Competition Law and Policy: Challenges in South Asia

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Foreword

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Competition—the process of rivalry between business enterprises for customers—is a fundamental characteristic of a flexible and dynamic market economy. By responding to demand for goods and services with lower prices and higher quality, competing businesses are pressured to reduce costs, increase productivity, and invest and innovate in processes and products. They do so by adapting existing knowledge to local contexts and by creating and commercializing new knowledge. Successful enterprises become stronger and more competitive—in both domestic and international markets. They also contribute to sustainable economic growth, development, and poverty alleviation.

Competition is not automatic. While it reflects the business conduct of enterprises, it depends on the business environment or investment climate in which they operate, including the legal and regulatory framework, barriers to entry and exit, and prevailing conditions in markets for labor, land, finance, infrastructure services, and other productive inputs. Moreover, even if most of the problems that enterprises in developing countries often confront in these areas were mitigated, competition is not necessarily assured. Competition needs to be maintained, protected, and promoted. Herein lies the role and importance of effective competition law and policy, the subject of this engaging report. As the authors point out, a well-designed and effectively implemented competition law and policy aims to reduce or eliminate impediments to competition that unnecessarily arise from public policy interventions by the government and restrictive business practices by the private sector. In addition to helping realize the benefits of competition, competition law and policy fosters broader and shared economic development, increases transparency in government-business relations, and limits opportunities for rent seeking and corruption.

More than 100 countries have enacted or significantly revised and strengthened their competition legislation. But in South Asia, only three of the region’s eight countries—India, Pakistan, and Sri Lanka—have formally enacted competition laws. In addition, India and Pakistan are significantly updating their legislation and institutions. Active discussions are also under way in neighboring countries, notably Bangladesh, Nepal, and Sri Lanka. Drawing on lessons from international best practice, this report is a timely contribution to informed discussions and improved policymaking.

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This report seeks to respond to the increased interest and demand from South Asian countries to improve their competition law and policy frameworks. In particular, the Government of Pakistan had asked the World Bank Group to help it prepare a competition policy report highlighting the need and importance of establishing a modern, updated competition law as part of its second generation reforms. Parts of this report reflect materials prepared specifically for this purpose. In addition, the Government of India has requested technical assistance in conducting sector-specific policy reviews and market studies to build staff and institutional capacity in the context of ongoing implementation support for competition law and policy. The Government of India has also requested information on international experience with broader competition policy implementation beyond law enforcement, including examples of more and less formal articulation of competition policy principles and their institutionalization. Bangladesh indicated its intent to pass a competition law in its recent Poverty Reduction Strategy Paper, and has also requested assistance from the World Bank Group in this regard. This report examines the main drivers of and impediments to effective implementation of competition law and policy in South Asia more generally, and proposes elements of a road map for moving forward.

The authors are grateful for the extremely helpful suggestions provided by formal reviewers of this report, in particular Harry Broadman, Paulo Correa, and Ioannis Kessides, as well as Simon Bell, Shantayanan Devarajan, Ejaz Ghani, Barbara Kafka, Eric Manes, and other participants in initial and final review processes. Initial findings of the report were shared at a Private Sector Development learning event on competition policy held in Washington, D.C. in March 2006. The report was edited by Paul Holtz.
There is growing recognition that a flexible, dynamic, competitive private sector is essential to fostering sustained and shared economic development. Just as sound macroeconomic management and good public governance are important prerequisites for economic stability and efficient government services, it is crucial to develop a competitive business environment for private firms. Promoting effective competition spurs firms to focus on efficiency and improves consumer welfare by offering greater choice of higher-quality products and services at lower prices. It also promotes greater accountability and transparency in government-business relations and decisionmaking, and helps reduce corruption, lobbying, and rent seeking. In addition, it provides opportunities for broadly based participation in the economy and for sharing in the benefits of economic growth. Without effective competition, firms are more likely to possess considerable market power—enabling them to earn excess profits and wield political influence to tilt public policy in their favor. Without effective competition, there are also likely to be distorted price and profit signals and increased risk of misguided investment and output decisions, which can have economy-wide repercussions.

This report focuses on the five South Asian economies that have shown the strongest interest in adopting or modifying their policies on competition: Bangladesh, India, Nepal, Pakistan, and Sri Lanka. It argues that encouraging and strengthening competition is critical for sustainable, private sector–led growth and poverty reduction. Competition policies are government measures that directly affect the extent of rivalry between enterprises and the structure of industry. Competition policies typically include both broader measures to enhance competition in local and national markets (such as liberalized trade policy, relaxed foreign investment and ownership requirements, and economic deregulation) and competition law (also referred to as antitrust or antimonopoly law) designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace.\(^1\) It is in the interest of every South Asian country to adopt and effectively enforce an appropriate

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\(^1\) Khemani and Dutz (1996). More than 100 countries have competition legislation. More than half of these have adopted or strengthened such policies since the early 1990s, but effective implementation varies due to factors such as inadequate resources, administrative capacity, and political will and support.
competition law. In addition, South Asian economies need to take credible steps to implement a more explicit, broader competition policy to attract more investment (domestic and foreign) and develop their national competitiveness.

The report is organized as follows. Section 2 discusses the benefits and challenges of promoting competition. It reviews evidence on the benefits of competition, argues that competition matters even more in less mature markets, and explores why competition often remains insufficient despite its obvious benefits. Competition deterrence is linked to the vested interests of people with political and economic market power—incumbent businesses, corrupt bureaucrats and politicians, protected workers in formal employment—who oppose the development of competition that would force uncomfortable economic changes. Section 3 focuses on some of the key barriers to competition in the five South Asian economies being studied, including insufficient openness to the world economy, regulations that constrain enterprise entry and exit, and other elements of the investment climate related to competition. Section 4 examines what these countries should do, based on international best practice in designing and implementing competition law and policy. Section 5 contrasts this road map with what the countries have done to date, presenting overviews of their competition law and policy implementation. Section 6 concludes the discussion and offers some recommendations.

The main conclusions and recommendations center on challenges of unfulfilled potential—namely, the contrast between the size of the potential benefits to South Asian economies from increased competition and the slow pace of competition reforms to date. All South Asian governments should seek to create business environments where business success is linked to underlying enterprise competitiveness. Doing so would ensure the sustainable entry and growth of enterprises based on productivity rather than political connections, enhancing job creation and growth of better-paying jobs.

South Asia has been relatively slow in adopting effective competition policies, and remains more closed than most regions to global competition, regional competition, and intense rivalry among domestic firms. Most South Asian economies have a legacy of public restraints and bureaucratic hurdles that impede starting and closing businesses, employing workers, getting credit, trading, and enforcing contracts. Corruption, and the attendant lack of a level playing field, is a top obstacle in most countries in the region. Powerful vested interests shared by favored firms and certain government bureaucracies, and their reluctance to remove public restraints and bureaucratic barriers to competition, are the main impediment to enhanced competition. Introducing effective competition laws and policies would ease this obstacle—but that can happen only with sufficient political will and support for change from pro-competition
stakeholders. That will require significantly enhanced efforts at strengthening “natural” allies of competition, including dynamic entrepreneurs and exporters that have gained from competition, as well as consumer associations and other representatives of civil society, buttressed by enlightened champions within government.

Three policy thrusts deserve special attention in all South Asian economies. First, as part of competition promotion, each country’s government should:

- Enact a national competition law and devote sufficient resources to adequately enforce it.
- Undertake strenuous competition advocacy efforts within government, focusing on facilitating understanding of the impact and reducing the most important competition-related barriers to doing business.

Second, as part of competition advocacy by business, the private sector should:

- Mobilize natural allies of competition (firms that have benefited from competition and have an interest in maintaining an open, level playing field) to provide political support for competition policies.
- Pressure governments to improve transparency and accountability in public procurement, aided by greater use of electronic procurement technologies.

Finally, as part of advocacy efforts at the regional level, governments and businesses should:

- Create opportunities to integrate markets through competition policy at the South Asia regional level, allowing a broader range of stakeholders to participate and so making it harder for a single group to block such initiatives.
- Establish a working group to develop an action plan to increase regional competition, including agreeing on principles of mutual interest for regional cooperation on cross-border competition, trade, and investment.
A Pro-Growth and Pro-Poor Benefits of Competition

Economies with competitive domestic markets tend to have higher levels and growth rates in per capita income (Figure 1). These economies also have lower poverty rates and

**Figure 1 Competition, Entry, and Economic Growth**

*Source:* World Bank (2002). Data are from the World Economic Forum and World Bank SIMA Indicators

*Note:* “Competition” is the average response by surveyed international business leaders in each country to the question, “In most industries, rate competition in the local market on a scale from 1 (limited, with rare price cutting) to 7 (intense, with changes in market leadership over time).” “Entry” is the average response to the question, “Rate the entry of new competitors in the local market on a scale from 1 (almost never occurs) to 7 (is common).”
attract more domestic and foreign investment. These conclusions are consistent with the broad empirical finding that barriers to competition impede innovation, growth, and prosperity.

Based on a detailed study of industries and companies across a broad range of countries, undistorted competition in product markets is the most important long-run determinant of productivity—and hence prosperity. Low education levels and limited capital do not appear to be binding constraints on productivity. Direct investment by top-class companies (domestic and foreign) can readily overcome such obstacles and allow workers to reach world-class productivity levels—if allowed to do so through open markets and a level playing field where efficiency and innovation are appropriately rewarded. India’s emergence as a major global center for automotive design and car and component manufacturing in less than a decade was the result of explicit policies to promote competition in this sector, showing the potential productivity benefits of competition (Box 1). Increased competition and investment have also led to higher employment and wages in India’s automotive sector. Similar productivity and employment benefits have occurred in other sectors that India has liberalized, such as telecommunications, consumer durables, domestic airlines, and information technology (IT) and software.

Although competitive markets can be fostered without enacting a competition law or instituting an explicit competition policy, effective competition law and policy can play an important role in protecting and encouraging competition. By helping to lower public policy and private barriers to entry and restraints to trade, competition law and policy can help create opportunities for broadly based participation in the economy. In addition, the lower prices that result from increased competitive pressures make goods and services more affordable. Indeed, various studies suggest that poor people often pay higher prices and receive lower-quality goods and services than do more affluent segments of society.

In terms of empirical evidence on the effectiveness and impact of competition law, the most-studied experience is that of U.S. antitrust enforcement. Based on an exhaustive review of examples of socially beneficial antitrust challenges by U.S. federal antitrust agencies to price fixing and other forms of collusion, mergers that appeared likely
Box 1 The Benefits of Increased Competition: India’s Automobile Industry

Despite the partial nature of India’s 1991 economic reforms and subsequent sector liberalization, they fostered increased growth, competitiveness, and domestic and foreign investment. Nowhere is this more evident than in the automobile industry, which in 2002 permitted foreign direct investment (FDI) up to 100 percent for the manufacturing of automobiles and their components, with no minimum capital investment required for new entrants. Once described by *The Economist* as producing outdated 1940s models referred to as “fossils on wheels,” today’s automobile industry accounts for:

- 4.0 percent of GDP in 2004–05, up from 2.8 percent in 1992–93.
- More than $13.5 billion in investments during the past decade
- Over $21.6 billion in annual turnover of automobile sales.
- Direct employment of 0.5 million workers and indirectly 10 million, compared with fewer than 100,000 before 1991.

While two decades ago Indian customers waited for five years or more to get a car, today they have a plethora of models to choose from in all price ranges, from economy to luxury. Abroad, Maruti Alto’s hatchback, manufactured in collaboration with Suzuki, accounts for 19 percent of the small cars sold in the Netherlands. India has also become a significant exporter of automotive parts.

The benefits of intense competition and increased investment have also stimulated innovation. Mahindra & Mahindra spent just $120 million to develop its fast-selling Scorpio model—one-fifth of what it would cost in Detroit (the Michigan city home to most major U.S. car makers). Similarly, Tata Motors developed its Indica model for $340 million, compared with a global development benchmark cost of $1 billion. As a result, India has emerged as major global center for automotive design as well as manufacturing of cars and components.


to harm competition, and monopolists that used exclusionary practices to obtain or maintain their market power—as well as a survey of empirical evidence on the value of antitrust enforcement derived from informal experiments on the behavior of U.S. firms during periods without such enforcement and the behavior of firms under different national competition law regimes—the conclusion was that: “Overall, the benefits of antitrust enforcement to consumers and social welfare—particularly in deterring the harms from anticompetitive conduct across the economy—seem
likely to be far larger than what the government spends on antitrust enforcement and firms spend directly or indirectly on antitrust compliance.”

At the international level there is compelling evidence that enforcing competition law, by prosecuting international cartels, has yielded significant gains to developing economies. One of the starkest examples is the estimated overcharge from an international cartel of vitamin producers between 1990 and 1999. The total value of overcharges from the cartel for imports into 90 economies was $2.7 billion—including overcharges to Pakistan of $36.8 million, India of $25.7 million, Bangladesh of $6.4 million, and Nepal of $1.2 million. There is robust evidence that cartel members imposed greater price rises and larger overcharges to customers from countries with little or no competition law containing tough penalties for cartels. Overcharges for vitamins and other essential goods and services consumed by poor people are disproportionately felt by them.

An examination of the potential and actual experience of competition law and policy in affecting pro-poor outcomes—and in particular, Millennium Development Goal (MDG) targets—highlights links between competition and three MDG targets: those on alleviating poverty, reducing hunger, and making available the benefits of new technologies. Such links are weaker between competition and the high-profile MDG targets on education, health care, safe drinking water, and medicines to control HIV/AIDS, malaria, and other major diseases. This is likely because competition policies affect these MDG outcomes only indirectly through their effects on markets, while policy observers and development practitioners tend to emphasize actions that result in direct improvements in MDG outcomes. This highlights the need for competition authorities and policymakers seeking to build support for strong competition policies to better analyze, document, and disseminate the pro-poor benefits of competition, to help raise understanding among all stakeholders—particularly those interested in achieving the MDGs. Doing so is perhaps the most important initial task of competition advocacy (see section 4B).

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6 Baker (2003). U.S. examples cited include a prosecuted international cartel of vitamin producers that resulted in overcharging to purchasers in the United States alone of at least $1.2 billion, and a prosecuted lysine (an additive to animal feed) cartel that resulted in overcharge to customers exceeding $75 million in the United States and $200 million worldwide. A study of soft drink bottling mergers found that acquisitions between horizontal rivals led prices to rise an average of nearly 13 percent in large mergers. And a settlement by the U.S. Federal Trade Commission with Xerox (which had been charged with monopolization) that required patent licensing in return for a small royalty opened the market to competition and innovation and led to substantial improvements in product quality and large reductions in price.

7 Evenett (2003).

8 Evenett (2006). This conclusion is based on 1,092 statements from MDG-related reports of UN agencies (rather than writings of experts sympathetic to promoting competition) that relate competition or its absence to various development outcomes.
B  Competition Matters Even More in Less Mature Markets

How important is promoting competition in less mature markets, such as South Asian economies, relative to more advanced industrial economies? And what are the most appropriate policies for promoting competition? To answer these questions, focus is placed on inadequate essential business infrastructure, both physical and institutional, as a key characteristic defining less mature markets.

To enter and expand ventures, enterprises require flexible access to basic business services. Largely local physical infrastructure that stimulates entrepreneurship includes traditional network industry infrastructure services and many others. Entrepreneurial activity generally requires that infrastructure services such as telecommunications and transportation facilities (such as roads) be available, flexible, and cost-effective. Increased availability and affordability of data and information services like the Internet, call centers, high-speed data networks, and collaborative tools facilitate efficient downstream entry. Many other inputs essential for entrepreneurial activities are local in nature, including production sites and related industrial real estate markets, financial services, transportation operations (such as trucking), distribution warehouses and other logistics-related facilities, semi-finished materials and parts, professional business services (legal, accounting, auditing, engineering, consulting, architectural, and other market-making services), and skilled workers. In addition, elements of institutional infrastructure—such as government rules on enterprise entry and exit, financial regulation, and customs enforcement—are affected by governance issues, including bureaucratic norms and corruption. Barriers to productive entrepreneurship are often likely to reside in less traditional but easier to address areas of the environment for doing business, such as the need to strengthen registries and introduce liens on movable assets (such as motor vehicles), to facilitate access to finance.

Among the traditional transmission channels between competition and enterprise growth is how enhanced rivalry can spur innovation among profit-maximizing firms and how competition can act as a disciplining device, inducing managers to adhere more closely to maximizing profits. In less mature markets inadequacies in essential business infrastructure services can impede entrepreneurship, making genuine competition even more important. Addressing such inadequacies is critical because it simultaneously fosters competition. While many firms may be able to overcome some of the problems of inadequate business infrastructure by internalizing certain costs

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9 Rey (1997).
and functions, other firms (especially smaller ones) may find this difficult—stunting the development of entrepreneurial, innovative firms.\(^{10}\)

Markets for basic business services are often thinner in less mature markets; imperfections in capital markets are the best-known example. Due to more pronounced information asymmetries in credit and product markets, more significant contract enforcement problems, and weaker institutions, internal agency costs are likely to be much higher for firms. In such contexts, increasing competition may have a particularly favorable impact on growth. In particular, when agency problems become especially severe—as when the need for outside finance becomes so high that investors are reluctant to lend—more competition can increase investment and other credible forms of commitment.\(^{11}\) In addition, product market competition can substitute for debt-related financial pressure and external shareholder control. Such competition is even more important where external shareholder control is weak.\(^{12}\)

Another problem that is more acute when business infrastructure is inadequate is the vulnerability of essential local inputs to monopolization. Opportunities for foreclosure are often greater in emerging markets given the legacy of strong government intervention and weak governance, with captured or otherwise dysfunctional public institutions restricting the scope of market interactions. Elites might control local markets and have financial incentives to block would-be entrepreneurs from accessing needed inputs. Such foreclosure could be more profitable for local input monopolists than selling inputs at suitably higher prices for a variety of reasons, such as facilitating price discrimination or denying economies of scope with other markets where monopoly power can be effectively entrenched. Facilitating access to essential business inputs should be a prominent aspect of competition policy, in terms of both law enforcement and a more wide-ranging competition advocacy mandate.\(^{13}\)

\section*{C Deterrents of Competition and the Tyranny of Predatory Vested Interests}

Despite the benefits of competition and its increased importance in less mature markets, insufficient competition persists in many contexts. Most developing economies,

\(^{10}\) Dutz (2005) provides evidence on how competition and innovations in upstream business services provide significant downstream benefits in terms of new entry, entrepreneurship, and innovation.

\(^{11}\) Aghion and others (1999).

\(^{12}\) Nickel and others (1997).

\(^{13}\) For a more detailed discussion of these ideas, see Dutz, Ordover, and Willig (2000).
including those in South Asia, share a number of structural, institutional, and governance characteristics, such as:

- High domestic product market concentration and barriers to entry and trade, and limited rivalry among firms. Although markets for goods and services are being liberalized, these changes tend to be slow due to past government policies and interventions (such as industrial policy, tariff protection, licensing, preferential procurement, and the like) as well as structural features of the economy (such as small domestic markets and underdeveloped capital markets). This is further documented in Section 3 for the South Asian economies.

- Lack of an effective market for corporate control—that is, the process by which inefficient firm management is displaced through changes in ownership and mergers and acquisitions. This in partly due to restrictions on foreign ownership, lists of “reserved” economic sectors, and high ownership concentration.

- High ownership concentration and weak corporate governance. In many developing economies major corporations are owned by families or controlled by small groups of influential investors. For example, most of the 50 largest industrial groups in India are family owned and controlled. As a result few public shares are issued and traded.

These factors tend to reinforce one another and give rise to inflexible, inefficient industrial and financial market structures. They also have adverse implications not only for fostering effective competition and competitiveness, but also for governance at both the state and corporate levels—and for the persistence of an anti-competitive nexus of mutually supporting vested interests between incumbent firms and government, with some of the earned rents used to entrench market power by buying government favoritism. Since firms tend to be large in size and few in number, they have organizational and financial advantages in influencing legislation and regulation. In more advanced countries with a depth of informed opinions, competing interests, and independent media, powerful commercial interests may not always prevail. But in most developing countries, including some South Asian ones, competing opinions are more limited. In such contexts interest groups are more likely to succeed in furthering their agendas.

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15 On India, see Piramal (2003). A survey of nearly 3,000 firms in nine East Asian economies found that more than half are controlled by a single shareholder. Also Prowse (1998) and Claessens, Djankov, and Lang (1998). In OECD countries, by contrast, most publicly trade companies are widely held (except in Belgium, Greece, Portugal, and Sweden).
The close connection between economic power and political influence is widely recognized. The successful resistance of public enterprises to privatization programs, for example, has been encountered over a wide spectrum of cultural and economic environments—from Ghana to India and Thailand. Another example is the successful opposition of domestic bankers in many countries to competition from foreign banks. Even during East Asia’s 1997–98 economic crisis, major conglomerates in the region were able to water down unfavorable reforms and delay their implementation.

The ability of corporate elites to resist policy reforms is cause for concern. As noted, inadequate competition limits access to capital by new or small businesses. Lenders and investors understandably prefer more established firms with significant business advantages. Over time, industrial structure may become skewed, with a few large conglomerates dominating the economy and a large number of small firms struggling, with few prospects for growth. Another concern is that when distorted prices guide business decisions, the pursuit of profits may be detrimental to social welfare. Profitable operations based on domestic prices may actually produce a loss when inputs and outputs are valued at world prices—as with many commodity monopolies in Africa and politically connected conglomerates in East Asia.

In India major concerns have emerged about the strong influence that private conglomerates wield “behind the scenes” to undermine liberal economic reforms. In the past these conglomerates operated comfortably under a system of market cartels in concert with large public enterprises. But uncompetitive sales of privatized public enterprises and policies favoring incumbents pose “the danger that the Indian economy’s pre-liberalization system of public sector dominance will give way to dominance by private monopolies or to a system in which the leading conglomerates carve out separate territorial jurisdictions.”

Vested interests exist not just in the private sector but also among various political and other groups with economic interest. The political economy of reforms and development in India has been strongly influenced by three “proprietary classes”—industrial capitalists, rich landlords and farmers, and the civil and military bureaucracy—that form an “elaborate network of patronage.” In the interests of “inter-group equity,” some Indian policies are essentially anti-market, reflect a deep suspicion of competition, and work against market and allocational efficiency. A similar political economy is reported in Pakistan, with “military capital” playing a prominent role. As Rajan and Zingales (2003) state: “The corrupt version of capitalism—when powerful corporations deliberately

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18 Nadvi and Sayeed (2004).
try to eliminate healthy competition to preserve their privileged position—generates economic inefficiencies and social injustice, thereby undermining political support for the free-market based system.”¹⁹ The authors also observe that “while everyone benefits from competitive markets, no one in particular makes huge profits from keeping the system competitive and the playing field level…Without a strong political constituency supporting them and under the continuous pressure of vested interests, markets are always too restricted, never too free.”²⁰

Competition law and policy can mitigate some of the adverse effects of the structural and other characteristics prevalent in developing economies. Economies with more effective competition law and policy have lower levels of market dominance by large firms. The least developed countries tend to have the highest levels of market dominance and the least effective competition law and policy; they also rank low on the World Economic Forum’s business competitiveness index. Moreover, the more effective is competition law and policy, the greater is local market competition.²¹ In addition, countries with competition (antitrust) laws score better than those that do not on the Heritage Foundation’s index of freedom of economic life/action. They also score better on the Freedom Foundation’s index of political freedom.²²

¹⁹ Rajan and Zingales (2003a).
²⁰ Rajan and Zingales (2003b, p. 311). The authors argue that competitive financial markets are perhaps the most critical factor for sustainable economic development. Vibrant financial markets threaten sclerotic corporate establishments and increase corporate mobility and opportunities—which translate into personal freedom and economic development for more people. Elites restrict access to capital and severely limit not only overall economic development but also that of individuals. In the end such vested interests backfire, as the excuse for suppressing competition to reduce risk results in lack of innovation and increased exposure to market downturns.
²² Carlton (2003).
There is considerable diversity among the five South Asian countries that are the focus of this study, compounded by significant diversity within each country. This section focuses on barriers to competition in these economies—particularly the insufficient openness of most of them to the world economy, regulations that constrain enterprise entry and exit, and other elements of the investment climate related to competition, based on enterprise surveys. What is perhaps most striking is that, despite the diversity, there is considerable commonality across these economies relative to selected international benchmarks for a number of the barriers—such as relatively low foreign direct investment (FDI), protection from dismissal for formal sector workers at the expense of large pools of equally qualified underemployed workers, regulatory complexity affecting cross-border trade, inefficient contract enforcement, and insufficient access to electricity. The commonalities in some of these barriers are at least partly related to the predatory vested interests discussed in Section 2.

South Asia is more closed to international and domestic competition than most other regions. As shown in figures 2–4, South Asia has high tariff protection, low openness to international trade, and low FDI and information flows. Figure 2 provides average tariffs for all products and for agriculture for the South Asian focus countries in 2002–05, benchmarked against China. Despite the tariff liberalization that began largely in the 1990s, by world standards the South Asian countries are still among the most highly protected—except for Sri Lanka (though its agriculture tariffs are exceptionally high), they are all among the top 20 percent of 139 developing countries.

Figure 3 highlights how South Asia also lags in openness to foreign competition, based on imports and exports of goods and services as a share of GDP in 2004. The region’s low openness to foreign trade (again, except for Sri Lanka) relative to East Asian and Pacific countries is driven partly by tariff and nontariff barriers, but also by other regulatory and infrastructure barriers to trade—including, as discussed below, procedural requirements for trading and bottlenecks in port and road infrastructure.

23 Although these data improved significantly for some countries during 2004–06, comparable data for East Asia and Pacific countries also improved during this period.
24 See table 3.4 in World Bank (2004b, Vol II, p. 35). In figure 2 the China data are for 2002, with China used as a benchmark for tariff comparisons rather than East Asia and the Pacific for lack of regional data.
Figure 4 presents a similar closed picture in terms of openness to foreign investment and access to information flows, based on FDI as a percentage of GDP and on fixed and mobile phone subscribers per 100 people in 2004. South Asian countries receive less than half the average share of FDI to East Asian and Pacific countries. India's meager FDI of 0.8 percent of GDP is just over one-quarter of China's share, which is above the East Asia and Pacific average. Nepal has extremely low FDI as a share of GDP. Finally, South Asia lags enormously in terms of access to information flows (as proxied by fixed and mobile teledensity). Bangladesh, Nepal, and Pakistan have the lowest teledensity, and India's teledensity of 8.5 is one-sixth of China's (which again is above the East Asia and Pacific average).

Source: World Bank 2006a
Figures 5–10 provide compelling evidence on the region’s legacy of public restraints and bureaucratic barriers to competition by comparing the severity of those regulations that most constrain enterprise entry and exit in South Asia with regional benchmarks from East Asian and Pacific and OECD countries, in six areas: starting a business, employing workers, getting credit, closing a business, trading across borders, and enforcing contracts. These areas are critical to ensuring effective supply responses and curbing the market power of incumbent firms. That competition barriers need to be addressed at the local level is highlighted by the range of variation in severity of regulations constraining enterprise entry and exit across cities within the same country. In India the average ranking across 10 regulatory indicators varies by 26 places in global rankings (from best-ranked Bangalore and Hyderabad, tied for 108th place, to Kolkata, at 134th), in Pakistan by 34 places (from Karachi at 74th to Quetta also tied at 108th), and in Bangladesh by 14 places (from Dhaka at 88th to Bogra at 102nd). Wherever there is scope for local variation, the focus on competition problems must be at the local level since problems typically occur where opportunities for pressure by vested interests are greatest.

- **Starting a business** identifies the legal and bureaucratic hurdles that entrepreneurs must overcome to enter—in particular, the number of procedures required to register a firm and the number of days spent completing entry requirements (Figure 5). Business registration is typically a critical prerequisite for access to a range of complementary market infrastructure, including finance, physical infrastructure (such as electricity and water), and contract enforcement. The higher is the number of procedures, the greater is the scope for enforcing them unevenly across enterprises. As a region, South Asia performs comparatively well in regulations on starting a new business. But India and Pakistan, with 11 procedures each, and Sri Lanka, requiring 50 days on average to complete entry procedures, still compare unfavorably with the East Asian average of 8.2 procedures, the OECD average of 6.2, and especially Australia and Canada, which require only 2 procedures and no more than 3 days. There is also considerable variation across cities within some countries. While the reported number of days to start a business in India is 35 in Mumbai, it is 51 days in Kolkata and 52 days in New Delhi and Bhubaneshwar (in the state of Orissa). Although India has liberalized enterprise entry significantly since the early 1990s, there are still some key service subsectors subject to FDI ceilings, and some business and retail service subsectors with FDI restrictions. Furthermore, industrial licensing restrictions and controls remain in the sugar, petroleum refining, fertilizer, and

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25 For local data on variance in restraints across 12 cities in India, 6 in Pakistan, and 4 in Bangladesh, see World Bank (2007). Averages across restraints by city mask more significant variations across cities for individual restraints.
drug industries, and 326 industrial items in various sectors remain exclusively reserved for production by small-scale enterprises.\textsuperscript{26}

- \textit{Employing workers} measures the flexibility of labor regulations—in particular, the difficulty of hiring new workers (using a 0–100 index, where a higher value indicates more rigid regulation, such as limits on the use of term contracts) and the cost in weeks of wages for firing redundant workers (or for replacing less productive formally employed workers with better-qualified workers) (Figure 6). Of 175 countries, Sri Lanka ranks 98\textsuperscript{th}, India 112\textsuperscript{th}, Pakistan 126\textsuperscript{th}, and Nepal 150\textsuperscript{th} in the ease of hiring and firing workers. South Asia ranks particularly poorly in terms of redundancy dismissal regulations, with firing costing 90 weeks of wages in Nepal and Pakistan, and 178 in Sri Lanka—compared with the East Asian average of 42 and the OECD average of 31. Sri Lanka is the most expensive place in the world to dismiss workers, after Zimbabwe, Sierra Leone, and Egypt. In New Zealand and the United States, in contrast, the cost of dismissing redundant workers is zero. India has 47 central laws and 157 state regulations that directly affect labor markets,

\textsuperscript{26} Planning Commission (2006, p. 34).
often inconsistent and at times overlapping. Restrictive labor regulations are costly in terms of lost enterprise entry, expansion and adjustment opportunities, and formal sector jobs, with workers pushed into the informal sector.\textsuperscript{27}

- **Getting credit** here covers credit information registries—both public credit registry and private credit bureau coverage as a percentage of the adult population (Figure 7). Enterprises consistently rate limited access to credit as one of the main barriers to operations and growth, with uneven access constraining competition from rewarding the most productive firms. Better information on potential borrowers’ creditworthiness helps improve such access.\textsuperscript{28} South Asia falls far behind in the availability of credit information, having the world’s lowest coverage for both public and private registries: only 0.1 percent of the South Asian population is covered by public registries and 1.3 percent by private bureaus, compared with 3.2 percent and 10.1 percent in East Asia and the Pacific and 10.1 percent and 60.8 percent in OECD countries.

- **Closing a business** tracks legal, procedural, and administrative bottlenecks in the bankruptcy process—in particular, the time required to complete a bankruptcy and how many cents on the dollar claimants (creditors, tax authorities, and employees) recover from an insolvent firm (Figure 8). Enterprise exit is particularly onerous in India in terms of time (10 years, the longest in the world, and in stark contrast to the OECD average of 1.4 years) and in terms of recovery rate (13 cents on the dollar, in contrast to the OECD average of 74 cents). Central authorities need to recognize the variance across cities in their countries: in India time and recovery rates are 7.3 years and 19.5 cents on the dollar in Bangalore, but 19.6 years and 5.5 cents in Kolkata.

- **Trading across borders** examines procedural requirements for exporting and importing a standardized cargo of goods, and serves as a proxy for restraints impeding indirect local pro-competition spillovers from export rivalry and direct entry from foreign enterprises through import competition, as summarized by the number of days needed to comply with procedures required to export and import goods (Figure 9). Trading across borders is slow and complex in South Asia, with Bangladesh ranked 134\textsuperscript{th}, Nepal 136\textsuperscript{th}, and India 139\textsuperscript{th} worldwide in terms of these trade costs impeding competition. Every container is opened in Nepal and Sri Lanka, in contrast to 5 percent of imports undergoing inspection in OECD countries.

\textsuperscript{27} Based on a study of differences in labor regulations across states, World Bank estimates suggest that India failed to create about 2.8 million formal manufacturing jobs due to just two clauses of its Industrial Disputes Act—about 45 percent of all formal manufacturing jobs currently existing. See World Bank (2006d, p. 25).

\textsuperscript{28} For evidence that improving credit information and laws to create and enforce collateral not only strengthens the rights of creditors but also benefits deserving borrowers by increasing their chances of getting credit, see Djankov, McLeish, and Shleifer (forthcoming).
countries. Bangladesh and India rank especially poorly in terms of time needed to comply with import procedures, at 57 and 41 days respectively (requiring 16 and 15 separate documents for import)—in contrast to an average of 26 days in East Asian and Pacific countries and 12 days in OECD countries. The variation in time to import is particularly stark in Bangladesh and Pakistan, from 24 days in Chittagong to 57 days in Dhaka, and from 19 days in Karachi to 42 days in Peshawar and Quetta.

- **Enforcing contracts** explores the efficiency of enforcing a simple commercial contract in terms of number of procedures and days from when a lawsuit is filed in court until enforcement of the judgment (payment; Figure 10). Inefficient courts create an uneven playing field and especially inhibit new entrants—including foreign investors and small businesses, among others—by constraining access to favorable financial terms on loans and slowing adoption of new technologies.  

Of the 10 areas of everyday business measured by the World Bank's *Doing Business 2007*, this is the one where South Asia performs worst, with Pakistan ranking 163rd, India 173rd, and Bangladesh 174th worldwide. Bangladesh and India are among the four countries in the world with the longest court delays, at 1,442 and 1,420 days to enforce a contract respectively. In Pakistan it is far more costly to enforce contracts in business centers such as Karachi and Lahore than in other cities, with a difference of more than 100 days between Karachi (880 days) and Lahore (875) relative to Sialkot (735) and Peshawar (730). Reported differences are even bigger in Bangladesh (1,790 days in Bogra compared with 1,373 in Khulna) and India (1,420 days in Mumbai compared with 610 in Bhubaneshwar, Orissa). During 2005–06 no reforms in procedures for contract enforcement occurred in South Asia.

In addition to these objective measures of regulation-based constraints to competition, it is useful to take into account what enterprise managers say about other elements of the investment climate related to competition. To enter and expand, enterprises require access to essential business services—both physical and institutional infrastructure. Figures 11–13 provide subjective evidence based on enterprise surveys on the inadequacy of business infrastructure in the five South Asian countries of focus.

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29 Figure 10.1 in World Bank (2006b) shows the negative correlation between FDI and time to enforce a contract. Qian and Strahan (2006) find that small businesses get better financial terms on loans when contracts can be enforced quickly and cheaply. Cooley, Marimon, and Quadrini (2004) find that new technologies are adopted faster when courts are efficient, since new businesses—as the predominant innovators—do not have the clout that larger firms do to resolve disputes outside courts.

30 These data are based on investment climate surveys of private manufacturing enterprises with varying degrees of representative sampling conducted in Bangladesh in 2002, India in 2003, Nepal in 2000, Pakistan in 2002, and Sri Lanka in 2004. Given that enterprise managers in a given country and year may have been more or less vocal in responding to constraints than managers in other countries, depending on their own requirements and expectations, comparisons of rankings of constraints across countries are more problematic than relative rankings within a given country.
relative to the average in OECD countries for three areas: access to electricity, access to communications and transport services, and access to “level playing field” enforcement by government (measured by the extent of bureaucracy and corruption).

- **Access to electricity** is a major problem for entry and expansion (Figure 11).\(^{31}\) In all five South Asian countries except Pakistan, electricity is among the top three obstacles to operations and growth, as reflected by the percentage of enterprise managers ranking it as a major or very severe obstacle. For Bangladesh, India and Sri Lanka it is the top obstacle; for Nepal it is the second, and for Pakistan it is the sixth (behind customs and trade regulations for Nepal and behind access to finance, tax administration, tax rates, corruption and policy uncertainty for Pakistan). In all these countries, getting access to an electrical connection is also much more problematic than in the average OECD country. And once connected, enterprises typically have to endure poor-quality supply, including frequent outages and fluctuating voltages—preventing entry into many lines of business that require constant power supply without the added (and less efficient) expense of investing in their own generator capacity.

- **Access to transport and communications services** also are major problems for many enterprises (Figure 12). To compete with their rivals, entrepreneurs need rapid, low-cost ways to get their goods to markets. Complaints about the access, quality, and cost of transport services focus on roads and ports. In Sri Lanka, for instance, 20 percent of urban manufacturing firms and 40 percent of rural firms indicated that transport was a major or severe constraint, with rural firms emphasizing road quality and access. Such constraints facilitate local monopolization. In Bangladesh the main complaint involves the port of Chittagong, where congestion, poor management, labor problems, and lack of equipment lead to ship turnaround times of five to six days, compared with one day in more efficient ports.\(^{32}\) In terms of communications, despite the rapid spread of mobile telephones in much of South Asia, access to a fixed line remains an arduous process in some countries. In Bangladesh enterprises that obtained a connection within the previous two years reported an average wait of 126 days, and Sri Lankan enterprises reported a wait of more than 48 days, with all countries above the OECD benchmark of 8 days.

- **Bureaucracy and corruption** can stifle competition by facilitating an uneven playing field (Figure 13). Corruption—also known as the “bribe tax”—is ranked as a key obstacle to enterprise operation and growth in Bangladesh, India and

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\(^{31}\) Electricity is the most striking area where most South Asia countries appear to be doing significantly worse than comparator countries; see World Bank (2006c). The main exception is Bhutan, where sizable hydroelectric assets are among its most important competitive advantages.

Pakistan. In Pakistan and India, the perception of an uneven institutional playing field is reinforced by the high response rate of managers on the “time tax,” with an average of almost 9 and 7 percent, respectively, of senior managers’ time taken away from managing the productive aspects of their firms, and rather spent dealing with government regulations and tax inspectors.

**Figure 11 Access to Electricity**

<table>
<thead>
<tr>
<th></th>
<th>Electricity is Major Constraint (% of Firms)</th>
<th>Electricity Access (Days for Connection)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bangladesh</td>
<td>73.2</td>
<td>66.3</td>
</tr>
<tr>
<td>India</td>
<td>36.0</td>
<td>20.0</td>
</tr>
<tr>
<td>Nepal</td>
<td>41.5</td>
<td>32.9</td>
</tr>
<tr>
<td>Pakistan</td>
<td>39.2</td>
<td>54.1</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>41.3</td>
<td>8.3</td>
</tr>
<tr>
<td>OECD</td>
<td>12.1</td>
<td>8.3</td>
</tr>
</tbody>
</table>

**Figure 12 Access to Communications and Transport Services**

<table>
<thead>
<tr>
<th></th>
<th>Transport is Major Constraint (% of Firms)</th>
<th>Fixed Line Access (Days for Connection)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bangladesh</td>
<td>24.2</td>
<td>126.0</td>
</tr>
<tr>
<td>India</td>
<td>7.1</td>
<td>9.3</td>
</tr>
<tr>
<td>Nepal</td>
<td>15.2</td>
<td>22.3</td>
</tr>
<tr>
<td>Pakistan</td>
<td>9.9</td>
<td>48.4</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>22.0</td>
<td>7.9</td>
</tr>
<tr>
<td>OECD</td>
<td>16.6</td>
<td>7.9</td>
</tr>
</tbody>
</table>

**Figure 13 Bureaucracy and Corruption**

<table>
<thead>
<tr>
<th></th>
<th>Corruption is Major Constraint (% of Firms)</th>
<th>Percentage of Time Dealing with Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bangladesh</td>
<td>57.8</td>
<td>3.7</td>
</tr>
<tr>
<td>India</td>
<td>28.0</td>
<td>6.7</td>
</tr>
<tr>
<td>Nepal</td>
<td>10.7</td>
<td>8.7</td>
</tr>
<tr>
<td>Pakistan</td>
<td>40.3</td>
<td>3.5</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>16.9</td>
<td>3.5</td>
</tr>
<tr>
<td>OECD</td>
<td>16.1</td>
<td>3.0</td>
</tr>
</tbody>
</table>


*Note:* The Nepal survey did not including questions on electricity access, fixed line access, and time dealing with regulations.
Having discussed the benefits and challenges of promoting competition, and reviewed some of the key barriers to competition in South Asian economies, this section focuses on what the region’s countries should do to promote it. International good practice in the design and implementation of competition law includes adopting an appropriate law, preventing private restrictive business practices through effective law enforcement, actively promoting competition advocacy to open markets, fostering compliance with the law and reducing regulatory burdens, and addressing a range of institutional sequencing and design issues.

An explicit legal framework helps safeguard and encourage competition. Across the world, numerous examples exist of tendencies by firms to thwart competition and monopolize markets—tendencies that cannot be effectively prevented without an effective competition law that injured parties can rely on to obtain relief. When countries enact an explicit competition law, they should keep the legal framework as simple as possible and avoid excessive precision, to allow the economic analyses and judicial processes that interpret the law to evolve flexibly in response to changing economic conditions. In addition, the recommended policy approach should place more emphasis on anticompetitive business conduct by incumbent firms rather than on large size in terms of market shares or assets.

Developments in the economics of industrial organization over the past three decades have led to a reassessment of the structural approach in the design and application of competition law and policies. In the absence of significant barriers to entry, high or increasing levels of market concentration are unlikely to result in anticompetitive business practices. In such situations, markets are likely to be contestable—that is, new firms will quickly enter the market if incumbent firms charge high prices and earn excessive profits. Moreover, large firm size could be due to economic efficiency and superior competitive performance.\(^{33}\)

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\(^{33}\) See Baumol, Panzer, and Willig (1982), and Goldschmidt, Mann, and Weston (1974).
A Adopting Competition Law and Policy

Competition law is a set of rules and regulations, supported by an institutional structure for enforcement, that preserve and promote competitive rivalry in markets. The foundation of competition law is increasingly based on analysis of the market power of enterprises in a relevant product and geographic market. In so doing, competition law seeks to constrain the ability of enterprises—acting unilaterally or collectively—from engaging in illegal business practices that profitably raise prices above the competitive level for a sufficiently long period to adversely affect the well-being of consumers. Although there is no definitive list of business practices and strategies that must be included in a competition law, three areas typically fall within the purview of most competition laws:

- **Cartel control**: measures related to agreements between enterprises in the same market that restrain competition.
- **Abuse of dominance**: measures related to attempts by large, incumbent enterprises to independently exercise or enhance their market power.
- **Mergers and combinations control**: measures related to consolidations of assets and business operations of two or more enterprises that may significantly lessen competition.

In many jurisdictions competition law empowers competition authorities to address the anticompetitive effects of government measures—or, more broadly, to promote competition through means not involving law enforcement. This is often referred to as competition advocacy, and as illustrated in Figure 14 and discussed in more detail.

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**Figure 14 Institutional Design Options for Competition Law**

![Diagram of Institutional Design Options for Competition Law]

- **Competition Law Enforcement**
- **Competition Advocacy**
  - Awareness Raising
  - Opinions
- **Private sector**
- **Judiciary**
- **General Public**
- **Universities and think tanks**
- **Civil Society**
- **Rule makers and regulators**
below, it entails providing opinions and pro-competition arguments to policymakers and regulators by engaging the competition agency with multiple stakeholders. Indeed, competition advocacy was the first function that India’s new Competition Commission (created in 2002) was empowered to perform.

Competition policies cover a much broader set of instruments than competition law, and typically include all policies aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers and opportunities for harmful coordination, to ensure that markets work effectively and serve the interests of all citizens. Competition law is only a subset of a nation’s competition policies. Competition policies typically include pro-competition approaches to trade, investment, sector regulation, and consumer protection. As illustrations, barriers to international or interregional trade, restrictions on FDI and technology transfers, restrictions on entry in regulated network utility industries, regulations affecting the registration of new enterprises and the taxation and corporate governance of existing enterprises, and rules on marketing practices all influence the extent of competitive pressures in markets and so are appropriate concerns of competition policies. In many countries competition agencies have become the focal point for consultations and putting forward pro-competition viewpoints across a broad range of policy areas.

Countries have taken a wide variety of approaches to competition policy. These range from no explicit articulation of competition policy beyond that articulated in the competition law to very formal articulations of competition policy principles and their additional institutionalization—with competition policy implementation (as opposed to competition law enforcement) often placed under a politically strong institution in the executive branch. Australia may have the world’s most explicit competition policies. The Hilmer Committee report (1995) recommended adopting a detailed quantitative assessment of the costs and benefits of enforcing competition through simplified regulations (for instance, liberalizing trade at the international, inter-, and intra-state levels by reducing tariffs and taxes). Incentives for reform implementation were designed, such as providing additional federal resources to states that achieved tax reduction targets, while compensation of short-term losers was also put in place. The Hilmer report led, among other measures, to a formal institutionalized process in 1995 known as the National Competition Policy. The core idea of that policy was that regulation—a significant portion of government action—should be subject to coordinated, systematic, and ongoing (annual) review. By focusing on anticompetitive regulations, the annual, coordinated regulatory reform process has increased Australia’s GDP by at least 2.5 percent.34

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34 See National Competition Council (2005).
B  Fostering Competition Advocacy

As noted, competition advocacy concerns itself with promoting competition beyond the enforcement of legislative controls on specific anticompetitive conduct and combinations by enterprises. In this sense, advocacy is about fostering competition in ways unrelated to law enforcement. It seeks primarily to reduce policy-based restrictions on competition and, more generally, focuses on the broader questions on the role of competition in the overall economy. It also seeks to encourage compliance with the law through information dissemination and cooperative initiatives with business—especially industry, trade, and professional associations.

Competition authorities should not have a monopoly on advocacy. To the contrary, such authorities should help ensure that other entities within government and more broadly within civil society assist in these tasks. Similarly, competition advocacy should not create an additional regulatory oversight or super-regulatory entity; advocacy is most effective when it helps limit inappropriate oversight of industry by other entities. The appropriate short-term priority for South Asian countries should likely be on regulatory reforms stressing simplification of regulations and deregulation to facilitate enterprise entry, expansion, and exit—helping build support for and reducing the types of barriers highlighted in Section 3.

Competition advocacy plays an important role in creating and strengthening effective markets. Ideally, a competition authority should be a country’s strongest public voice on promoting competition and articulating the competition perspective. Advocacy complements law enforcement by increasing competition throughout an economy. Furthermore, because both public and private constraints can be used to the same effect—namely, to give monopoly rents to selected enterprises—reducing private constraints will lead enterprises to rely more on public constraints. Thus effective competition policy must be able to move on both fronts.

This argument is even stronger in economies with a strong legacy of state intervention that have recently introduced competition policy—especially where laws limit the extent of enforcement. In such environments, effective competition advocacy can help create an environment where, over time, enforcement strengthens the role of markets by reducing government interventions and concomitant regulatory burdens. Thus advocacy may not just be a complement to enforcement, but an essential first step in expediting full, effective competition. Given that competition authorities typically lack sufficient political capital and reputation in their early years, and that policy-generated obstacles to competition are often maintained by support from powerful vested interests, initial advocacy efforts should focus on public restraints whose removal is subject to less debate, or that directly benefit entrepreneurs, exporters, and other stakeholders who can be counted on to provide strong backing and support. Special
attention should be paid to initiatives that directly or indirectly benefit as broad a base as possible. Finally, even if a country is not ready to implement a competition law, an entity should be vested with the authority to undertake competition advocacy—typically under a politically strong institution in the executive branch, as that branch would usually also be entrusted with the broader oversight of the country’s competition policies.

Competition advocacy should focus on increasing understanding among all stakeholders of the obstacles and benefits of increased competition by:

- **Conducting studies** in markets where competition does not appear to work effectively (because of public or private restrictions), either in response to a government request or based on the authority’s volition.
- **Influencing government policymaking and implementation**, by providing advice in instances where competition is absent or restricted, to ministers, government departments and agencies, regulators, and representative bodies. Such advice typically includes identifying and commenting on existing and proposed legislation, regulations, and policies of public bodies that constrain competition in the markets they affect. These areas can include trade and investment policies (such as on tariffs, antidumping duties, FDI restrictions, and intellectual property rules), sector regulations (such as telecommunications, transport, and oil and gas), reviews of proposed privatization, and operations of other central, provincial, and local government entities.
- **Raising public awareness** of the benefits of competition and the role of competition policy to deliver better economic outcomes, by championing competition more broadly to develop a “competition culture” in society.
- **Fostering compliance** with competition law to avoid unnecessary and costly litigation.

Essential to consistent messages on the role of competition is the ability to undertake rigorous economic and legal analyses of laws and regulations—analytical, reasoned, balanced, and well-argued. This ability helps create status and credibility for an authority, and so helps counterbalance vested interests opposed to change. Decisions on conducting such studies should be based on factors such as the economic importance of the market, indicators of possible competition problems, existence of private or public barriers to entry, degree of public interest, and the costs of conducting them.

Countries have adopted different approaches on how best to influence government policymaking and implementation, ranging from implied or informal understandings based on a general advocacy statement in the law to more explicit statutory underpinnings. Countries such as Canada, Italy, the Republic of Korea, and Russia assign their competition authorities legal mandates to submit their views on certain issues
to the appropriate ministry or regulatory agency. Such mandates range from making public opinions and recommendations to having veto power on policies that may limit competition (as in Russia, in terms of how proposed privatization transactions are structured) or providing no-objection screening to existing regulations (as in Italy and Korea). Many authorities have mandatory consultation on new legislation, regulations, or other government actions that affect competition. Such statutory powers can be made more explicit by supporting regulations that ensure, for instance, that the competition authority has a seat on the privatization commission or has the opportunity to review all privatizations—so that public monopolies are not transferred to private monopolies without appropriate restructuring, asset divestiture, or pro-competition change to the market structure in the relevant industry. An additional dimension to consider is empowering the competition authority to challenge public restrictions in the courts or other appropriate public forums. In Brazil, the European Union, and Mexico as well as in some transition economies in Central and Eastern Europe, the competition authorities are empowered to review and question local, regional and national legislation that unnecessarily impedes competition, and call for alternative approaches to be considered.

The precise processes through which these powers would be enabled may be best included in regulations subsequent to the publication of competition law. It will be critical to develop processes to ensure that implementation is workable, and allows the competition authority to have access to required information and focus on cases most harmful to economy-wide competition—without overwhelming its capacity.

Requiring at a minimum that the authority’s comments on competition issues are made public imposes desirable quality control, and ensures that the language of advocacy remains accessible—because it should be framed in a way understandable to the general public. A transparent publication requirement of all advocacy opinions also opens the process to third-party advocates of competition, and forces the arguments of vested interests into the open, imposing the same self-discipline on them. In selecting instances where to dedicate its limited resources for policy-related advocacy, the competition authority should start by picking cases where restrictions on competition are most obviously excessive and disproportionate. Some form of “proportionality test” can provide a consistent approach to pro-competition advice. The idea is that unnecessary restrictions on competition should be avoided—but where they are needed for other policy objectives, they should be the most effective instruments available and only involve restrictions that are unavoidable to achieve clearly stated goals.

Especially in the early years of a new competition authority and until a broad understanding of the benefits of competition develops in any country, the authority has a critical role to play in creating and strengthening its natural allies. Such allies can help
the authority champion the benefits of competition and facilitate its understanding of the greatest obstacles to competition. These allies, in turn, can help ensure that the competition authority is effective in its other tasks and not captured by vested interests. Education and constituency-building efforts should be directed, among others, at pro-competition interest groups—especially exporters, grassroots entrepreneurs (new entrants and rural or small firms without market power), and consumers, who all stand to gain the most from competition policy. Being able to take credit for having successfully championed the removal of a regulatory obstacle that impeded entry or access to an essential business service should help strengthen political support for pro-competition policies. Efforts to raise public awareness typically include training for judges, lawyers, government officials, and businesses, and outreach to universities, think tanks, consumer groups, and broader civil society through sponsorship of and participation in conferences and seminars, publication of guidelines, information notes and studies, and user-friendly, up-to-date Websites.

Opinions differ among practitioners on the priority that should be accorded to competition advocacy relative to the other functions of a nascent competition agency. One school of thought is that unless the competition law is vigorously enforced and guilty parties are penalized, the law and the competition agency will not be credible. According to this view, the competition advocacy arguments will not carry any weight in government or business decisions until the agency has achieved credibility based on effective enforcement. A somewhat complementary viewpoint is that new competition agencies should not initially be too active in either advocacy or enforcement. According to David Lewis, Chairman of South Africa’s Competition Tribunal, enforcement priority should be given primarily to evaluating mergers and acquisitions:

[A] strategy aimed at building a new competition authority should not rest on advocacy or enforcement, because both draw heavily on experience and technical competence and they require the reserves of political capital that enable even the most powerful antitrust regime to absorb the inevitable setbacks that are associated with these activities. New antitrust authorities are possessed of neither experience, nor wide-ranging technical competence, nor bountiful reserves of political capital…Merging firms have incentives to conclude their transactions as expeditiously as possible and the parties voluntarily cooperate with and provide relevant information to the competition authorities. Firms opposing a specific merger transaction also do the same, so there is less burden and use of formal powers to gather evidence by the authorities. Moreover, merger transactions provide an opportunity to the staff to learn about how industries and markets function, which can assist them in analyzing
more complex anticompetitive situations in the future. In addition, since the bulk of economic studies indicate that little value is created for shareholders of acquiring firms, the commercial and economic consequences of erroneously prohibiting a merger may not be very large. (Speech at Fordham Corporate Law Institute, 2004)

But South Africa’s economy is not typical of most developing economies. It has reasonably well-developed physical and business infrastructure, as well as sophisticated companies and management, business press, civil service, and related institutions. The authors of this report disagree with Lewis’s arguments as being generally applicable, and believe that new competition agencies need to be cautious about vigorously enforcing the law—including merger provisions—until appropriate institutional capacity, staff skills, and knowledge are developed. Too vigorous initial enforcement of competition law could prevent the efficient economic restructuring and adjustment process that usually occurs as governments deregulate and liberalize markets. An appropriate balance has to be struck, but the starting point should be to win support for competition law and policy among various stakeholders in government, business, and civil society.

C Institutional Sequencing and Design Issues

When should competition law and policy be introduced as part of a government’s economic and regulatory framework? There seems to be consensus among competition policy experts that the appropriate institutional sequencing is to introduce a competition law and policies as early as possible, because otherwise the broadly based public benefits that usually accrue from pro-market reforms may become distorted and reaped by private interest groups. Without an effective competition law and policies in place, consumers and businesses that are victims of anticompetitive practices will have no explicit measures available to seek relief. This proposition would also apply in post-conflict economies such as Afghanistan, where various laws and institutions have yet to be formalized. In such cases the need for a fully fledged competition law may not be initially feasible.

Still, it may be important to at least start with strict provisions aimed at prohibiting and penalizing collusion and bid rigging in government procurement. Governments are among the biggest buyers and consumers of goods and services, and taxpayers are often the victims of anticompetitive business practices, corruption, bribery, and conflicts of interest. Moreover, most competition cases, even in jurisdictions with longstanding competition laws, tend to be based on complaints by firms forced to pay high prices for inputs because of illegal price fixing and bid rigging, or denied access to vital markets and distribution channels by other businesses.
Several institutional design features should be considered to support effective implementation of competition law. In Canada, the United States, and the United Kingdom a mix of criminal procedures and civil and administrative procedures has been used to administer and enforce competition law—while other jurisdictions (primarily Europe, India, Latin America, and Pakistan) rely solely on administrative procedures. In both legal approaches, horizontal price fixing and collusive bidding agreements are strictly prohibited and subject to severe penalties. The treatment of other types of horizontal restraints, such as geographic market allocation, parallel pricing, and output restrictions, varies across countries.

Structural and other provisions, which are enforced under the “rule of reason” approach, are more suitably handled using both civil and administrative legal procedures. But courts and administrative tribunals in South Asia are unlikely to have the needed expertise on competition-related matters. So, to enforce competition law, consideration should be given to creating specialized administrative bodies or tribunals comprised of judicial and nonjudicial members with backgrounds in law, economics, finance, and various fields of industry and business. This is, in essence, the approach taken under India’s 2002 Competition Act.

Regardless of the institutional model adopted, certain principles need to be reflected in the design of an effective agency for competition law:

- The agency should be independent and insulated from political interference and influence. It should be accountable to an impartial body, such as an independent committee or elected parliament.

- Investigation and prosecution function should be separated from adjudication functions when enforcing competition law. That was not the case in India’s new Competition Act (2002), giving rise to the constitutional challenge described in Section 5B.

- Checks and balances should be in place, with appropriate rights to appeal and reviews of decisions and facts based on legal and economic interpretations. This approach also safeguards against the possibility of competition authorities being captured by special interest groups.

- Cases and related matters must be resolved expeditiously to avoid unnecessary transaction and other business costs. But proceedings also need to be transparent—while protecting sensitive business information of a competitive nature. Reporting of cases and transparent proceedings help guide businesses and reduce uncertainty.

- Measures are needed to collect relevant information and evidence on markets and firms.
• Proceedings should be accessible to all affected parties, with provisions for introducing expert testimony and evidence.
• Provisions are needed for imposing significant penalties, fines, and other remedial measures as deemed necessary to deter and correct infractions of the law.

Even if most of these principles are followed, additional and more subtle institutional design issues—appropriate to the national context—can make the difference between success and failure. A comparison of the Netherlands and Panama is instructive. The two countries’ competition agencies started at about the same time during the 1990s, and neither country had ideological, social, or cultural endowments favoring competition enforcement. Both introduced competition law in response to international obligations. After five years the Netherlands Competition Authority had successfully prosecuted about 15 hardcore cartels (including some rigging bids for public works) and several cases of anticompetitive behavior. Meanwhile, Panama’s Free Trade and Consumer Affairs Commission (CLICAC) had barely finished one cartel case. Although human capital may have played a role, salaries in Panama were high (a commissioner’s salary could reach $90,000 a year, not including benefits). Moreover, the Dutch authority has ample sanction powers, while CLICAC does not (see final bullet above). Other institutional aspects, such as organizational structure and specialized knowledge, may have played a role. The Netherlands Competition Authority created a specialized department for cartel investigations, while CLICAC did not, and personnel of the Dutch authority handle only antitrust cases—while CLICAC staff are also involved with consumer protection and trade remedy cases.

As noted, competition policy agencies should also be vested with a statutory role of participating, formulating, and commenting on government economic and regulatory policies affecting market competition. By advocating competition, such agencies can counter or at least minimize the rent seeking common in most countries—particularly in South Asia. Given the limited administrative capacity and enforcement experience in this area in South Asia, some commentators consider it the most important, if not the sole function, of a competition policy agency. Competition advocacy can also reduce the possibility of misapplying provisions of competition law, which can induce further distortions into an economy.

The burden of implementing competition law does not have to rest solely with government (Figure 15). Provisions for individual private and class action suits help

35 The authors are grateful to Paulo Correa for this insightful comparison, communicated in a earlier review of this paper.
36 See Kovacic (1995), and Rodriguez and Williams (1994).
strengthen application of the law and promote a competition-oriented culture. But appropriate safeguards are needed to prevent the potential abuse of such provisions, to avoid unnecessary litigation. Moreover, competition law does not necessarily have to be administered by a large bureaucratic office—especially if the law contains provisions for private actions. A specialized court or tribunal can consist of a few full-time members as well as draw on part-time officials for cases requiring sector-specific expertise. In addition, implementation of the law can proceed in stages, starting with competition advocacy and prohibitions on price fixing and other types of collusion among firms. In more complex areas of competition law, such as mergers and abuse of dominant market position, only the most blatant infractions can be pursued until the necessary experience has developed. Among the countries reviewed in this report, India has largely adopted this approach—though, as discussed below, effective implementation of its competition law has been mired by other, related issues.

D Interface with Other Government Bodies and Jurisdiction

Competition law affects all sectors and economic entities engaged in commercial activity (unless otherwise exempted). One of the challenges facing competition agencies is to ensure, as much as possible, that other government policies and regulations do not unnecessarily impede the competitive process. As the preceding discussion suggests,
Competition advocacy plays an important role in this regard. But there still arise situations—in South Asian and advanced industrial economies—where sector-specific and other regulatory bodies have jurisdiction over important economic activities, including adjudicating anticompetitive matters.

These situations vary across countries but include areas such as the provision of basic infrastructure services—namely, telecommunications, electricity, and water—as well as financial services and air and rail passenger travel. In most of these areas, specific regulatory institutions have been created to set rules on entry, exit, pricing, output, and other business matters, including competition. Thus a question that usually arises is whether the competition authority should have sole, concurrent, or no jurisdiction over such matters—as well as the best approach to ensuring that competition policies are coherent and consistent.

No clear-cut model of best practice can be recommended. For example, the Australian Competition and Consumer Council has jurisdiction over competition matters across a wide range of regulated industries, while sector-specific regulators and government departments deal with technical issues such as setting standards, engineering specifications, and the like. Although the United Kingdom has sector-specific regulatory bodies, they work closely with the Office of Fair Trade to determine how to handle competition complaints.

In other countries there are rivalries and jurisdictional turf battles between competition and sector-specific regulatory authorities, resulting in application of different principles or complete gaps in policies on anticompetitive business practices and market structures. Most South Asian economies fall into this category. For example, India has seen a competitive industry evolve for telecommunications (especially mobile), yet the roles, responsibilities, and jurisdictions of the Department of Telecommunications, Telecommunication Regulatory Authority, and Competition Commission have not been delineated when it comes to competition issues. A similar situation prevails in Pakistan between the Monopoly Control Authority and government departments and regulatory bodies dealing with electricity and telecommunications. Meanwhile, Bangladesh has not created sector-specific regulatory institutions, and state-owned entities are under the direct oversight of relevant government ministries.

To foster investment and growth, business uncertainty stemming from concurrent or lack of effective competition and regulatory frameworks needs to be addressed in developing economies—especially in South Asia. In designing regulatory policies and institutions, safeguards need to be developed to prevent capture by regulated entities and vested interest groups in both the public and private sectors.
E  International Dimensions of Competition Law and Policy

With increased globalization of markets and cross-border flows of goods, services, and investment, competition agencies in various countries have had to address the international dimensions of administering competition law and policy. These dimensions most often arise between major bilateral trading partners. For example, international cooperation arrangements—ranging from consultative agreements and memorandums of understanding to formal treaties—exist between Australia and New Zealand; Canada and the United States; the European Union, United States, and Japan; and member countries of the Andean Pact, Southern Common Market (MERCOSUR), and North American Free Trade Agreement (NAFTA), among other trading blocs. These international cooperation arrangements cover matters such as:

- Extraterritorial effects of business transactions and practices and of administration of competition law and policy.
- Cooperation, information exchanges and mutual assistance.
- Industrial policy and subsidies.

Member countries of the South Asian Association for Regional Cooperation (SAARC) should consider similar bilateral and multilateral agreements as they integrate further within the region.

Extraterritorial effects of competition can arise in a variety of ways. For example, one of the trading partners’ countries could have an export cartel. Some countries exempt such cartels from competition law under the reasoning that they do not reduce competition in the domestic market. But an export cartel—even if legally sanctioned—could adversely affect an importing country’s markets, creating friction in economic relations between the two trading partners. Moreover, illegal international cartels can have anticompetitive effects, as in the cases of vitamins, lysine, and other products discussed above. In some case mergers and acquisitions among firms doing business in different countries can also create concerns about competition. If a merger or acquisition is prevented by one country, it may hurt commercial interests in another. In addition, because governments compete for foreign investment—by offering subsidies and other incentives—such activities can impair competition for firms in countries that do not receive such investment.

For these and similar situations, competition agencies have found it beneficial and in their mutual interests to enter into international cooperation agreements. Such agreements may contain provisions for one agency to ask another for assistance in investigating and gathering evidence on a specific anticompetitive business practice.
(referred to as positive comity). They may also take into account the effects on the
national interests of the other country in its enforcement of competition law (referred
to as traditional comity). In addition, such agreements may contain provisions for
exchanges of non-confidential information, experiences, and staff.

Increased cooperation between national competition agencies leads to greater
convergence in enforcement policies, investigative techniques, information
requirements, and time taken to review and resolve cases. Such convergence is being
furthered by the International Competition Network, an organization in operation
for since 2001. This convergence facilitates and reduces the transaction and other
costs associated with doing business across borders.
The South Asia region has been relatively slow in moving from command and control policies to market reform and adjustment policies. Only 3 of the region's 8 countries—India, Pakistan, and Sri Lanka—have formally enacted competition laws (Table 1). The Middle East and North Africa region has also been quite slow, with 7 of 21 countries having enacted competition laws, as has the Sub-Saharan Africa region, with such laws in 17 of 50 political entities (countries and regional groups of countries). In the East Asia and Pacific region, 13 of 32 political entities have enacted such laws. The Latin America, Caribbean, and North America region has been more active, with competition laws in 19 of 37 political entities. Europe and Central Asia stands out in this regard, with such laws in 47 of 58 political entities. This progress has largely been driven by the desire of Central and Eastern European countries to join the European Union—which requires that its members not only enact but also effectively implement competition law.

As highlighted in the following subsections, Bangladesh, India, Nepal, Pakistan, and Sri Lanka are at widely varying stages in implementing competition laws and policies. India has the longest, most active history of competition law implementation, and enacted a new law in 2002. Moreover, this law is being amended, and the newly formed Competition Commission of India is stepping up its advocacy activities. Pakistan has

<p>| Table 1 Countries with Competition Laws by Region (circa 2006) |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|</p>
<table>
<thead>
<tr>
<th>Indicator</th>
<th>Sub-Saharan Africa</th>
<th>Latin America, Caribbean, and North America</th>
<th>East Asia and Pacific</th>
<th>South Asia</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of countries/regional groups</td>
<td>47/3</td>
<td>35/2</td>
<td>32</td>
<td>8</td>
<td>57/1</td>
<td>21</td>
</tr>
<tr>
<td>Number with competition law</td>
<td>17</td>
<td>19</td>
<td>13</td>
<td>3</td>
<td>47</td>
<td>7</td>
</tr>
</tbody>
</table>
also recognized the desirability of updating its competition law and policy, and recently finalized a draft law that was submitted to the prime minister’s office as the first step toward ratification. Sri Lanka is at a different stage, having modified its competition law in the direction of a more traditional consumer protection law. Finally, Bangladesh and Nepal lack competition laws, though both are exploring their development—driven by a range of pro-competition stakeholders.

A Bangladesh

**Context.** Bangladesh does not have a competition law framework to deal with situations that significantly impede competition, such as cartels, bid rigging, monopolization, restrictive business practices, and mergers and acquisitions that result in market dominance. In addition, the government has no formal institutional mechanisms to systematically review existing or proposed policies and regulations that may adversely affect competition. Formally, the Monopolies and Restrictive Trade Practices Ordinance, enacted in 1970 by the Government of Pakistan when Bangladesh was still part of East Pakistan, remains on the books. But neither the government nor the private sector has ever tried to invoke this law, and no commission or other specific body has been set up to administer it. In any case, the law is dated. If at some point Bangladesh considers enacting a specific competition law, it would be advisable to start afresh.\(^{37}\)

In addition to the competition-related problems (including corruption) identified in Section 3, a 2004 survey by the Bangladesh Enterprise Institute found that 65 percent of respondents considered price fixing a major anticompetitive practice in domestic markets, followed by monopolies and bid rigging (48 percent), discriminatory dealings (39 percent), and entry barriers (30 percent). Most respondents strongly favored introducing a competition law and an independent agency to administer it.\(^{38}\)

Although there are few studies on competition and market structure in Bangladesh, in many sectors—such as sugar, beverages, jute, paper products, fertilizers, petroleum refining, and electrical machinery—state enterprises are prominent and often dominant. State enterprises are generally insulated from competitive market pressures, and it is alleged that they enjoy price preferences in government

\(^{37}\) In 2004 Bangladesh’s Cabinet approved a consumer rights law containing some competition provisions on unfair and misleading marketing practices. But the law’s fate is unknown, as it has yet to be submitted to Parliament. See Rahman and Eusuf (2006).

\(^{38}\) BEI and Cuts (2005).
procurement decisions of up to 15 percent. Infrastructure services, such as electricity and fixed-line telephones, are often provided by monopoly state enterprises operating under unclear regulations. Low investment and high operating costs undermine the competitive position of private firms in these sectors. In addition, the Bangladesh Enterprise Institute survey suggests that concentration is high in sectors where private firms primarily operate. Anticompetitive practices are alleged to be prevalent in markets for consumer toiletry, tobacco, pharmaceutical products, and health services. Such practices, emanating from both public policies and private restraints, have also been alleged in other sectors (Box 2).

**Issues moving forward.** The Bangladesh economy has been liberalized considerably in the past decade, and steps have been taken to improve the competitive environment for business—for example, through a privatization program and, more recently, through the introduction of procurement guidelines. But problems in implementation remain, as evidenced by lack of progress on privatization and limited adoption of the new procurement policies.

The importance of promoting competition and instituting a comprehensive framework for competition law and policy has been recognized and supported by

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**Box 2 Examples of Competition Problems in Bangladesh**

**Cartels and anticompetitive business practices**

- Cartels are alleged to exist in the purchase, distribution, and sale of several staple products, including rice, sugar, potatoes, and other foods. These cartels are reputedly partly due to monopsonistic market powers of wholesalers, who also provide finance to farmers, control truck transportation, and provide refrigerated storage facilities. Cartels are also believed to exist in the supply of cement, fertilizer, corrugated steel, and intercity bus services.

- In freight forwarding, fees and commissions for imports and exports are alleged to be high because of cartel and market sharing agreements.

**Import controls**

- Until recently the government banned land-based imports of cotton yarn from India due to concerns about under invoicing, smuggling, and customs and excise inspection capacity. Although cotton yarn could be imported from India and other countries through the Port of Chittagong, delays of up to 21 days, increased transport costs, and reduced variety impaired the competitiveness of Bangladesh’s knitwear and garment industry, which has been faring well despite the expiration of the Multi-Fiber Agreement.
Box 2 Examples of Competition... (Contd.)

The industry employs about 2 million workers—85 percent of them women. The competition and price discipline provided by imported yarn (even at only 5–10 percent of total market supply) was evident, as the minister of finance threatened to open up the land border points if large domestic suppliers did not lower their prices.

- A single firm has apparently been granted the license for importing compressed natural gas (CNG) auto-rickshaws from India and China. Lack of competition in this market has resulted in significantly higher prices than those in more competitive markets (such as that in Kolkata, India). CNG auto-rickshaws are mostly operated by self-employed workers—often from the poorer segments of the population—who formerly operated bicycle rickshaws and are trying to raise their living standards.

- Import controls extend to products such as sugar, salt, and newsprint, among others, with adverse effects on domestic prices and competition.

- Nontariff barriers related to customs inspection, truck transportation, container handling, and freight forwarding raise transaction and other costs of imports.

Government procurement and privatization

- Allegations include irregularities and lack of transparency and competitive bidding in procurement of passenger aircraft for domestic air services. The tendering process was delayed and cancelled, resulting in resubmission of bids with no price changes—and a used aircraft was apparently purchased at a high price outside the normal procurement system.

- Illegal practices and irregularities are said to have occurred in the Power Development Board’s evaluation of bids for power projects. Two Chinese companies, CMEC and Harbin, are currently engaged in litigation and have lodged complaints about the evaluation process and awarding of contracts under public procurement regulations.

- Various government agencies and departments have instituted different procurement policies, without adequate measures to ensure accountability, transparency, coherency, and consistency in bidding and contracting.

- Allegations have been made of lack of competition, undervaluation, and preferential sales of jute mills and other state assets. In some cases inadequate safeguards were taken to ensure continued operations of viable privatized firms.

Regulatory framework for infrastructure

- Oversight and regulation of infrastructure—such as electricity, telecommunications, water and sanitation, ports, and domestic passenger air-services—are generally considered insufficient to ensure efficient operations, reliable services, and competitive prices.
both public and private representatives, as well as by various nongovernmental organizations (NGOs). But concerns remain about the timing and sequencing of this framework and the staff, resources, and institutional capacity building needed for its effective implementation.

There is also a need for greater public information dissemination and education. Widespread misconceptions exist on what competition policy is, and on the merits of introducing it in Bangladesh. Many in general public view the topic as part of trade-related issues—such as World Trade Organization (WTO) requirements—and not about fostering competition, entry, efficiency, and consumer welfare in the domestic economy.

Moreover, notwithstanding the various allegations of anticompetitive business practices and market situations, and government policies and regulations that impede competition, available information is primarily anecdotal in nature. More in-depth analysis and accurate information on the costs imposed by lack of competition, and identification of the critical sectors most affected, is needed for informed policymaking and economic decisionmaking.

**B India**

*Context.* For most of its economic history since independence (in 1947), the Government of India heavily intervened in various spheres of the country’s economic activity.³⁹ Through elaborate systems of regulations, licensing, price controls, trade protection, rigid labor and land tenure laws, investment and ownership restrictions, state enterprises engaged in commercial business, five-year plans, and the like, the government determined the structure of industry and state of competition (if any) in the major sectors of the economy. During the 1960s concerns about the slow pace of “trickle-down” benefits to poorer segments of society and high levels of industrial concentration led to the establishment of several commissions and committees to examine the various issues.⁴⁰ In 1969 these efforts culminated in the passage of the Monopolies and Restrictive Trade Practices Act and creation of the Monopolies and Restrictive Trade Practices Commission.

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³⁹ The discussion in this section draws on Mehta (2005), and Chakravarty (2005).
⁴⁰ Committee on Distribution of Income and Levels of Living (Mahalanobis Committee, 1960); Monopolies Inquiry Commission (1964); Hazari Committee (1966); Industrial Licensing Policy Inquiry Commission (ILPIC 1967).
Instead of examining the distortions induced by public policies, the government seemed to blame the problems on the private sector.\footnote{41} Paradoxically, while the new act had all the hallmarks of a competition law, instead of maintaining and encouraging competition, it became a bureaucratic instrument for intervening and restricting entry and expansion of existing firms and competition in the Indian economy. The approach adopted toward large firm size and combinations (mergers and acquisitions) increased enterprise diversification and conglomeration, to the detriment of economic efficiency and competitiveness. In addition, a plethora of new regulations segmented industries and firm size by instituting “reserve lists” of economic activities that could be engaged in only by small and medium-size enterprises. Such an approach toward “competition policy” provides ammunition to libertine critics that governments—especially in developing countries—should not be encouraged to adopt competition law, because they are more likely to result in further interventions and economic distortions.

In 1991, as part of structural economic reforms, India’s government annulled the most restrictive provisions of the Monopolies and Restrictive Trade Practices Act—namely, those aimed at preventing concentration and growth of firms by imposing size and other controls on firm mergers and acquisition, investment, and expansion activities. The policy of extending application of the act to cover state enterprises engaged in commercial economic activities was reiterated to level the field between the public and private sectors. But while the preferential treatment accorded to public enterprises has been formally removed, private firms continue to complain that in practice this is not the case.

In 1999 the government appointed the High Level Committee on Competition Policy and Competition Law, which in its 2000 report recommended the adoption of a new law in light of market liberalization and globalization. A subsequent “concept bill” was placed on the Website of the Department of Company Affairs and, along with various meetings across the country, input from different stakeholders and interest groups was solicited. The 2002 Competition Act was enacted with the proviso that, before it came into full effect, the newly created Competition Commission should give priority to building its staff and institutional capacity by conducting market studies and competition advocacy.

\footnote{41} One change that one of the government’s high powered (Sachar) committees (1977) recommended was removing exemptions from application of the Monopolies and Restrictive Trade Practices Act to public enterprises. Public enterprises were found to engage in monopolistic, restrictive, and unfair trade practices. This recommendation was not acted on until 14 years later—though allegations of such practices being prevalent and public enterprises being accorded preferential pricing in government tenders persist. However, the Sachar committee also recommended expanding the power and role of the Monopolies and Restrictive Trade Practices Commission.
The Competition Act states its main goals as being:

- Preventing practices adversely affecting competition.
- Promoting and sustaining competition in markets.
- Protecting the interests of consumers.
- Ensuring freedom of trade in markets in India.

In implementing this act, India's economic development needs must be borne in mind. Although the act is a law of general application with few exemptions or exceptions, the central government can exempt application of the act (or any of its provisions) if it concludes that doing so is in the interest of states or the general public. So, while the act’s main goals are to maintain and encourage competition—thereby fostering economic efficiency and consumer welfare—in certain circumstances (left undefined) exceptions are possible in the context of broader public interests.

India’s Competition Act contains features of modern competition laws elsewhere, with provisions prohibiting anticompetitive horizontal agreements and a “rule of reason” approach to vertical agreements, abuse of dominant market position, and combinations or mergers and acquisitions likely to substantially reduce competition. There are no mandatory notification requirements for mergers and acquisitions, and provisions are aimed mainly at large transactions or high market shares. In addition, The Competition Commission is accorded independent status and, along with its law enforcement functions, can engage in competition advocacy by focusing on public policy as well as private sector practices that unnecessarily impede competition.

However, implementation of the Competition Act and staffing of the Competition Commission have been mired in bureaucratic infighting and a constitutional challenge. Highly vocal criticisms were levied by consumer and other civil society groups that the designated chairman of the commission was a senior civil servant with no legal training or background in competition economics. And since he was about to retire, this seemed like another example of bureaucratic rent seeking, in the form of sinecure for former civil servants. The nominee withdrew from seeking the post, and to date only one full-time commission member has been appointed, with a small skeletal staff. The constitutional challenge led to a reference to the Supreme Court, which opined that the act and the establishment of the commission did not provide sufficient separation of powers between investigation and adjudication of cases. The Indian government

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42 The act specifies two exceptions: the first relate to reasonable conditions regarding intellectual property rights, the second to export cartels.

43 Such exceptions are also provided for in advanced industrial economies such as Germany and the United Kingdom, among others.
has recently tabled parliamentary amendments to the Competition Act to address the points raised by the Supreme Court, among others.

**Issues moving forward.** The immediate challenge for the Indian government is to get the legislative amendments through parliament so that the Competition Commission can be fully constituted and staffed, and the full force of the Competition Act can be brought into effect. Since the 1991 economic reforms and removal of controls on combinations, merger and acquisition transactions have proceeded unfettered. Between 1991 and 2003 such transactions have quintupled, from 44 to 214 a year.\(^4\) The actual pace of such activity has likely been higher because most such transactions are unreported. While not all such transactions necessarily result in substantial lessening of competition, some do. A current transaction that would give rise competition concerns in other jurisdictions is the proposed acquisition of Sahara Airlines by Jet Airways for domestic passenger services along some major routes. Various other mergers and acquisitions—in sectors such as cement, pharmaceuticals, and various consumer products—would be given prima facie review if the Competition Act was in effect. The consolidation in industry may give rise to market structures and competition problems that would be difficult to remedy.

In addition, there have been widespread pressures for protection and increased regulation where the competition advocacy function of the Competition Commission would be particularly useful. For example, the Post and Telecommunications Department has reputedly drafted legislation for monopoly rights on all letters and packages up to 500 grams—a measure that, if instituted, would severely limit competition and effectively ensure the demise of the fast-growing and efficient private courier business, to the detriment of consumers. A more appropriate policy would be to ensure a monopoly on letters of 20–50 grams for the post office and, capitalizing on their extensive network, offer competing private courier services—as in countries such as Australia, Canada, the United Kingdom, and the United States. Demands for sector regulations and price controls have also emanated from the steel industry. In addition, delineation of the roles and responsibilities of the Competition Commission and sector-specific regulators and regulations in areas such as electricity, telecommunications, and energy (among others) remains largely undefined.

In sum, the Indian government faces significant challenges in developing and implementing policy and in building staff and institutional capacity to foster competition. The pace at which these efforts have proceeded thus far is cause for concern and raises questions about whether various vested interests—including

\(^4\) Agarwal (2005).
those in bureaucracy itself—are part of the problem. Yet the benefits of increased competition in fostering broadly based economic development, investment, growth, and overall competitiveness are clear in India’s economy—as evidenced by the lower prices, increased consumer choice, and higher quality of products and services such as automobiles, consumer electronics, and domestic passenger services.

**C Nepal**

**Context.** Nepal does not have a competition law. During accession negotiations for the WTO, Nepal agreed to enact a competition law by July 2004. Although a draft competition bill was prepared by the Ministry of Industries, Commerce, and Supplies, the draft has not been enacted. Reportedly, the Ministry of Law expressed concerns about the creation of an independent competition authority, and the draft was sent back to the Ministry of Industries, Commerce, and Supplies for reconsideration. In March 2006 the secretary of the latter ministry said that the draft competition law is in its final stages and would soon be enacted by ordinance.

A few legislative documents have provisions related to competition in markets. The 1990 Nepal Constitution makes explicit reference to competition principles. Article 25(2) states that “the role of the state shall be to transform the national economy into an independent and self-reliant system, by preventing the available resources and means of the country from being concentrated within a limited section of society, by making arrangements for the equitable distribution of economic gains on the basis of social justice, and by making such provisions as will prevent economic exploitation of any class or individual.”

The 1992 Enterprises Act was the first law to mention competition related to industry. The act’s preamble states that, “for the overall economic development of the country, it is expedient to make arrangements for fostering industrial enterprises in a competitive manner, through the increment in productivity, by making the environment of industrial investment more congenial, straightforward and encouraging.” And the concomitant 1992 Foreign Investment and Technology Transfer Act opened up most sectors to FDI—with the exception of cottage industries, real estate, and sectors affecting national security.

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46 Inaugural address to a workshop on “Competition Law for Economic Development,” held in Kathmandu on 16 March 2006, jointly organized by an NGO (South Asia Watch on Trade, Economics, and Environment) and a business association (Federation of Nepalese Chambers of Commerce and Industry).
Nepal’s 1998 Consumer Protection Act was adopted to protect the interests of consumers, by addressing restrictive and unfair trade practices. But this act’s effectiveness has reportedly been very weak.\textsuperscript{47}

\textit{Issues moving forward.} Just as Nepal’s efforts to increase competition in telecommunications have been halted by poor enforcement institutions, weak checks, and vested interests, it appears that enactment and effective enforcement of competition law face the same risks. If the country’s competition authority is made part of an existing government department, such as the Department of Commerce of the Ministry of Industries, Commerce, and Supplies, its competition law is likely to be as ineffective as the Consumer Protection Act.\textsuperscript{48} Even if the authority is nominally independent, successful impact is not assured.\textsuperscript{49} Overzealous enforcement could protect local incumbent enterprises from effective international competition—and even from competitive pressures by new domestic entrants—by inappropriately imputing abuse of dominance on the part of foreign enterprises or inappropriate practices by new entrants, when in reality the conduct merely reflects the pro-competition practices of healthy rivalry.

\section*{Pakistan}

\textit{Context.} Pakistan has had a competition law since 1970: the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance. Enactment of this law appears to have been largely motivated by the realization that a few privileged elites had cornered the benefits of growth, as wealth became increasingly concentrated in the economy following a period of high growth and business favoritism during the 1960s. Although timely information on industrial concentration is not available, older census data suggest that four or fewer firms account for more than three-quarters of output in two-thirds of industries.

The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance prohibited undue concentration of economic power, unreasonable monopoly power, and unreasonable restrictive trade practices. The law provided for the creation of a Monopoly

\textsuperscript{47} Dahal (2006), p. 122.  
\textsuperscript{49} In the above-mentioned workshop on “Competition Law for Economic Development,” the president of the Federation of Nepalese Chambers of Commerce and Industry stated that “the need of the hour is a competition law with a strong and effective authority in order to put our ailing economy on the right track.” But he added that the law would be important to safeguard Nepalese industries from the potential anticompetitive practices of large multinational corporations. Another presenter urged government to “make extra efforts to ensure that the law would boost existing industries.” See www.sawtee.org/uploads/events/competitionlaw.php for coverage of the 16 March 2006 workshop.
Control Authority to administer the law, and gave it the status of an autonomous and quasi-judicial body comprising three members appointed by the federal government for terms of five years. But nationalization of a large number of private enterprises in the 1970s restricted the scope of the law almost immediately after it was enacted. The Monopoly Control Authority lost its status as an independent body and was merged with the Corporate Law Authority, focusing on corporatizing public enterprises that were already exempt under the law. And once the economy began to witness rapid deregulation, privatization, and trade liberalization in the 1990s, shortcomings of the law became more obvious. In particular, the law does not cover public enterprises—and since 2002 it does not cover privatized public enterprises regulated by sector regulators. Penalties for noncompliance with the law are so low that enterprises typically prefer to pay them rather than comply with the orders of the Monopoly Control Authority. In addition, the law does not provide for compensation to affected consumers and other parties. Another shortcoming is that it has no explicit provision for its overriding effect on other laws.

**Issues moving forward.** To remedy inadequacies of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, in 2002 the Monopoly Control Authority—on its own—prepared a draft of a new competition law. For many reasons, including a perception that an effective competition law would discourage investment in the country, Pakistan’s government was reluctant to move forward on the draft law’s suggestions. Then, in 2005, the government requested assistance from international development partners to help modernize and strengthen the draft law and build capacity in a new competition agency. A finalized draft law was sent to the prime minister’s office in July 2006. The government wants to submit the new draft competition law for legislative approval—either as law approved by Parliament or as ordinance under the president’s signature. Policy issues to be addressed include:

- Creation of an appropriate institutional framework that aligns the competition law with appropriate judicial review, investor and consumer protection, and broader regulatory reform.
- Appropriate access to market data from government and independent agencies, and agreement on the role of enterprise registration.
- Effective penalties.
- Appropriate, efficient avenues for appeal.
- Effective jurisdictional lines and cooperation protocols with sector regulators, the privatization commission, and other public agencies.
- Clarification of the role and form of competition advocacy.
- Agreement on the final form of independence, funding, staffing, and capacity building for the new competition commission.
Moving forward, three key risks need to be mitigated. First, as part of the general political complexities faced by policymakers guiding the transition of Pakistan’s government from owner to regulator, strong and sustained political will is required for any new regulatory body to be effective and independent in its daily operations. Second, limited market transparency and data availability make accurate analysis difficult, while additional reporting and registration burdens on the private sector should be avoided. Better and more timely data sources are needed for market analysis. Third, as a matter of law this subject is new to Pakistan—having been dormant since its inception. Judicial capacity is already weak and overburdened, and there may not be sufficient investment in the skills and knowledge required for this new and complex area of law. Building capacity in related professions should therefore be part of any program for implementation support.

E  Sri Lanka

Context. Sri Lanka has had a competition law since 1987, when it enacted the Fair Trading Commission Act No 1. This act provided for the establishment of the Fair Trading Commission, a quasi-judicial body under the Minister of Commerce and Consumer Affairs. The commission held wide-ranging powers over the control of monopolies, mergers, and anticompetitive practices—all of which were considered illegal only if they were contrary to the “public interest.” But the law contained no clear definition of what constituted the public interest. The commission had the power to take into account “all matters that appeared relevant,” which resulted in special considerations being given to safeguarding consumer and producer interests, and maintaining a balanced distribution of industrial activity—considerations that could deviate from protecting the competitive process to instead an anticompetitive stance of protecting existing competitors from the productivity-enhancing effects of genuine rivalry.

The law also was not implemented effectively, as noncompliance with pre-merger notification was common. In addition, although the Fair Trading Commission had powers commensurate with those of a district court to conduct investigations, it did not use those powers to consistently promote competition. For instance, commissioners believed that the merger of Glaxo-Wellcome and SmithKline Beecham did not fall within its authority, since it was an international merger. In addition, the commission’s powers were considerably curtailed by its inability to make binding interim orders, and by long delays in court proceedings.

In 2003 the Sri Lankan government repealed the Fair Trading Commission Act and passed the Consumer Affairs Authority Act. The new act provides for the establishment of an investigative body, the Consumer Affairs Authority, and a separate adjudicative body, the Consumer Affairs Council. But while this act stipulates that the functions of the authority include controlling and eliminating restrictive trade agreements, it completely omits investigation of anticompetitive practices, promotion of effective competition between traders and manufacturers, and legislative provisions to deal with monopolies and mergers. In its current form, the Consumer Affairs Authority Act is a consumer protection law rather than a competition law. The lack of clear statutory provisions and guiding provisions has made effective implementation of pro-competition principles even more difficult than before.

Issues moving forward. In many ways the Consumer Affairs Authority Act is a step backward. Effective enforcement and monitoring mechanisms capable of delivery the goals and objectives of competition law are lacking. In particular, there is a glaring omission in the Act with respect to monopolies and mergers. Furthermore, the Sri Lankan economy lacks a competition culture that could help promote competition as an integral part of economic policymaking, including policies on privatization and industry oversight. The first priority for further reform should be to achieve consensus among key national stakeholders on the benefits of competition, to move toward agreement on how to improve the policy and enforcement framework.
This report’s main conclusions and recommendations focus on challenges of unfulfilled potential—namely, the contrast between the size of the potential benefits to South Asian economies from increased competition and the slow pace of competition reforms to date. Given the strong vested interests opposed to increased competition, South Asian economies need to take credible measures and provide support to credible institutions to implement more explicit competition policies, so that disadvantaged new entrants somewhere to go for relief.

South Asia has been relatively slow in adopting effective pro-competition policies. South Asia has been moving only gradually from command and control policies to market reform and adjustment policies. The region remains more closed than most to global competition (except for Sri Lanka), regional competition, and intense domestic rivalry. On the whole, South Asian economies suffer from a legacy of public restraints and bureaucratic hurdles that impede starting and closing businesses, employing workers, getting credit, international trade, and enforcing contracts. Corruption, and the attendant lack of a level playing field, is a top obstacle in most countries. The region’s countries have been particularly slow in enacting competition laws, with only India (1969), Pakistan (1970), and Sri Lanka (1987) formally enacting such laws—and India’s law overhauled and upgraded in 2002 but not yet fully effective, Pakistan considering a new draft, and Sri Lanka’s law effectively downgraded to a consumer protection law in 2003.

Enacting a competition law typically sends a strong signal to investors (domestic and foreign) that there are formal rules of the game for business conduct, and hence promotes investment. Yet the record of enforcement across South Asian countries has been uneven, as noted in the World Bank’s World Development Report 2005. Effective enforcement, in turn, requires committing sufficient public resources—to strengthening related skills, upgrading capacity, and building institutions—as well as independent investigation and adjudication, buttressed by appropriate checks and balances.

Effective competition requires creating a “culture of competition.” Given that many South Asian countries suffer from high poverty, effective competition is even more important than in most other regions. By broadening choices and facilitating access to
essential goods at lower prices, competition directly alleviates poverty. And by spurring growth and so creating new opportunities for entrepreneurship and jobs, it also raises the incomes of all. Although competition policies are both pro-poor and pro-growth, their effective implementation is too often thwarted by powerful vested interests—established, favored firms and certain government bureaucrats—that stand to lose acquired rents.

These predatory vested interests have emerged over time, and their reluctance to sufficiently remove the legacy of public restraints and bureaucratic barriers to competition represents the most important bottleneck to enhanced competition in South Asia. Disarming such interests is extremely difficult—particularly in India, but also in Bangladesh, Nepal, Pakistan, and Sri Lanka, with each country facing its own challenges. Effective competition laws and policies can loosen such bottlenecks, but only with sufficient support for change from pro-competition stakeholders. This, in turn, requires significantly enhanced efforts at strengthening as broad a base of support for competition as possible—starting with a much deeper understanding of what is at stake among the “natural” allies of competition, including associations of dynamic entrepreneurs and exporters that have gained from competition as well as consumer associations and other representatives of civil society, buttressed by enlightened champions within government.

Three policy thrusts deserve special attention by South Asian authorities, whether within a formal competition agency or elsewhere within government, and by the private sector:

- As part of efforts to promote competition, each national government should focus on enacting an appropriate competition law (with sufficient resources for effective enforcement) and on facilitating understanding of the impact and reducing the most important competition-related barriers to doing business—with an emphasis on local competition bottlenecks, where collusion is likely to be greatest but benefits are likely to be most visible. A key challenge is for pro-competition entities to acquire the status and ability needed get the rest of government, at central and local levels, to adopt more pro-competition policies. Civil society should also play a greater role in promoting competition across South Asia: the promotion of competition is not a monopoly right held by government. Business associations of exporters and small and medium-size enterprises have a critical role to play, as do NGOs. South Asia’s Consumer Unity and Trust Society (CUTS) has been particularly successful in increasing the demand for competition by raising awareness of its benefits across civil society. For example, CUTS has helped increase the accountability and transparency of decisions by India’s government on staffing senior positions, activities of the Competition
Commission, and regulatory policies related to infrastructure services. More of such efforts are needed throughout South Asia.

- **As part of competition advocacy by business, the private sector should focus both on mobilizing natural allies of competition to provide political support for pro-competition policies and on improving the transparency and accountability of public procurement, aided by greater use of electronic procurement technologies.** Governments are major buyers and sellers of goods and services. By improving transparency and accountability of public procurement and government-business relations more generally, competition authorities also help increase the efficiency of public spending—allowing more public resources to be channeled where they most help the truly needy. The productive private sector should do its part in each country to provide political support for such pro-competition policies.

- **As part of advocacy efforts at the South Asia regional level, governments and businesses should analyze opportunities for regionalizing competition policy—allowing a broader range of stakeholders to participate and so making it harder for a single group to block such an important pro-growth, pro-poor initiative.** As international trade and investment barriers fall, cross-border trade and investment is increasing in South Asia. South Asian countries would benefit from regional harmonization of competition policies—particularly in terms of the treatment of cross-border mergers and acquisitions, but also the continuing range of government regulations, controls on inward and outward direct investments, and conduct of private enterprises that limit access to national markets. It would be useful to establish a regional working group to develop a time-based plan for increasing regional competition, including agreeing on principles of mutual interest for regional cooperation on cross-border competition, trade, and investment. Just as the European Union plays a key role in spurring policy harmonization among aspiring Central and Eastern European member countries, a regional pro-competition initiative could play a similar role in South Asia, for the benefit of all the region’s citizens.


Bibliography


