under the right conditions conglomerates could have been supportive of rapid, equitable growth. In the case of Indonesia, however, their dominance was often supported by government policies and regulations according them market power and protecting them from competition. This produced a pattern of growth that left Indonesia vulnerable to crisis and fueled popular resentment.

A senior government official remarked that one of the outcomes of the economic crisis in Indonesia was a strong domestic consensus in favor of change in the way business was done, by the government and by the private sector. He suggested that these changes would be significantly advanced by encouraging the competitive process through market reform. It was recognized that without appropriate and predictable market-based policies, including competition law, however, it would be difficult for Indonesia to restore investor confidence, and revive investment flows, which are vital for sustained economic growth. Competition law in particular would help remove impediments to market competition and promote the development of a more transparent, fair and just society.

The need to increase market forces would call for:

- accelerating privatization of state-owned enterprises and corporate restructuring,
- widening the scope of deregulation, as well as for further liberalization of both domestic as well as international trade and investment, and

- implementing effectively the Law 5/1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition ("Competition Law") to remove impediments to market reform, and the operation of the Supervisory Commission for Business Competition (Komisi Pengawas Persaingan Usaha "KPPU"), a newly created independent government authority, to implement and enforce the law.

Understanding the Free Market Model

The free market model has come to be recognized as a superior alternative for economic development. History and theory have exposed the weaknesses of the two other principal models, centrally-planned economies and social market economies.

The fall of communism revealed fragile and extremely under-productive economies that were the result of central planning. A major problem with centrally-planned economies is the repercussions of a wrong decision. One wrong decision by a central planning body can, on account of the interdependence of the economy inherent in the plan, multiply and lead to undesirable developments of the economy as a whole. In a competitive economy on the other hand, the individual enterprise bears responsibility for the results of its own mistakes. It suffers losses and may even have to cease operations if it cannot hold its own. In a competitive economy, the market is a regulator and ultimately compensates for the inevitable mistakes by individuals.

Similarly, prolonged recessions, high employment, high inflation and marked inefficiencies in the 1970s in Western Europe demonstrated certain weaknesses of the social market economy model. Western European countries were concerned with the continued poor performance of the regulated sectors of their economies, including several sectors that were 'regulated' by public ownership. These publicly owned firms and state-regulated industries were extremely inefficient: there were few constraints on spending, and they functioned with the security that they would not be permitted to fail. The poor economic performance of many of these countries led them to place greater emphasis on competition policy, and today both the traditional form of natural monopoly regulation and the idea that state ownership was a good way to deal with natural monopolies has lost its foothold in Western Europe. In general, the result has been a demonstrable commitment to efficiency, growth, and opportunity, and this success has in turn encouraged the growth of the free market model.

Despite the success of the free market model in Western Europe and other OECD countries, some scholars continue to argue that a close integration of business and government is needed to ensure firms are large enough to compete effectively in international markets. This argument claims that markets often fail to guide investments to industries that would generate high growth and governments must therefore "lead the market" by identifying strategically important industries and a few large firms that can act as "national champions" and "engines of growth." This view claims that a purely free market model hinders domestic firms' ability to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as mergers and acquisitions.

These arguments, although appealing, might require balance. As one conference participant indicated:

- First, it is firms and industries and not nations that compete against each other.
- Second, governments through various economic policies such as limiting competition, charging higher prices to domestic consumers, and/or providing tax incentives for subsidies for exports, are in effect cross-subsidizing foreign consumers.
- Third, if firms or industries have not been exploited for economies of scale it is likely that this is because such economies may not exist.
- Fourth, recent studies on the East Asian economies demonstrate that a common denominator in explaining higher than average growth rates is a high degree of inter-firm rivalry and exposure to domestic and international competition.

Participants agreed that, in general, when the weaknesses of alternative models are combined with the successes of the free market model, there is a near uniform acceptance of the latter. Indonesia appears to have embraced this model and is working to adopt it.

Adoption will face difficulties, however. One conference participant pointed out that these difficulties may be exacerbated because of collusive networks left over from the previous regime that allowed rent-seeking, favoritism, corruption, and nepotism (KKN). This is one factor among many that led participants to caution that the instruments of a market-based economy applied in more advanced and industrial nations, such as competition law, cannot be simply transplanted in transition countries.

II. Implementing the Model: Instruments of Competition Policy

The main instruments for nurturing market reform encompass several micro-economic, industrial and commercial policies such as economic regulation, privatization, international trade, foreign investment, and competition law. The application and interface between these and other related policies can have a significant bearing on industrial structure and the competitive market performance of enterprises in both the private and public sector, and on economic development generally.

As with any policy intervention, the design and implementation of competition policy market reforms require the development of priorities in sequencing policies. This involves a series of trade-offs between goals.

Policy Sequencing

Participants at the conference offered differing views on policy sequencing in transition economies.

Step by Step. One view was that countries should undertake reform in steps, by first addressing industry, investment and trade deregulation. Privatization would start early, but inevitably (at least has been the case in many countries), continue on a very long-term track. Competition law should be one of the last elements put in place. The argument that supports this view of sequencing says that gains in efficiency can be more effectively pursued through trade liberalization and deregulation, supplemented with privatization, than by competition law. Once a sector has been liberalized by way of introducing new competitors on the market, competition law and its enforcement can fill the primary role of *maintaining* competition as well as avoiding distortions caused by anti-competitive practices.

Simultaneously. Another view claimed that competition law must be simultaneously undertaken with other efforts at liberalization and deregulation. Proponents of this view explained that competition policy consists of two segments, one is the public or government restraints to competition, and the other is the introduction of the competition law. Both should be addressed simultaneously to have optimal impact on the economy because alone each reform is insufficient.

Deregulation of the economy reduces domestic barriers to entry, and economic liberalization will expose domestic firms to international competition. Deregulation of the economy, however, may not be sufficient to force competition into an industry that has structural restraints to competition such as economies of scale or a cartel. Similarly, privatization needs to be accompanied by a competition law since without a consideration of competition privatization may become a transfer of ownership from public to private without any impact on competition. While implementing these reforms simultaneously may not be practicable, efforts should be made to introduce them as closely as possible. Experience from countries that introduced competition law but at the same time heavily regulated and protected their economy has demonstrated that the competition laws will be overridden. This was the case in Brazil, Thailand and South Korea.

Governments frequently criticize simultaneous reform, voicing concerns about opening themselves up too quickly to competition. Participants who advocated early introduction of competition law suggested that these concerns could be resolved by allowing for a transition period for trade liberalization, but stressed that there is no reason for a transition period before adopting and enforcing a competition law. When a significant number of a country's enterprises have such high costs and other problems that they would be quickly wiped out if efficient foreign competitors were to enter right away, the country may decide to have a transition period before exposing some of its markets to competition. Such a policy does involve a delay in trade liberalization – hopefully for a short, finite period of time – but it does not call for a delay in adopting and enforcing competition law.

It is accepted that having a competition law does not in any way prevent the delay in opening trade, and permits a country to prevent its domestic firms from abusing their economic power to the detriment of consumers and of society as a whole. In fact, if a country does not enforce competition law during a transition period, domestic firms are much less likely to use the period for its intended purpose – to make investments and take other steps that will make them more efficient. Rather, they are likely to spend the transition period exploiting domestic consumers and trying to create entry barriers that will prevent foreign firms from entering after the transition.

At the same time, participants did acknowledge that early introduction of a competition law can be modified to allow for a competition law that is not necessarily as comprehensive as the laws in countries that have a competition law tradition. Many participants advocated the view that competition authorities may want to focus early efforts and resources on education of the public and businesses to help society adjust to a competition culture rather than focus on law enforcement.

Trade Liberalization

Some speakers argued that in economies where high levels of industry concentration prevail, such as Indonesia, trade liberalization can to a large extent solve anti-competitive behavior by exposing these industries to international competition. In absence of barriers to trade, domestic monopolists or oligopolists lose their ability to exercise market power irrespective of actual imports' share of the domestic market because of the threat of potential competition.

Recent empirical studies cited by one conference participant, however, suggest that the effects of trade liberalization on competition may be limited in some circumstances. Examples were given of factors that can impede the pro-competitive effect of trade liberalization:

- The pro-competitive effects of tariff reductions may be diluted if import supply is not very elastic.
- Trade policy is not comprised exclusively of tariff policy: as countries liberalize import tariffs there has been an increase in non-tariff barriers such as

countervailing duties, antidumping duties and voluntary export restraints.
- An increasing share of economic activity relates to non-tradable goods and services.
- Inter-firm contractual arrangements and vertical integration combined with high levels of concentration in upstream/downstream markets may prevent the development of new sources of inputs or new distribution channels.
- In the absence of effective competition, domestic firms can raise prices up to the international prices plus transport costs and still keep out imports.
- International cartels may divide up markets through price-fixing or geographic market-sharing agreements.
- Finally, differences in income, tastes, and culture and in product safety, consumer protection, and technical standards may also separate markets.

For these and other reasons, the speaker argued, liberalized trade cannot effectively substitute for competition law. Other conference participants accepted his arguments, and emphasized, however, that international trade and competition law measures should complement each other in promoting trade, market access, economic efficiency, and consumer welfare. Promoting objectives of a liberal trade policy support the objectives of competition law and vice versa. For example, trade liberalization and competition policy together could prevent powerful business interests with monopoly power from creating barriers to trade.

Foreign Direct Investment

Discussions also considered the importance of competition policies in attracting foreign direct investment (FDI). To this extent, participants indicated that to provide an environment that is conducive to foreign direct investment, first and foremost countries must seek to create competitive conditions in domestic markets. Further, an internationally-accepted policy mix of relevant instruments must be in place to reassure investors of the security of their investments.

Due to the increasing globalization of today's investments and transactions, one way in which countries help maintain a positive relationship between FDI and competition policy is through cooperation and work-sharing among competition agencies. It was pointed out that while it has often been true that levels of investment are directly correlated with a country's regulatory ease of investing, globalization of corporations has increasingly made this true.

One speaker cautioned that while FDI increases the competitiveness of the host country and should be encouraged, there is still a responsibility to examine investments to make certain that each FDI transaction is bringing net benefits to the country. To do so, competition authorities must be certain that FDI is covered by competition law. For example, efficiency can be promoted in a specific market receiving FDI if competition law is used at entry, through merger review and in the context of post-entry competition issues. Considerations should be balanced, however, and competition authorities must be aware that the competitiveness resulting from FDI may have undesired outcomes for development goals (employment, etc.).

While inward FDI can contribute towards the competitiveness of the host country's market, at the same time it can disturb the performance of local firms. The speaker provided the example of MNC activity which increase or decrease market concentration and this may in turn influence the performance of firms, industries and consumer welfare. Thus in determining how much FDI should be encouraged, there is a need to balance the benefits associated with FDI and the immediate costs it may have in terms of reducing economic welfare.

Trade Liberalization, FDI and Competition Law: Two Case Studies

An Indonesian participant offered two case studies as examples of the varying roles of competition law in industries that undertake liberalization. As the examples below demonstrate, in some industries competition law has a more important role as a necessary counterpart to trade liberalization and increased foreign direct investment than in other industries.

Case Study 1. Automobiles

In the past, the automobile and motorcycle industry was highly regulated and protected, with domestic content requirements and other restraints on the market. This industry was then liberalized, international competition and investment were allowed in. For example, local content requirements were abolished and the tariff rate brought down to an average of 60%.

This resulted in increased imports that drove down prices of these products. For example, in the motorcycle market, imported motorcycles are selling at prices ten to twenty times lower than the average price of domestically produced motorcycles. Eventually, the price of domestic producers was forced down in order for them to compete with imported products.

Case Study 2. Wheat Flour

The Indonesian government agreed to open the wheat and wheat flour industry to free competition and lift restrictions in wholesale trade. The results have been positive. When BULOG's control was eliminated the market took over without any significant discontinuity in supply to Indonesia. Smaller producers of wheat flour were able to secure their supply through the spot market. And, because wheat was easily obtained at the world market, the imported prices were driven to international prices. The market share of the two largest domestic producers dropped by almost 10% within one year after deregulation. The real price of wheat is currently falling, in part because of the declining international price of wheat and in part due to competition. Consumers have more choice to source wheat flour needs.

The effects of liberalization, however, are compromised by anti-competitive practices that continue to pervade the industry. For example, the market for imported wheat flour is restricted to the large food-processing industry and the market for small industries and households is still controlled by domestic producers. The main difficulty for imported flour to challenge the domestic producers is the distribution network. The distribution network of wheat-flour in the past was controlled by BULOG through license, however, now that BULOG's monopoly has been lifted most of the distributors have to rely on the dominant wheat flour producers.

A recent study showed that there are vertical restraints such as exclusive dealing imposed by the producers on the distributors. Independent distributors are reluctant to jeopardize their relationship with the dominant firm because import supply continuity could prove problematic. Therefore, imported products are not able to compete effectively with the domestic producers unless it invests in building an independent distribution network. Anti-competitive behavior such as vertical restraints imposed by the dominant wheat flour producers on distributors can only be prevented by competition law.

III. Figuring out the Fundamentals: The Substance of Competition Law and Policy

Competition law provides a regulatory framework to maintain and improve efficiency in markets, promote competitive pricing practices, and restrain price rises in markets where competition is affected by business practices (namely horizontal and vertical restraints (collusive price-fixing, input/output allocation, bid-rigging); abuse of dominant position (exclusion, discrimination and predation); and mergers and acquisitions. In many transition economies competition laws also cover a broader range of anti-competitive government actions and policies, including discretionary grants of monopoly power and unduly restrictive government regulation.

Competition law by itself does not create competition, but when effectively applied, can counteract the dangers of private anticompetitive behavior. For example, cartels may deliberately create artificial shortages, with the result that some consumers are not able to obtain the product while other consumers pay an inflated, or monopoly, price. Dominant firms may abuse their market power through, for example, tying two products without a legitimate business purpose. Entry to new participants may be blocked by firms with market power that erect protectionist barriers. Competition law can address these anticompetitive practices.

In addition to private anti-competitive behavior, competition law can be used to counteract inefficient government regulation and promote efficiency within the private sector. Poorly designed government regulation can contribute to the creation of private monopoly and can have effects similar to public monopoly, including the lessening of economic opportunity. Government ownership and operation of business entities can also have this effect. Likewise, while competition law cannot redress the wrongs of the past, it can be used to help redesign the system so that future industrial and economic growth derives not from undue privileges but from dynamic, efficient and fair competition.

> "*Competition law only safeguards competition…*" reminded one conference participant. "*It is a tool for readying the future, not for remedying past inequities.*"

Relevant Provisions

Speakers at the conference emphasized that generally, the most important provisions in a competition law address abuse of dominance, conspiracy and merger operations.

Agreement provisions are used to prohibit cartels and any agreements that unduly lessen competition. Two factors are often assessed to determine whether competition is unduly lessened or prevented: the structure of the market to determine the degree of market power, and the behavior of the parties to the arrangement to determine the agreement's likely effect. The danger of cartels or cartel-like arrangements is that they distort trade and create societal inefficiencies. Although potentially more unstable than monopolies, they risk to produce monopoly profits, engage in price fixing, and so forth. Highest priority is accorded to enforcement of conspiracy provisions because of this potential great harm to the economy. Using the conspiracy provisions to prevent cartels and cartel-like agreements results in an increase range of goods available to consumers, reducing prices and decreasing barriers to entry.

Abuse of dominance is invoked when there is a practice by one or more persons who substantially or completely control a type of business, where the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. Structural dominance alone is not the focus of this provision. This provision can help to ensure that abusive dominant domestic firms do not impede the development of the competitive discipline hoped to be realized through the removal of trade barriers and foreign competition. Participants provided examples of anticompetitive acts that this provision can confront, including disciplining a firm that has market power in for one product and uses that market power to tie in another product used by the same consumers, adoption of an incompatible product specification by a firm with the intent to prevent or eliminate entry by a competitor, acquisitions by a firm to prevent or eliminate entry by a competitor, or predatory pricing.

Merger Provisions are tools to discipline anticompetitive behavior before it takes place. Since a merger is potentially forever, these provisions allow careful scrutiny for potential negative effects on the economy. Specific criteria that is often considered when a competition authority is deciding whether or not to allow a merger to go through is: the role of foreign competition, whether the business of a party to the merger is likely to fail, availability of substitute products, barriers to entry, effective remaining competition, removal of a vigorous and effective competitor, and extent of change and innovation. These factors are examined to decide if there will be a substantial lessening of competition post-merger. Often there is an efficiency exception where parties can establish that the merger brings about gains in efficiency, and the gains would not be obtained without the merger, allowing mergers that would provide net benefits for the society to be realized.

Approaches to Competition Law

Conference participants made three principal recommendations for a consistent approach to competition law:

- clarity in definitions of the goals of competition law,
- universal application of competition law to all players, and
- clear division between market share and anti-competitive business conduct.

> "It is almost a maxim: if the institute [competition commission] were to fully accomplish its mission, its role would be controversial. . . . In one word, it would know it is doing a good job if no one liked it."
> - Douglass C. North, cited by a participant

Clearly Defined Goals

A concern appreciated in transition economies in applying competition law is the continued reliance on competition law to promote goals other than efficiency and consumer welfare. Yet a departure from the narrow objectives of competition policy or enforcement, seeking other goals such as the empowerment of small and medium firms, regional development, or ethnic interest protection, provide for both government protection of inefficient firms and unnecessary intervention or regulation of business activities.

Conference participants emphasized that international best practice suggests that efficiency and consumer welfare should be the only goals of the competition law and that other concerns should be dealt with either through exemptions or by examinations on a case-by-case basis.

One speaker drew attention to the fact that the Indonesian competition law lists four objectives, some of which are objectives by themselves, whereas others are actually a means to achieve a certain objective. For instance, he explained that to achieve national economic efficiency is an objective in itself, which can be achieved by means of preventing private entrepreneurs from engaging in monopolistic practices and/or unfair business competition. The failure to distinguish between ends is problematic, as it may give rise to misinterpretation of the law. More importantly, listing several objectives may render the law less effective since there are many tradeoffs between the different goals.

In most countries the primary objective of the competition law is consumer welfare and efficiency. In some instances countries have permitted other objectives to be considered. When these objectives, however, have been allowed, they are narrowly defined or otherwise protected by strict procedures.

An Australian speaker explained that Australia has an authorization procedure that provides an exemption from the trade practices act for conduct that would result in a net public benefit. The Australian

Competition Commission (ACCC) may, upon application or on behalf of a corporation, grant an authorization to the corporation to acquire shares or assets or to give effect to any other agreement which may substantially lessen competition. An authorization is only granted when the ACCC is satisfied, in all circumstances, that the relevant agreement or other conduct is likely to result in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition – that is, the agreement or conduct would likely to result in a net public benefit.

To ensure that the exception is only granted in meritorious circumstances the authorization procedure is a public process. An application for authorization is placed on a public register and the ACCC invites interested parties to make submissions to it. The ACCC then issues a draft determination and any interested party is entitled to call for a predetermination conference before a final decision is issued by the ACCC. Any interested party may then appeal that determination to the Australian Competition Tribunal for a review of the determination.

Allowing Net Public Benefit Exceptions: An Example from Australia

In April 1999 the ACCC granted two authorizations to cement manufacturer, Adelaide Brighton Limited (ABL), as part of a restructuring of the cement industry. After extensive market inquiries and submissions from over 30 interested parties, the ACCC concluded that the restructuring would provide a net public benefit because of three factors:

1. the increased independence of ABL from other cement and concrete companies in Australia would likely increase its competitive behavior;
2. ABL would be strengthened as a competitor by having access to the international experience and financial strength of its new controlling shareholder; and
3. ABL would be able to rationalize its activities which should lead to lower prices for consumers.

General Application

While the previous section acknowledges that there may be some room for exceptions to efficiency goals, participants emphasized that these exceptions must also be subject to a strict economics test: that a net public benefit result, for example. Otherwise, *and as a general rule,* competition law should be applicable in *all circumstances* and to *all parties*. There is a tendency in many countries with nascent competition laws to attempt to “carve out” exceptions for governments, state-owned enterprises, or other major sections of the economy. Speakers at the conference urged Indonesia to follow acknowledged best practices where no one is privileged to be outside the reach of the law.

A Peruvian participant offered a striking example of how the competition agency in Peru (INDECOPI, National Institute for the Defense of Competition and Protection of Intellectual Property) has demonstrated its commitment to universal application through its willingness to investigate *any* allegation of unfair competition. Recently, upon request from several private companies, INDECOPI heard complaints lodged against four ministries, even filing against the ministry it reports to and on which it depends for budgetary support.

In light of the importance of universal application, one speaker argued that the Indonesian law should have made it clearer that the primary objective of the antimonopoly law is to protect and maintain free and open competition by explicitly preventing both the state, state-owned enterprises and private firms from restraining domestic competition and trade. In other words, the law should have stated clearly that the primary objective of competition law is to prevent both private firms and state-owned enterprises from engaging in anti-competitive behavior and the government from intervening arbitrarily in the market by issuing policy-generated barriers to competition.

Distinction between Size and Behavior of Firms

Speakers adamantly stressed that in enforcing the law, international best practice also advises that the new agencies should approach businesses with a focus on behavior based on *actual exercise of market power*, not on the mere holding of a position of dominance or monopoly because market share does not necessarily indicate anti-competitive practices.

A number of participants pointed out that one of the problems with the Indonesian competition law is that it fails to make a distinction between anti-competitive business conduct on the one hand and the undesirable market structures on the other. Various types of anti-competitive business conduct are clearly identified in the law (price fixing, market divisions, boycotts, etc) yet in the same chapters that define the anti-competitive conduct certain market structures (monopoly, monopsony, oligopoly, etc) are explicitly banned. This failure to make a clear distinction between anti-competitive business conduct and market structures, specifically by prohibiting *both* certain types of anti-competitive conduct and certain market structures, is a major shortcoming that falls short of international best practices. It was agreed that this lack of distinction may impede, rather than promote, free competition.

Questions from the floor raised the concern that the new enforcers, concerned about high concentration ratios, might be tempted in good faith to intervene directly in concentrated markets to reduce the market share of large firms. Respondents said that this practice would be a mistake, suggesting that a better starting point would be to examine the entry conditions and arrangements and mechanisms likely to lead to anti-competitive business practices – namely, how firms acquire knowledge of a rival's policies and products, their capacity to influence interactions through trade and business associations, and their control of documentation and information channels.

Competition Law and Conglomerates

Situation: There is a view that conglomerates contributed to the undesirable industrial concentrations, excessive diversification, and lack of governance and transparency.

Myth: Competition law should be used to break apart the conglomerates because of this negative influence they have had in the past.

Reality: Although these perceptions of the negative influence may be valid, the problems they raise cannot be resolved through the enforcement of a competition law.

Conglomerates are not anti-competitive forms of business as such. Many are efficient and do not abuse their position by engaging in anti-competitive conduct. The focus should be on competitive behavior, not on organizational form, market share, or industrial structure.

Participants encouraged the new enforcers to design a legal test for intervention that focused on more than concentration. One speaker offered a comparison from Australia where the legal test is a substantial lessening of competition, a forward looking test addressing competitive dynamics, not just market concentration. Australia has chosen not only to allow concentrated markets to remain that way so long as there is no anti-competitive behavior, but has even allowed mergers and joint ventures of firms with high market shares when there were significant safeguards in place to protect competition. An example is in 1997 the ACCC allowed a joint venture between CSR and Mackay Refined Sugars to combine their sugar refining, distribution and marketing operations. CRS and Mackay were the two largest sugar refineries, but the ACCC was satisfied that imports would impose a sufficient competitive restraint.

Concern about concentration is particularly worrisome in high technology industries. Because of their unique characteristics, and the importance of encouraging innovation, Canadian and other participants urged the Supervisory Commission for Business Competition to proceed cautiously in these areas, see box below.

Understanding Differences: Competition Law in High Tech Industries

The unique economic characteristics of the information economy and importance of innovation require that competition law authorities use caution when intervening in high technology industries in order to promote future investment, research and innovation. This does not mean that competition law does not have a proper role in high technology industries, but that it should be handled with care.

For example, eliminating restrictive or exclusionary contracts, or removing unbundling or tying agreements, is generally preferable to compulsory licensing, the mandating of access to a network or any other expropriation of intellectual property, as the former are less intrusive. Divestitures and break up orders for ongoing business can be even more draconian in these industries.

The Supervisory Commission for Business Competition will have to determine their own legal test, based on the particular needs of their country. The question and answer session, however, did make clear that the principles highlighted above should be considered carefully before any test is designed or intervention occurs.

Advice from Germany on Agreement Provisions: Cartels

The market can only fulfill its functions if competition between the various suppliers is effective and not prevented by agreements, i.e. the formation of cartels. There are many possible forms of cartels with which competing enterprises can restrict competition through contracts or decisions. The most serious form of a restraint on competition is the price cartel, when competing enterprises agree on sales prices or price increases.

Rather than resorting to direct price-fixing, competitors may seek to accomplish their purpose by other forms of cartels, including situations where competitors enter into quota and allocation cartels, e.g. agreements among competing enterprises on production or sales ratios, or division of sales areas, with an obligation not to compete with each other. Territorial divisions, for example, are considered to be “better” than price-fixing because they have the same result (to eliminate competition) and they almost guarantee that all participants will receive a satisfactory share of the market. One of the results of these type of agreements is uniform pricing. The problem with these agreements is that they protect less efficient producers and keep firms from expanding.

Cartels are designed to secure a higher profit for the participating enterprises than would be possible under competitive conditions. Cartels will seldom function as efficiently, precisely, or reliably as a single-firm monopoly, but still can result in the development of “monopoly returns” which distort the general distribution of incomes and hence prevent competition from exercising its steering function. Using the conspiracy provisions to prevent cartels and cartel-like agreements results in an increased range of goods available to consumers, reducing prices and decreasing barriers to entry.

Conditions that favor cartels include barriers or lags to entry, including sunk costs and inelasticity of demand at the competitive price. High costs of entry are barriers if new entrants must bear a higher burden than existing participants. Slow speed of entry may encourage cartelization, even if it only allows existing firms to capture short-term gains. Other barriers to entry can include cost and demand disadvantages, including patents and other legal licenses, scarce resources, and product differentiation/consumer loyalty. Other conditions that favor cartels are low costs of organization and policing – the fewer the participating firms, the easier they are to organize.

Infringements of the ban on cartels are prosecuted by the competition authorities. Since cartel behavior unambiguously undermine the objective of providing consumers with competitive prices and product choices, violation carries heavy fines. In Germany, these can be up to three times the profit earned on illegal transactions. Fines to the value of many millions of Deutsche Marks have been imposed for illegal cartel agreements, for example in the linoleum and building industries. The German authorities also have the power to issue injunctions (forbid restrictive practices), to declare contracts and decisions invalid or call for an amendment (for example in cases of misuse of cartel agreements) and to give approval for certain agreements or decisions (for example for certain cartels.)

Due to the egregiousness of cartel behavior, the German Cartel Office (and regional offices) can act autonomously in examining cases of infringement of the cartel legislation. Since centralized and well-organized cartels are easier to detect, cartels are often decentralized and informal and thus harder to discover. Frequently, information from consumers or competitors is the initiative for action by the cartel authorities.

Sometimes, the German authorities will allow cartels to exist. Application for permission must be made to the cartel authorities, and after very extensive information gathering and examination an exception may be granted.

The Canadian Experience with Abuse of Dominant Position Provisions

The abuse of dominant position provisions of the Canadian Competition Act ("the Act"), like others, are premised on the principle that the public interest is best served when markets are competitive. These provisions address conduct by a dominant firm which prevents or impedes market access though the creation or raising of barriers to entry. Mere structural dominance is not, in and of itself, the focus of the abuse provisions.

Abuse of dominance under the Act requires a practice of anti-competitive acts by one or more persons who substantially or completely control a type of business, where the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. The Act contains a non-exhaustive definition of anti-competitive act, which includes (i) the preemption of scarce facilities or resources required by a competitor for the operation of a business, and (ii) the adoption of product specifications that are incompatible with products produced by another person.

In determining whether an act is anti-competitive, the analysis must take into account "the commercial interests of both parties served by the conduct in question and the degree of restraint or distortion of competition which exists." A consistent theme in the enumerated anticompetitive acts is that a dominant firm engaging in predatory, exclusionary or disciplinary behavior against one or more smaller rivals. Horizontal arrangements, however, may fall within these provisions as well.

If the Competition Tribunal finds an abuse of dominance, it may issue an order prohibiting the practice of anti-competitive acts or, if it concludes that a prohibition order is not likely to restore competition, it may make any other order that is necessary to overcome the effects of the practice of anticompetitive acts, such as an order that assets or shares be divested or that the terms of a contract be rendered unenforceable.

These provisions are particularly important in the context of a deregulated and privatized business environment, and can be instrumental in assisting in the transition from regulation to deregulation. Specifically, they help to ensure that dominant domestic firms do not impede the development of the competitive discipline hoped to be realized through the removal of trade barriers and foreign competition.

Provisions similar to the Canadian abuse of dominant position provisions can be effective tools to address issues of access to essential facilities. For example, it may not be sufficient to simply implement a policy of deregulation without ensuring that entry on competitive terms is possible. The essential facilities doctrine provides that persons who control a facility essential to entering a market must allow others access to that facility on reasonable commercial terms. This doctrine is becoming increasing important as Canada's telecommunications and other industries continue to be deregulated.

Two of the themes underlying the abuse of dominant position provisions can provide useful lessons for Indonesia: *balance and caution in enforcement.*

The abuse of dominance provisions strike a *balance* between the need to discourage practices that harm competition and the need to avoid imposing burdensome regulatory costs or requirements upon Canadian industries which impair their ability to compete in international markets. For example, the abuse of dominance provisions of the Act compels the Tribunal to consider whether the lessening of competition is attributable to the superior competitive performance of the dominant firm or firms. It does not call upon the Tribunal to balance superior competitive performance against the effects of anti-competitive acts , but rather to consider superior competitive performance as a factor to be considered in determining the cause of the lessening of competition and not as a justifiable goal for engaging in the anti-competitive act.

Abuse of a dominant position can do great harm to an economy. At the same time, Canadian enforcers recognize that high technology industries undergoing rapid transition may have unique economic characteristics that require careful consideration of the implications for future investment, research and innovation. Thus, *caution in application* is urged as well as an incremental approach to enforcement remedies is taken for these high technology industries.

Advice from the United States: Designing Merger Policy

One participant used the American experience to offer three suggestions for the development of merger policy. First, regulation must be adapted to the type of transaction being examined: merger policy must reflect the type of merger being considered. Conglomerate mergers, he suggested, should not be a major concern. Conglomerate mergers usually involve a product extension, such as a cigarette company buying a food processor, or a geographical market extension, a bakery in Jakarta buying a bakery in Denpasar. Conglomerate mergers often have no direct effect on competition unless it can be proved that, but for the merger, the cigarette company would have begun processing food or the Jakarta bakery would have begun producing in Denpasar. On the other hand, conglomerate mergers offer the fewest opportunities for an increased economic efficiency. Conglomerate mergers can be thought of as low cost/low benefit mergers, so it is best not to use costly review and enforcement procedures to stop them.

Vertical mergers, which involve integration forward or backward in the chain of production or distribution through the acquisition of a supplier or customer, do not reduce the number of economic actors in a particular market but could change patterns of industrial behavior. Given the great potential for increased economic efficiency and a limited capacity for economic harm, however, this treatment is viewed as a policy mistake that protected competitors instead of competition.

Thus, together with conglomerate mergers, in conducting the balancing test of efficiency versus reduced competition, the evaluator should likely err on the side of efficiency. Horizontal mergers, however, raise concern because of their direct impact on competition and are generally viewed with great strictness by American judges.

Second, there is a general trend for markets to be defined more broadly and thus make it easier for mergers to pass inspection. American policymakers recognize that market definitions and predictions of future efficiencies, costs, prices, outputs, and barriers to entry, are relatively crude and unreliable. To counterbalance this tendency, markets are now defined more broadly, and the merging parties must account for a larger share of a more concentrated market before the merger is prohibited.

Third, authorization or prohibition of a merger is often a function of barriers to entry in the market. In the United States, if a merged US company can show that barriers to entry are low, the merger will likely be permitted. New entry increases competition in the future. The analytical problem is to define socially-harmful barriers in ways that can be measured concretely: for example, the economies of scale or superior efficiency of a merged firm may deter the entry of other producers, but Americans usually try to promote these barriers anyway. Excess capacity or dominance over an irreplaceable raw material or distribution network as a result of a merger will almost always lead to that merger being invalidated. Other entry barriers are more ambiguous in their anti-competitive effects: consider asset-specific investments (sunk costs) such as extensive advertising, and an extensive product differentiation that deprives new entrants of niche products that would enable them to gain a toehold in the market. American economists agree that almost all of the barriers to entry created by government can be safely eliminated, and thus competition authorities may want to advocate deregulation.

While the American experience has shown that case-by-case determinations are often the best way to deal with the complexities involved, the experience has also shown that competition authorities should also plan their policies carefully. Fair warning should be given of the kinds of mergers that are permitted and prohibited, so that companies can plan for competition-enhancing mergers and avoid the inefficiencies of undertaking mergers that will only be struck down later. American enforcement authorities have done this through the merger guidelines, and these should be consulted when drafting the merger regulations called for by Indonesian Article 28(3).

Compared to agreements that restrain trade, mergers involve a more complete and permanent integration of the parties' economic activities. Internal pressures (cheating within a cartel) often force the disintegration of an agreement among independent firms, but a merger is potentially forever. Hence getting merger policy right is crucial for a sound long-term competition policy. While the complexities of merger review suggest that a certain amount of uncertainty and ferment is perhaps natural during the Competition Commission's early days, it is important for the Commission to provide guidance through guidelines at an early date. In the end, as one speaker commented, Indonesia should be envied for the fresh start it has in making merger policy.

IV. Creating a Culture of Competition: The Role of the Supervisory Commission for Business Competition

The Supervisory Commission for Business Competition is the first independent regulatory agency in Indonesia's history. Hence, its effectiveness will depend upon its capacity to:

- overcome past practices involving close dealings between government agencies and business which favor a few large firms;
- identify the forces and policies that affect competition in markets, and address competition issues in a technical, transparent, non-intrusive and fair manner;
- develop an effective advocacy strategy for public policy measures affecting competition; and
- build the Supervisory Commission for Business Competition on the basis of stability, independence and technical merits.

If these goals are accomplished, the Supervisory Commission for Business Competition will have the potential to exercise significant influence on important policy matters that affect market structures and business conduct in Indonesia.

At the same time, the general consensus at the conference was that promoting competition in still regulated markets such as Indonesia is an enormous task. Discussions from the floor led to the conclusion that success depends largely on how well the concepts and values of competition are interwoven in the policymaking process and among the population.

Traditional law enforcement – successfully employed in countries with significant market tradition – have helped deter anticompetitive practices and thereby maintain the competitive process. However, the complexities of law enforcement seem to warn cautiousness in Indonesia given the unique problems of its transition to competitive markets.

Speakers suggested that the Supervisory Commission for Business Competition should carefully assess this constraint before embarking with active competition law enforcement. Law enforcement might be a costly and risky option. Participants placed strong emphasis on the fact that in environments where there is still the potential for governments to shift convictions from interventionism to open markets, a promising path early on for competition agencies is to concentrate less on traditional law enforcement and more on creating a culture of competition through alternative activities.

The alternatives to traditional law enforcement were classified into two complementary categories.

- *Advocacy*: promoting competition values by identifying government measures affecting competition and offering advice on whether they are compatible with the operation of the markets.
- *Transparency*: Promoting competition through transparent enforcement of competition law.

While the Supervisory Commission for Business Competition will have to find its own methods of promoting transparency and conducting advocacy that are uniquely adapted to the Indonesian situation, speakers presented guiding principles and country experiences that offered useful starting points.

Competition Advocacy

Government measures that relate to and potentially conflict with competition law-policy include tariffs, subsidies, antidumping, government procurement, technical standards, intellectual property rights, and state-owned enterprises. These policies typically aim to protect domestic firms and restrict market access and foreign rivalry, so a *competition goalkeeper* can be part of the government structure to scrutinize and when necessary, temper, these policies. Examples provided by participants of the scope of measures to be examined included exceptions granted, taxes, government procurement and other discriminatory policies.

During a transition period many cartel activities and abuses of dominant position may be lawful in emerging markets because of protectionist measures. Advocacy contributes to dismantling these barriers.

Resolving battles against more powerful government agencies and well-organized groups, however, requires committed institutions and political will.

Competition law can be used to conduct a comprehensive review of existing laws and regulations, develop a consistent set of criteria for their evaluation, and identify and evaluate the net benefits that they impose. Using competitive principles to review legislation that impedes competition can provide an important step towards eliminating unnecessarily burdensome regulations. It can also provide the government with access to consistent, high quality advice in evaluating the costs and benefits of proposals for changes to commercial regulations.

Review of Business Legislation

In order to strengthen competition, participants across the board made a strong case for the Supervisory Commission for Business Competition to review of existing laws and regulations. With the development of institutional mechanisms, the public or net benefit of existing or even proposed legislation can be evaluated from the perspective of its impact on impeding or promoting competition.

An Indonesian speaker highlighted the fact that the Supervisory Commission for Business Competition is well-equipped to conduct competition advocacy: an important feature of Indonesia's competition law is that it allows the Supervisory Commission for Business Competition to provide suggestions and advice on government policies and measures that promote anti-competitive practices or inefficiency. Since law enforcement requires anyway that the Supervisory Commission for Business Competition assess whether restraints on competition lead to reductions in consumer welfare or economic efficiency, such a standard could be equally applied to numerous government-based anti-competitive barriers and policy actions, especially those likely to conflict with the competition law, a central priority for the Supervisory Commission for Business Competition. Given its broad authority to investigate and its ability to monitor commercial conduct, the Supervisory Commission for Business Competition is best qualified to provide expert and well-informed analysis on competitive issues within the government.

Advocacy Areas

Activities may include the review of possible sources of public restraints on competition to provide advice in three principal areas: trade policies (tariffs and non tariff barriers, antidumping duties, countervailing duties and discriminatory export practices); investment policies (exclusionary lists, ownership restrictions, licensing requirements); and regulation (sectoral power, transportation, telecommunications; natural monopolies).

A Canadian participant pointed out that competition advocacy occurs in Canada where the Bureau often acts as competition advocate in a less formal but important manner. The Commissioner is often called upon to provide advice on the competitive market implications of policy options as they are being considered by politicians or government officials. Such advice can range from oral advice by Bureau officials to officials in other departments to Reports of the Commissioner to Cabinet Ministers, as well as testimony before House and Senate Committees. Advice has been provided in this fashion on matters such as financial sector deregulation, airport privatization, telecommunications and broadcast policy, electronic commerce and foreign trade/WTO issues. The speaker suggested that the Supervisory Commission for Business Competition should consider filling a similar role as Indonesia deregulates many of the same industries.

A word of caution on competition advocacy through the provision of advice was offered. Such advice is not risk free. The Canadian speaker explained that it is crucial to proper enforcement of competition law that the official charged with its enforcement remain independent from the political milieu. Many of the enterprises affected by the decision of the competition authority will have significant economic and political influence, particularly during the transition period from a market characterized by regulation or state-owned enterprises through the privatization and deregulation process to a market-based environment, the ability to exert influence is strong. The focus of a framework law must be the market and not particular incumbents. The Canadian Commissioner, for example, has recently come under attack for being too close to the political leaders in the sense of doing their bidding under the guise of enforcing the Act. Whether valid or not, such attacks illustrate the risks associated with the informal advisory role of the Commissioner.

Words of Experience

"Embark on the process with open eyes, moving from stable state monopoly or regulated environment is messy – competition is messy, markets are messy. Some old and familiar enterprises and practices will not survive, expect dislocation. Social policy bargains between industry and government are likely in place and will have to be dismantled."

"The impact on prices will not be uniformly down. When the regulatory matrix of cross-subsidies is unwound and consumers begin paying the market value of what they consume, some will pay more. Telecommunications and electrical energy sectors are good examples of systems involving cross subsidization. The urge to speak only in terms of lower prices to consumer will be great and must be tempered with the notion of paying market value."

Promoting Market Transparency

Competition policy is a multi-layered policy, and suggestions from the conference on transparency-enhancing activities that the Supervisory Commission for Business Competition could undertake were addressed according to these layers (i.e., the law itself, policies filling the gaps of the law, and policies to counteract the interventionist nature of governments.) Conference participants suggested that in formulating an agenda to promote transparency each layer of competition policy be included. An ideal transparency agenda would address each level individually and equally.

The *first layer* encompasses the legal framework that promotes a market economy by enacting legislation in such fields as commerce, contract and bankruptcy and then ensures the functioning of the market mechanism by adopting competition and its related laws. This first layer increases the legal stability of business entities and dealings, providing a level playing field for players in the marketplace. The most important role of the competition agencies in promoting market transparency at this level is to ensure that the competition law clearly prescribes relevant provisions.

The *second layer* encompasses the policy related to the legal framework of the competition law. This layer can further be divided into three sub-categories.

- The first subcategory is the policy to elaborate substantive rules in legislation, such as guidelines, the publishing of decisions on individual cases and advocacy activities. This subcategory provides firms with a concrete idea of what kind of practices fall within the legislation or on what conditions they are prohibited.
- The second subcategory is the policy increasing visibility of legal proceedings to prohibit unlawful practices. Activities include publishing the rule concerning law enforcement process, making clear to the public how the law is applied in practice, and other factors related to due process.
- The third subcategory is vigorous enforcement of the law. A law without enforcement would be worse than no law, due to its negative announcement effect on the market. Perhaps the most commonly cited way of encouraging transparency at this level is publishing guidelines, speeches, bulletins, advisory opinions, etc. – in short, informing consumers and businesspeople of the expectations and actions of the competition authorities. A word of caution is necessary: informing consumers should be balanced with the need to protect legitimate business interests. Information should be carefully considered before the decision is made to make it public.

The *third layer* contains the policy to counter interventionist policies, described above in the competition advocacy section. The clear responsibility of the government on the need for and efficiency of interventionist policies is the key to getting support from the market, and as a result, to enhancing transparency. Through competition advocacy, the competition agency can assist the government get these policies right.

Promoting Transparency at Each Layer

Layer 1. The Legal Framework

- Are relevant provisions of the competition law clear?

Layer 2. Policy Related to the Law

- Elaborate substantive rules in the law: guidelines, publishing decisions, etc.
- Increasing visibility of legal proceedings: promoting due process
- Vigorous enforcement of the law

Layer 3. Interaction with Other Laws

- Review of economic regulations and exemption systems from competition law, conducting advocacy activities

Country Experience

The conference participants drew on their own country's experience with promoting market transparency to offer suggestions of practices that might be useful to Indonesia. Insights and lessons from Germany, Canada, Japan, Taiwan and Peru are provided here.

Germany

The German Cartel Act provides various roles competition authorities and competition law play in promoting market transparency. The Act can apply to the State as well, such as to the acquisition of shares by the Federal government. One way in which the competition agency promotes transparency with the public and business actors is by holding discussions during investigations with the business world and the general public to ensure that as much information as possible is available on the activities of the accused players. These meetings are in addition to traditional intensive fact-finding and examination. Moreover, all activities of the Federal Cartel Office are reported at regular intervals, giving account of the work of the Office and providing information on the situation and development in its field of operation.

Canada

The discussion at the conference on Canada used the Canadian law and enforcement experience to demonstrate themes of balancing competing interests, striving for transparency and accountability, and enhancing process and substantive decision-making certainty.

Canada has a compliance-oriented approach that has been a hallmark of the Canadian competition policy. This approach proceeds on four assumptions: that most business people comply with the law; that a more adversarial approach has a chilling effect and great costs; that effective enforcement can often be achieved through a consultative approach by making it clear that the legal proceedings will be commenced when cooperation is not forthcoming or when undertakings are not honored; and that increasing certainty of process and substance is better for all concerned.

A significant part of Canada's Program of Compliance is communication of the Bureau's views, policies and resolution of cases. To that end, the Bureau issues, among other things, news releases in respect of important decisions, information bulletins, enforcement guidelines and speeches by the Commissioner. These steps are designed to promote certainty and increase transparency by informing the public.

Enforcement guidelines, for example, are at the heart of the educational side of the Program of Compliance. They are intended to help build information dissemination for the public as well as ensure internal consistency in the application of the Act. The Canadian participants suggested that in their experience, enforcement guidelines were of utmost importance, and that the Supervisory Commission for

Business Competition should design guidelines specific to Indonesia.

Ensuring transparency of the investigative and enforcement functions of the Canadian Bureau by the publishing of normative standards is also an effective means of holding accountable the exercise of the decision-makers discretion, while maintaining a flexible system that facilitates negotiated solutions to potential competition law problems.

While guidelines, speeches, information bulletins, backgrounders about cases, etc. are all made public, advisory opinions and confidential guidance are not usually made public to encourage greater use of the program. Highly sensitive commercial information that is submitted to the Bureau under the program of compliance is statutorily protected so that firms feel comfortable that the information they submit will remain confidential. At the same time, information that does not need to be protected and can promote consumer and business understanding of the rules is always published. For example, advisory opinions are often published subsequently in generic form since they can provide important information regarding the reasons for the Bureau’s principal conclusion. This practice of publishing information that may be of interest or help to consumers and businesses reflect a balancing act with promoting transparency and ensuring confidentiality that encourages businesses to use the program.

Another commitment to transparency can be seen in Canada’s numerous tools available to effect resolution where there is noncompliance, particularly in its clear mandates for gathering information during investigative visits. The Program of Compliance facilitates fact-gathering by providing an incentive for parties (i.e. speed, less expense and certainty) to provide as much information as possible voluntarily. Apart from the formal process to gather information, the Bureau makes extensive use of “field interviews” in which it telephones or meets with members of industry to gather views on issues such as market definition, barriers to entry and effective remaining competition. To increase impartiality and accountability, outside people with significant experience in the field or with specialized expertise (such as economists) are often brought in to perform thorough field investigations.

The Program of Compliance is not without its critics however, as the participants explained. Critics argue that the informal compliance-oriented procedures may, in a worse case scenario, permit certain forms of unchecked and even coercive conduct by the Commissioner and the Bureau in their dealings with parties. They suggest the broad discretion exercised by these bodies may also run counter to the principle of treating like cases alike, by permitting inconsistent treatment of arguably similar cases. Many others in the Canadian business and legal communities have recognized that there is not any track record of these concerns materializing given the objective and professional manner in which the bureau conducts its investigations. Moreover, the approach offers expeditious and less costly resolutions in many instances.

Japan

Like Canada, the Japanese Fair Trade Commission (JFTC) is developing tools to increase transparency by better informing the public of the Antimonopoly Act (AMA). One way in which the JFTC enhances transparency is by elaborating on the substantive rules of the AMA through guidelines. More than twenty sets of guidelines have been published to date. These are, for example, guidelines on distribution and business practices, on intellectual property rights, on government procurement to avoid bid riggings and on mergers and acquisitions. In making out these guidelines, the JFTC seeks views and opinions of interested parties, whether residing in Japan or abroad. In addition to the guidelines, the Japanese consumer and businesspeople are informed to the extent that legal measures taken by the Commission against violations are made public on the same day of measures. Measures to be published basically contain information on the names of violators, their practices, and provisions of AMA applied to them. The JFTC also publishes major consultations and replies to individual consultations, as well as publishes an annual report on enforcement activities.

Another way in which the JFTC promotes transparency is by increasing the visibility of enforcement proceedings of the act. The AMA clearly prescribes relevant provisions involving investigation and hearing procedures to respondents, types of legal measures than can be taken to violators and organization and powers of the Commission. Investigation procedures specify the mandate of the Commission and provisions securing the rights of a respondent are prescribed. In this way, transparency in enforcement proceedings is guaranteed both ex ante and ex post. The AMA also prescribes that the JFTC is an independent administrative body. This systemic nature of independence helps ensure the enforcement of the Act exactly in accordance with its provisions, thereby indirectly contributing to greater transparency.

Taiwan

Taiwan's Fair Trade Commission has played its largest role in promoting market transparency through its monitoring of the privatization process and through its role in deregulating industries and has had experiences similar to those that the Supervisory Commission for Business Competition may encounter.

A Taiwanese participant stressed that as the competition law enforcer, one of the most important duties of the Commission has been to monitor the operation of the newly privatized enterprises to ensure that these enterprises do not abuse their residual monopoly powers. The Commission has also helped advise administrative authorities when drafting the regulatory requirements of their industry. This ensures that the regulatory requirements of the administrative authorities are consistent with competition goals.

In the deregulation arena, the Commission established two task forces to identify the potential competition issues arising from newly deregulated markets, the 46-1 Task Force and the Deregulation Task Force. Since the Fair Trade Law (FTL) did not grant across-the-board exemptions, and instead only exempted certain firm behavior allowed by "other laws," the 46-1 Task Force of the Fair Trade Commission was formed to investigate and examine the existing "other laws" that provided a legal basis for exemption from the FTL. Through study groups and meetings with the relevant administrative agencies 122 provisions in 74 laws were recommended for amendment, of which a significant portion were undertaken. (The FTL has since been amended to provide that the FTL will not apply to acts performed in accordance with other laws only if the other laws do not conflict with the legislative purpose of the FTL).

The Deregulation Task Force, established in 1996, was more ambitious than the previous task force with its goal to carry out a deregulation program aimed at accelerating the deregulation process. The task force was responsible for enhancing the understanding of international trends, coordinating and conducting sector specific research, issuing a white paper and implementing the Commission's action plan. Twelve markets dominated by state enterprises were targeted by the task force for review. The initial findings were submitted to Taiwan's Cabinet by the FTC. The Cabinet then incorporated these reform plans into its regulatory affairs plans for consideration, and requested that relevant administrative agencies conduct further reviews and initiate implementation plans.

Peru

Innovative ways in which the competition agency in Peru (INDECOPI, National Institute for the Defense of Competition and Protection of Intellectual Property) promotes market transparency include, for example, its standardization and quality control service. This service is responsible for accrediting labs engaged in product certification, fostering the active participation of the private sector in drawing up technical norms, and becoming the custodian of national weights and measures standards. In addition, INDECOPI has created strategic alliances with public and private partners to ensure the effective transfer of institutional know how to overall civil society. Moreover, this transfer has the capacity to be very wide reaching since INDECOPI has decentralized offices which ensure wide access to INDECOPI's services. While INDECOPI follows a different model from others, its enormous success suggests that the Supervisory Commission for Business Competition may want to make a close examination of the model.

> "There will be tension and mistakes along the way. People will complain. While everyone says they want the benefits of a competitive marketplace, as consumers they may well continue to want government to protect them from the consequences of bad decisions. Expect this."

V. Developing Complementary Links: The Interface with Related National Policies

The interface of competition law with other national laws and policies can be a difficult area to navigate. In most cases, competition law can play a vital role in ensuring that other economic policies contain complementary economic objectives. In other cases, however, competition law can be a dangerous tool since, if not designed properly, it can work against competitive goals. Proceeding with the assumption that the goals of competition law should follow best practice and remain restricted to efficiency and consumer welfare, a significant portion of the conference was dedicated to the intersection of competition law and other related national policies.

The following sections explore the role of competition law as it interacts with small and medium enterprise development, consumer protection, investment, deregulation, privatization and decentralization.

Small and Medium Enterprise Development

Discussions on the interface of competition law and other laws necessarily raised concern at the conference that some Indonesian citizens may have confused the objectives of competition law with those of empowering small scale enterprises (SSEs), and perhaps even medium scale enterprises (SMEs). The Indonesian law explicitly exempts SSEs from various prohibitions, and appears to provide preferences to foster business for ethnic firms. Participants found this exemption difficult to reconcile with the thrust of the new market oriented SME programs. Cartel activities, it was pointed out, may result in monopoly behavior, which could negatively affect access and prices in these regions and markets.

By taking firm and consistent action against any anticompetitive behavior by dominant firm or a number of dominant firms, the competition law should be able to ensure a level playing field for both small and medium scale enterprises. A participant showed that such a stance would not be unique to Indonesia: South Korea's competition law aims at securing an equal development between large firms and SMEs but without protecting either category of firms excessively.

In Indonesia the development of viable SMEs has become one of the major development objectives of the new government for economic as well as social reasons. To achieve this objective, the government is preparing new efficiency and market oriented, demand-driven SME programs which, it is hoped, will be more effective than the more interventionist, welfare-oriented SME programs pursued thus far. These new SME programs will include the establishment of an enabling business environment for SMEs (by eliminating the policy and procedural impediments to SME operations) and better access to finance and appropriate business development services (in the field of management, training, technology and marketing.) These new SME programs, if designed and implemented correctly and consistently, should be adequate to encourage the development of a broad layer of viable SMEs without needing additional provisions in other laws, including the competition law.

Blanket Exemptions for SMEs

What happens when monopoly or cartel-like behavior by one SME harms another SME or their trading partners and consumers?

An Example from Central Sulawesi

- Only local private firms organized in Asmindo were authorized to control the trade of large-diameter raw rattan out of the province.
- This province's Asmindo acted as a cartel, as only the registered members of Asmindo were allowed to ship raw or semi-finished rattan out of the province.
- While this cartel was able to exert some market power vis a vis their buyers in Java or even in export markets, their real market power was exerted (as a monopsonist) with respect to the suppliers of rattan within Central Sulawesi.
- The suppliers were forced to go through Asmindo to ship their rattan out of the province. Not surprisingly, the trading margins for local Asmindo members were very high.

Speakers provided examples of how SMEs can illegally monopolize a regional or local market. One case was presented in detail, the Indonesian Furniture Association (Asmindo) in Central Sulawesi, see box above. This example highlights how monopoly or cartel-like behavior by SMEs can harm other SMEs, their trading partners and consumers.

Other participants pointed out, however, that because a blanket exemption is frowned upon does not mean that there should be no exceptions to the competition law at all. For example, in order to encourage innovation and employment, SMEs may need to cooperate with each other in order to reduce costs and share risks.

An American raised the example of the United States where antitrust laws do not obstruct joint arrangements aimed at creating new products or processes and raising efficiencies. At the same time, the antitrust statutes do prevent anticompetitive actions by firms whose goal is to prevent new businesses from producing more efficiently or making new, more competitive products. Thus the enforcement of antitrust statutes preserves the opportunities for SMEs to continue to play an important role in technological change and to profit from the fruits of new ideas and technologies.

Indonesia's competition law does provide a somewhat similar exemption with respect to cooperation agreements in the field of research. Similarly, Taiwan's Fair Trade Law permits exemptions for SMEs if concerted action improves operational efficiencies and/or strengthens the competitiveness of the SMEs and prior approval has been granted by the Commission. This type of exception appears less troublesome than the blanket exemption.

Consumer Protection

Recognizing the importance of consumer protection in promoting consumer welfare, many competition laws prescribe the protection of consumer benefits as one of the final objectives of the law. Whether implicit or explicit, the laws aim at providing a greater variety of goods and services with high quality and low price, by prohibiting cartels and other infringements that would otherwise raise prices for consumers.

In this respect, competition law can play an important role in consumer protection by means of addressing anti-competitive practices, especially in business to consumer dealings. An important issue in business to consumer dealings is coping with the information asymmetry between the two parties, since the business has more information than the consumer. Information asymmetry becomes even more amplified with the technological developments and deregulation, using new inputs or complex products such as financial services.

In response to the information asymmetry, many countries have been taking measures to protect consumers under competition law. Participants identified these measures and classified them into four categories:

- prohibiting anti-competitive practices in business to consumer dealings;
- prohibiting deceptive information;
- promoting information disclosure; and
- providing remedies for consumers harmed by false or deceptive information.

At the conferences, country experiences provided a deeper understanding of both the importance of consumer protection and means of implementation.

Japan

Japanese competition law has a number of provisions, and the competition commission wide authority, to protect consumers. In Japan, major practices that are prohibited that fall into the category of anti-competitive practices in business to consumer dealings (or business to business dealings closely related to the consumer) include resale price maintenance, restrictive practices among sellers, and restriction on parallel imports to prevent market access of new entrants.

With respect to resale price maintenance, the JFTC has been successful in abolishing an exemption that resale price maintenance used to enjoy under the AMA in a wide range of products (except for copyrighted products, which is limited to six types of products). In addition to the practices listed above, the AMA also prohibits related behavior. For example, the AMA prohibits the practice of inducing customers of a competitor by providing these customers with undue benefits in light of normal business settings. There was a case in 1991 where four large securities companies were reimbursing their good customers for losses they incurred in investments in order to maintain a business relationship with these customers. The JFTC rendered a cease and desist order following investigation.

Deceptive Advertising in Japan

In 1998, cease and/or desist orders were issued to 761 cases nationwide for violation of the second category of prohibited practices in consumer protection, deceptive information.

Examples include: a used car dealer rewound the mileage meters when selling cars, a company retailer put a seal of Italian flag with the words “Fabric in Italy” although the clothes were made in China, and in another case a manufacturer of air-purifying machines was found to be indicating higher levels of purification than was taking place.

Since failure to indicate important information to the consumer is prohibited in Japan under the AMA, disclosure of information is promoted indirectly. For example, a real estate agent failed to disclose that the property had a legal restraint prohibiting construction, but the advertisement for the property did not disclose such information and as a result the failure to indicate important information was found to be deceptive advertising.

Japan also has a fair competition code to promote further disclosure of information. Upon approval of the Commission, firms or a trade association can establish a voluntary competition code in certain kinds of products with a view to effectively avoiding unjust inducement of consumers, taking into account the features of the product. To date, 70 voluntary codes have been established. JFTC cautiously examines the codes and seeks public comments before approval.

Peru

The Peruvian Commission, INDECOPI, is somewhat unique because it has a more expansionary role in providing consumer protection than most countries. The agency has a specially-designated Consumer Protection Commission which is responsible for investigating and adjudicating consumer protection-related complaints. The Commission can start a procedure ex officio or on complaints filed by either of the parties involved. After adjudication, the Commission can fine violators heavy penalties. Evidence of its role is found in the number of complaints: complaints on consumer protection and unfair competition account for 90% of all cases since the Commission started operating.

INDECOPI is recognized as a leader both in Peru and by its neighbors for its role in conducting consumer education campaigns that enable consumers to actively defend their rights on the market as well as for its participation in the fight against consumer discrimination. Other than investigation and adjudication, one way in which the Consumer Protection Commission promotes such protection is through provision of services on information and training on markets rights. This includes providing training seminars and information programs for citizens and access to technological information database contained in patent documents.

Canada

Canada's principle instruments for consumer protection are rules that seek to increase information to consumers. One way in which Canada's competition agency counterbalances the information asymmetries between seller and buyer through false and deceptive advertising rules. Recognizing that advertising's potential as a tool, and its potential for abuse, has increased exponentially in today's technology world the Canadian Bureau has recently modified its laws to make it easier to bring and win a case of false advertising. The laws were modified to allow for a dual criminal and civil regime, where previously only criminal actions were available. False or misleading representations can be civil reviewable matters or criminal offenses, depending on the degree of severity. Telemarketing, double ticketing, multi-level marketing and pyramid selling are criminal offenses. Sanctions include fines and/or imprisonment. Sales above advertised price, promotional contests and similar activities are civil reviewable matters. Redress is done through cease and desist orders, publication orders or monetary penalties. While the dual regime is considered a positive reform, countries wishing to adopt similar practices should be certain that safeguards are in place to prevent the criminal adjudicative route being used as a threat to induce settlement on the civil side.

A Canadian participant noted that enforcement activities should be used with cautioned however: at one end of spectrum agencies should be vigilant, protecting consumer and economic welfare against cartel activity. On the other hand, the law should also be applied with caution and awareness of the evolving differences which exist in industries undergoing rapid technological change, provided that the conduct in question is fully disclosed.

Regulatory Reform

It was acknowledged that the guiding principle for deregulation should be that legislation should not restrict competition. For public utilities, for example, there is growing acceptance that only the distribution function (such as an electricity grid, a gas pipeline system or a system of railway tracks) possesses natural monopoly characteristics and thus need to be regulated. With the growing acceptance and success of the free market model, nearly all public monopolies will be targeted for reform. Competition authorities can play a large role in deregulation, primarily by providing expertise and dialoguing with industry regulators. Generally, practice in other countries suggests that this can be done on a formal level, through interventions, or on a less formal level through dialogue and cooperation.

In some countries, the competition agency may be granted by statute the right to intervene to offer advice on competition issues to regulatory commissions. Such interventions allow the competition authorities to bring a perspective to proceedings where the regulator or the parties may not have the required expertise or even the interest in addressing the market implications of the matter under consideration.

In Canada, for example, the Competition Act enables the Commissioner to intervene before any federal board, commission or other tribunal and provincial boards to provide input on the competition policy implications of the matter under review by the particular regulator. The Commissioner may make representations or call evidence in relation to competition issues relevant to the matters before the board. Once he has exercised his right, the Commissioner has the same status as any other intervener before the board. The main areas where intervention has occurred include: telecommunications, transport, financial markets, energy generation and distribution, postal services anti-dumping matters. As Canada deregulated its telecommunications sector, interventions were filed dealing with broad issues such as the appropriate regulatory framework post deregulation, network access and cross-subsidization to issues such as long distance rates and discounts.

As discussed in Part IV, competition agencies also may offer advice on a less formal basis. In Taiwan, for example, the Fair Trade Commission advises administrative authorities when they are drafting regulatory requirements of their industry to ensures that the regulatory requirements of the administrative authorities are consistent with competition goals.

In Japan, the Japanese Fair Trade Commission (JFTC) acts as a deregulation advocate by conducting fact-finding surveys on various regulated industries such as transportation (airlines, trucking, and taxis). Based on the findings, the JFTC works out proposals to the public regarding relaxation or elimination of regulations in the government's approval or licensing systems. While the JFTC is not in a position to carry out deregulation, expert advice offered on competition issues is used by the administrative agencies when they design deregulation plans.

Questions from the audience led speakers to emphasize that effective communication should not be targeted only at industry regulators: actions of regulators may cause uncertainty and risk for an investor. Communication should be with investors to assist the stakeholders in understanding the regulatory initiatives and requirements.

The discussion continued on prerequisites, such as the need for ensuring that before introduction of competition into a sector traditionally supplied by a public monopoly it is important to remove from public monopoly any responsibility for industry regulation and to re-locate industry regulation functions so as to prevent the former monopolist from enjoying a regulatory advantage over its rivals. Another consideration advanced was the importance of designing deregulation in such a way to prevent public monopolies are not simply converted to private monopolies because apart from the problems associated with a public monopoly, private monopolists have greater incentive to maximize profits with less concern for public policy considerations.

It was accepted by all advocates of deregulation that a key feature of reform should be to establish a mechanism to facilitate access to essential facilities. The mechanism has two main objectives. The first is economic, i.e. to improve economic efficiency by introducing competitive forces into certain essential facilities whose access is necessary for people to compete in upstream or downstream markets. To be successful this generally requires regulation or other incentives to guard against monopoly pricing, artificial constraints on capacity and anti-competitive behavior.

The subsidiary objective, one participant observed, is to establish light-handed regulatory procedures. Such procedures should be flexible enough to accommodate individual circumstances, not generate unnecessarily high administration and compliance costs but be binding on service providers and users.

When possible, regulation should be analyzed using cost-benefit analysis.

Suggestions for Indonesia

The government's current program of deregulation can provide the context for the Supervisory Commission for Business Competition to:

- initiate a comprehensive review of existing laws and regulations,
- develop a consistent set of criteria for their evaluation, and
- identify and evaluate the net benefits that they impose.

This would form an important step towards eliminating unnecessarily burdensome regulations.

In the medium term, the government will need to have access to consistent high quality advice in evaluating the costs and benefits of proposals for changes to commercial regulations.

In this context, it will be necessary to develop institutional mechanisms for the provision of this advice through a consistent framework for public or net benefit reviews of legislation that impedes competition.

Privatization

Unlike in the consumer goods industry, deregulation of utilities such as telecommunications and electricity raises the wider issue of privatization. In Indonesia privatization is particularly important since it is one of the main sources of financial resources for the state and there are currently 150 state-owned enterprises operating in a range of economic sectors mostly with some form of monopoly. Governments in general are eager to privatize to increase available monies for the state, and in Indonesia the budget deficit puts additional pressure for the government to privatize. The most important duty of competition agencies in the privatization process is to monitor the operation of the privatized enterprises to ensure that these enterprises avoid abusing any residual monopoly powers.

Speakers at the conference offered important watchwords on privatization to competition authorities that are directly relevant for Indonesia. The first suggestion is that governments should be careful not to rush privatization. Under pressure to come up with a significant amount of money to cover the deficit there is a temptation to start the reform program with privatization, but the experience of Britain (electricity, gas, water and telecommunication) has demonstrated that this is dangerous. Effective competition laws should be established before privatization so that privatization occurs with the proper capacity.

The second, related word of caution was that as governments may lose control of outcomes in a rushed agenda, prior operation of incentive-based regulation is essential. For example, where enterprises are natural monopolies or dominate their markets, unless reforms to market structure and incentive-based regulatory programs are designed and trialed while the enterprise is in government hands, the benefits of privatization may likely be wholly captured by the new owners. These two risks suggest that the government should be devoting considerable time and resources to backing competition law and competition authorities, not only for the present's sake but to safeguard future reforms and development against these threats.

In addition to ensuring that capture by the new owners does not occur, the competition authorities can also address the competition issues in the privatization process such as oversight of the maximum number of shares purchased by a single shareholder, reviewing the privatization regulations for conformity with market-based reform, etc.

Autonomy and Intra-Regional Trade

Ensuring free flows of goods and services within the domestic economy represents an important component of national competition law. This is particularly pertinent for a geographically large and diverse archipelagic country such as Indonesia. Many of the gains of national union are lost when localities can impose policies as though they were independent sovereigns because local governments often respond to local interests and naturally tend to favor them, even at the cost of the national interest.

Examples of local policies that can restrict internal trade flows include:

- tax barriers to inter-regional trade
- discrimination against out-of-region businesses
- bestowal of monopsony rights
- quantitative restrictions on inter-regional trade
- requiring in-region processing of exports
- regional allocation of markets
- forced partnership programs
- local benefits not provided to outsiders
- regional legislation with extraterritorial effects

The danger of local protectionism is in part because it is epidemic: local discriminatory and protectionist actions stimulate other localities to undertake defensive countermeasures and retaliations, all in a process of action and reaction that can spiral out of control.

The conference speakers on this topic shared many specific cases of anti-competitive local practices in Indonesia: quantitative restrictions on exporting livestock in Nusa Tenggara Barat, in-region processing requirements of cocoa beans and cashew nuts in South Sulawesi, regional allocation of tea markets in West Java, encouragement of partnership programs by Estate Crop Services Offices, discriminatory transportation policies such as requiring licenses not available outside the region as in South Sulawesi, grant of monopsony to PT Bima Citra Mandiri for sale of oranges.

While a well-intentioned competition law can attempt to fix problems of cartels, monopolies, etc., it can also be weakened in the face of decentralization initiatives that create power for local authorities, and as such room for local abuse. Indonesia is currently undertaking a comprehensive and ambitious decentralization program at the same time that it embarks on fostering a competitive economy. A conference participant warned that in decentralizing, Indonesia must take care that local autonomy strengthens, rather than weakens, nationhood and national competition policy.

Properly designed decentralization laws can be in harmony with competitive goals: for example, the provisions of Law 18/1997 now prevent provincial and kabupaten authorities from taxing agricultural products involved in inter-regional trade. As a result of this provision, the wedge between farmgate and market prices was reduced, and farmers were able to command a greater share of final wholesale prices.

Improperly designed decentralization policies can contradict the goals of competition law. An example is recent regulation involving consultants and government procurement. Nearly one third of consultants in Indonesia are domiciled in Jakarta. Responding to complaints from regional consultants and as part of the decentralization process in general, various measures were taken by the government to ensure local participation in projects. These measures had the effect of shifting the competitive criteria for winning government tenders from only technical capabilities, experience and price to consideration of factors such as firm size and place of domicile.

In Indonesia, current national policies regulating the types of tariff and non-tariff barriers that can be imposed upon domestic trade are piecemeal, open to misinterpretation and abuse and in many instances ignored by local governments. Conference participants offered a number of suggestions for Indonesia as it designs decentralization and competition policies:

- Consolidate all domestic trade policies, whether they be laws, regulations or government instructions, into a single law that explicitly prohibits the imposition of a variety of tariff and non-tariff barriers to internal trade.
- Devolving taxation powers other than trade, such as property of value added tax, from the center to the regions. At a minimum, provide strict guidelines to accompany any authority to tax interregional trade.

- Amending the Indonesian Constitution to provide for free internal trade and to secure the authority of the national government to override local action injurious to the national economy.

VI. Going Global: The Internationalization of Competition Law

The onset of globalization has brought with it new issues surrounding competition law. Economic integration has been facilitated by foreign investment in much of the world. Trade liberalization has lowered barriers and obstacles to entry for foreign products and services. Both factors have contributed to a changing marketplace that does not pay much attention to national borders. And yet, while competition law problems are no longer confined to national borders, enforcement remains largely within the realm of domestic action.

Question arise: how efficient can national competition enforcement be, focusing almost exclusively on effects within a nation's borders, in a world in which an increasing number of corporate transactions and practices have effects that are not confined to one jurisdiction? What role should national competition law assume for 'global' issues? This portion of the conference examined these issues and speakers proposed solutions to address global problems of competition.

There are many competition problems that transcend the boundaries of nations. These problems include mergers in truly transnational markets; duplicative, pile-on merger control; beggar-thy-neighbor nationalistic strategies; and systems clashes. One presentation at the conference addressed how nations could improve their coordination on a horizontal basis to minimize these problems.

While traditional solutions have been positive comity provisions and other horizontal government to government measures, the speaker believed that lack of sufficient horizontal government to government cooperation is not the major problem. Government officials acting for their governments, and sometimes also to solidify personal position, reputation or power, do not have sufficient incentives to treat larger-than-national problems as holistic problems of the wider community.

The problems of competition law she classifies into four categories: vision, proliferation, nationalism (externality), and systems clash.

The vision problem is that antitrust confined to national law obscures the full dimensions of world problems. For example, when the last two producers of seamless steel pipes appropriate for oil drilling in less developed nations planned to merge, neither they nor their home nations (Italy and Germany) had the incentive to protect China and the rest of the buyer market, and the buyer markets did not have the practical ability to protect themselves from monopolization. A proper vision requires a vision from the top.

The proliferation problem arises from the number of countries with competition laws, now approximately eighty nations. Approximately fifty require pre-merger notification and the lapse of a waiting period during which time the authorities analyze the merger. Firms whose business or conduct crosses borders often must comply with numerous national laws at once. These laws are not identical, and even identical laws have numerous interpretations and applications. In the area of pre-merger control, one small country (in terms of a merger's impact) can delay an entire transaction that has passed through the clearance process in some twenty or thirty other jurisdictions.

The nationalism (externality) problem occurs when nations make competition-law decisions based on what is good for the nation at the expense of the world. Possibly for nationalistic reasons, nations refuse to prohibit their nationals from doing abroad acts that are prohibited at home. This is so even where the nation into which the sales are made also condemns the conduct but finds enforcement beyond its practical power and resources. Moreover, nations selectively may fail to enforce their laws when the would-be defendants are nationals and the victims are foreign. An example of the nationalism problem is when a country supports an industry against foreign claims of a domestic market-blocking cartel or against foreign claims of domestic monopolistic exclusion of foreign firms.

The problem of systems clash arises when one nation allows what another nation prohibits. Systems clash may lead to hostilities, possibly culminating in a trade war. Since there are no overarching rules or protocols to channel behavior to alleviate such conflicts, and no rules for choice of law or jurisdictional priority, the most restrictive jurisdiction always wins.

These last two problems, nationalism and systems clash, were cited by a speaker who applied the problems of globalization to Microsoft (see box below). Discussions on the Microsoft case led to national solutions, for example that government officials should bear in mind that enactment of competition laws that are inconsistent with other jurisdictions can place exceptional burdens on global business. The Microsoft speaker said that government policymakers should make an attempt to harmonize their laws with other jurisdictions to the extent that harmonization is appropriate and consistent with important national interests.

Another speaker proposed two more solutions that addressed the problems internationally: education and more precision in existing international agreements, such as in the competition principles of certain WTO agreements.

Educational opportunities, she claimed, are waiting to be realized. The competition laws of nations are divergent, and to some extent this is so merely as a result of lack of information and understanding. Nations' laws tend to achieve greater convergence through cross-fertilization. Also, numerous developing countries that have recently adopted competition laws may need technical assistance and could profit from benchmarking and competition peer reviews. A firmer world infrastructure with a body of common understanding could lead not only to the anchoring of markets, but also to the strengthening of common cause, e.g., against both world cartels and local corruption and privilege.

Second, some WTO agreements now prohibit certain private or other commercial restraints, such as the General Agreement on Trade in Services and its

Telecommunications Annex. These agreements contain competition law vocabulary, such as “anticompetitive practices” and “abuse of monopoly position” without definition of these terms. The speaker explained that there is a particular need for the WTO nations either to adopt a choice-of-law principles in relevant WTO agreements or to develop common understandings of the competition concepts upon which market actors (e.g. telecommunications companies) can rely in conducting their affairs and upon which dispute settlement panels may draw.

Many measures would be useful in facilitating the enterprise of better and more nearly seamless competition policy for the world. GATT/WTO rules and concepts of transparency, proportionality, national treatment, mutual respect, due process, and a prophylactic principle in favor of openness, are among the most obvious. As markets become more integrated, the benefits of such disciplines will become more apparent, their adoption more natural.

While questions from the floor demonstrated that the debate is far from settled on the best route for internationalization of competition policy, a necessary factor for any solution, most agreed, is a global picture. A global picture gives further insight into problems that can be solved, and opportunities that can be seized, to enhance world welfare. While consensus did not emerge on how to internationalize competition law participants at the conference did welcome the idea of a global competition initiative that promotes education, perhaps a first step on the road to resolution.

Bringing Together the Global Picture: Views from a Multinational Corporation

A Microsoft participants addressed the issues of globalization, internationalization and national competition laws with respect to the effect on Microsoft. The global nature, strategy and products of a company such as Microsoft can quickly be compromised by inconsistent or inflexible national competition law requirements which would force Microsoft to localize products, marketing, etc. This has a dramatic effect not only on the MNCs such as Microsoft, but also on the consumer who faces fewer and less capable products.

Microsoft or its affiliates operate in virtually every country on the globe. Trade liberalization and other factors have made it possible for the company to market hundreds of products going through multiple distribution channels. Although reaching individual national markets all over the world, with limited exceptions, Microsoft's products are designed for the international market. The overall design, structure and features of Microsoft products are mostly uniform, based on international standards and not tailored to national markets, so users benefit from interoperability around the globe. Uniformity also means a small software developer can create a single new product that can benefit users not only in large markets like the United States and Europe, but also in vibrant and growing markets such as Indonesia, without having to engage in potentially costly efforts to design the product for each market.

In addition to uniform products, the core features of Microsoft's marketing and distribution practices are similar across the world. This is also important to a global business as this approach lowers cost of production, licensing and distribution thus enhancing Microsoft's ability to do business in emerging economies around the globe. This approach assumes a certain degree of harmony among competition policies, because if Microsoft had to follow a different distribution practice for every market where they do business, due to national laws, it would make doing global business prohibitively expensive.

Given the nature of a business such as Microsoft, inconsistent or inflexible national competition law requirements can slow the rate and quality of new product development, frustrate legitimate business objectives, and ultimately harm consumers. For example, if under a particular jurisdiction's laws, Microsoft or other software companies were forced to offer 'featureless' versions of their products each time that they released a new version incorporating a new feature, the number of software products that they would need to develop and support would grow exponentially in a short period of time and the market would soon be choked with multiple versions of the product. In addition, rather than developing a multitude of software products to conform to a particular country's laws, companies might instead decide to withdraw from markets with particularly burdensome requirements.

With the proliferation of new competition laws around the world there is an increasing threat that competition laws could be written or enforced in a manner that unintentionally blocks innovation since every national government has the power to adopt laws and regulations to regulate commerce within its borders. This threat is of particular concern to global businesses like Microsoft. The issue is how national competition and intellectual property regimes interact with one another in the context of integrated, worldwide business operations that cross many international borders and are subject to substantial competition oversight in other countries.

INTERNATIONAL CONFERENCE
COMPETITION POLICY AND ECONOMIC GROWTH: ISSUES AND OPTIONS
Shangri-La Hotel, Jakarta, May 22-23, 2000

SPONSORING ORGANIZATIONS:
The World Bank, GTZ , USAID, AUSAID, CIDA and The Asian Development Bank

Monday, May 22

OPENING SPEECHES

- Mr. Kwik Kian Gie, Coordinating Minister for Economy, Finance and Industry, Government of Indonesia
- Mr. Mark Baird, Indonesia Country Director, The World Bank

SESSION I: Competition Policy, Accountability and Transparency (Global Experience)

Chairperson: Mr. Erman Rajagukguk, Vice Cabinet Secretary, Office of the President, Indonesia

Speakers:
- Mr. R. Shyam Khemani, Group Manager, The World Bank
- Mr. Terry Winslow, Principal Administrator, Competition Law and Policy Outreach Program, OECD, France
- Ms. Sri Mulyani Indrawati, Director, Institute for Social and Economic Research, University of Indonesia

LUNCHEON and KEYNOTE ADDRESS: "Complementary Reforms to Ensure a Competitive Enabling Business Environment in Indonesia."
- Mr. Jaseem Ahmed, Asian Development Bank, The Philippines

SESSION II: The Role of the Competition Agencies in Promoting Market Transparency and Consumer Protection (Country experience)

Chairperson: Mr. Muchtar, Secretary General, Ministry of Industry and Trade, Indonesia

Speakers:
- Mr. Herbert Sauter, Former Director of the Anti-Cartel Office, Germany
- Mr. Takanari Yamashita, Deputy Director Int'l Affairs, Fair Trade Commission, Japan
- Mr. Kuo-yuan Liang, Commissioner, Fair Trade Commission, Chinese Taipei
- Mr. Armando Caceres, Chief Economist, Institute for the Defense of Competition, Peru
- Mr. Calvin Goldman, Former Director of Investigations, Competition Bureau, Canada

SESSION III: Promoting Efficient Markets through Effective Enforcement of Competition Law

Chairperson: Mr. Luis Tineo, Private Sector Advisory Services/Indonesia Country Team, The World Bank

Speakers:
- Mr. William E. Kovacic, Law Professor, George Washington University, United States
- Mr. Thee Kian Wie, LIPI and The Asia Foundation, Indonesia
- Mr. Roger Featherston, Partner, Mallesons, Stephen Jaques, Australia
- Mr. George Addy, Former Director, Competition Bureau, Canada

Tuesday, May 23, 2000

SESSION IV: Interface Between Competition and Regulatory Reform, Privatization, Investment and Unfair Practices

Chairperson: Mr. Gilles Menard, Former Deputy Director, Competition Bureau, Canada

Speakers:

- Ms. Mari Pangestu, Centre for Strategic & International Studies, Indonesia
- Mr. Ronald Adams, Former Director, Mergers and Assets Sales, Australian Competition and Consumer Commission, Australia
- Mr. Achmad Shauki, Researcher, LPEM/University of Indonesia, Indonesia
- Mr. Hideto Ishida, Partner, Anderson Mori, Japan

SESSION V: Globalization and Competition Policy

Chairperson: Mr. Terry Winslow, Administrator, Competition Policy Program, OECD, France

Speakers:

- Mr. Hassan Qaqaya, Competition and Consumer Protection Division, UNCTAD, Switzerland
- Ms. Rebecca Lenaburg, Associate General Counsel, Microsoft Corporation, South East Asia Region, Australia
- Ms. Eleanor Fox, International Trade Professor, New York University, United States
- Mr. Edward Graham, Senior Fellow, Institute for International Economics, United States

LUNCHEON and KEYNOTE ADDRESS: Private Sector Development in Indonesia
Mr. H.M. Rozy Munir, Minister of Investment and State Enterprise, Government of Indonesia

SESSION VI: ROUNDTABLE: Conclusions and the Way Ahead

Chairperson: Mr. R. Shyam Khemani, Group Manager, The World Bank

Discussants:

- Mr. Soy M. Pardede, Vice-President, Chamber of Commerce & Industry, Indonesia
- Mr. Gary Goodpaster, Partnership for Economic Growth, Indonesia
- Mr. Hadi Soehastro, Executive Director, Centre for Strategic & International Studies, Indonesia
- Mr. Didiek Rachbini, business consultant, Indonesia

INTERNATIONAL CONFERENCE
COMPETITION POLICY AND ECONOMIC GROWTH: ISSUES AND OPTIONS
Shangri-La Hotel
Surabaya, May 25, 2000

SPONSORING ORGANIZATIONS:
The World Bank, GTZ , USAID, AUSAID, CIDA and Asian Development Bank

OPENING REMARKS: Mr. M. Zuhdi, Vice Governor of East Java

SESSION I: Competition Policy, Accountability and Transparency (Global experience)

Chairperson: Mr. Bambang Adiwiyoto, Deputy Secretary General, Ministry of Industry and Trade, Indonesia

Speakers:
- Mr. R. Shyam Khemani, Group Manager, The World Bank
- Mr. Herbert Sauter, Former Director of the Antimonopoly Agency, Germany
- Mr. Gary Goodpaster, Partnership for Economic Growth, Indonesia

SESSION II: The Role of the Competition Agencies in Promoting Market Transparency and Consumer Protection (Country experience)

Chairperson: Luis Tineo, Private Sector Advisory Services/Indonesia Country Team, The World Bank

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- Mr. Achmad Shauki, Researcher, LPEM/University of Indonesia, Indonesia
- Mr. Paul Brietzke, Legal Advisor, Ministry of Justice, Indonesia

SESSION VI: Conclusions and the Way Ahead

Chairperson: Mr. R. Shyam Khemani, Group Manager, The World Bank

Speakers:
- Mr. Erman Radjagukguk, Vice Cabinet Secretary, Office of the President, Indonesia

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