

Competition Law in Developing Countries

THOMAS K. CHENG

OXFORD
UNIVERSITY PRESS

Contents

<i>Table of Cases</i>	xiii
<i>Table of Legislations</i>	xv
<i>Table of Jurisdictions</i>	xvii
<i>Table of Other Legislative Materials</i>	xxi
Introduction	1
1. Basic Premise and Classification of Developing Countries	9
I. Basic Premise	9
II. Diversity within Developing Countries	12
2. Economic Growth and Economic Development	19
I. Economic Growth	19
A. Basic Understanding of Economic Growth	19
B. Determinants of Economic Growth	20
C. Inclusive Growth	27
II. Economic Development	29
A. Development as Freedom	29
B. Development as a Process of Structural Transformation	32
C. Development as Poverty Reduction and Satisfaction of Basic Needs	35
III. Relationship between Economic Growth and Economic Development	42
3. Theoretical Analysis of Economic Growth	45
I. The Harrod–Domar Model	45
II. The Lewis Model and the Rostow Stage-of-Growth Model	47
III. The Solow–Swan Model	49
IV. The Endogenous Growth Models	56
A. The AK Model	57
B. The Lucas Human Capital Model	58
C. The Romer Knowledge Spillover and Product Variety Models	59
D. The Schumpeterian Models	64
4. Competition (Law Enforcement) and Economic Growth	70
I. Relationship between Competition and Economic Growth	71
A. Competition Promotes Investment	71
B. Competition Spurs Productivity Gains	76
C. Competition Encourages Innovation	82
D. Some Reservations about the Impact of Competition on Growth	94

II. Statistical Studies on the Relationship between Competition (Law Enforcement) and Growth	97
A. Studies Focusing on the Impact of Competition	98
B. Studies Focusing on the Impact of Competition Law Enforcement	104
C. A Summary	114
III. Competition Law Enforcement and Foreign Direct Investment	115
A. Relying on FDI to Promote Growth in Developing Countries	116
B. Relationship between Competition (Law Enforcement) and FDI	123
5. Competition Law Enforcement and Economic Development	128
I. Incorporating Poverty Concerns in Competition Analysis	128
A. Competition Law Enforcement and Poverty Reduction	128
B. Competition Law Enforcement and Income Inequality	134
C. A Proposed Approach	140
II. Formulating Enforcement Priorities in Light of Development Needs	146
A. The Agricultural Sector	148
B. Barriers to Entrepreneurship	154
C. Other Development Needs	159
6. Industrial Policy and Competition Law Enforcement	168
I. Overview	168
A. Importance of Industrialization	169
B. Definitions of Industrial Policy	171
C. National Champion Policy	176
D. Infant Industry Policy	181
E. Export Promotion vs. Import Substitution	185
II. Justifications for Industrial Policy	192
A. Addressing Coordination Failure	192
B. Capturing Economies of Scale	194
C. Developing Dynamic Comparative Advantages	196
D. Creating Rent to Overcome Information Externalities	197
III. The East Asian Model	200
A. An Overview	200
B. Japan	205
C. Korea	211
IV. Critique of Industrial Policy	227
V. Reconciling Industrial Policy and Competition Law Enforcement	240
7. Economic Characteristics of Developing Countries	250
I. Small, Fragmented, and Less Competitive Domestic Market	251
II. Widespread Poverty	258
III. Missing Institutions and Prevalence of Market Failure	261
IV. Poorly Developed Financial Markets	263
V. Significant Variations in Firm Productivity	268
VI. High Barriers to Entrepreneurship	270
VII. Heavy State Presence	272

VIII. Widespread Corruption and State Capture	276
IX. Prevalence of the Informal Sector	280
X. Domination of Large Business Groups	290
8. A Proposed Approach	307
I. A Growth and Development-Focused Approach	307
II. Special Focus on Poverty and Development Needs	311
III. Accommodations of Industrial Policy	317
IV. Taking into Account the Economic Characteristics of Developing Countries	318
V. Taking into Account the Enforcement Capacity of Developing Country Authorities	319
9. Cartels and Restrictive Agreements	322
I. Overview	322
II. Cartels	323
A. Developing Country Economies More Conducive to Collusion	323
B. Existence of an Agreement	324
C. How the Prevalence of Business Groups Facilitates Collusion	330
D. Cartels	333
E. Buyer Cartels	340
III. Other Horizontal Conduct	342
A. Group Boycotts	342
B. Parallel Exclusion	343
C. Other Types of Horizontal Agreements	344
IV. Vertical Agreements	347
A. Vertical Restraints More Problematic in Developing Countries	347
B. Resale Price Maintenance	349
C. Exclusive Dealing Agreements	353
10. Abuse of Dominance	357
I. Overview	357
II. Should Developing Countries Focus on Abuse of Dominance?	357
III. Special Economic Characteristics of Developing Countries Related to Abuses	359
A. Natural Tendency Toward Market Dominance	359
B. Poorly Developed Financial Markets	360
C. Heavy State Presence	361
IV. Market Definition and Market Power	361
A. Market Definition	361
B. Assessment of Market Power	362
V. Abuses	370
A. General Approach	370
B. Unilateral Refusal to Deal and the Essential Facilities Doctrine	375
C. Predatory Pricing	379

D. Excessive Pricing	385
E. Buyer Power Issues	391
11. Merger Control	397
I. Overview	397
II. Do Developing Countries Need Merger Control?	398
A. Arguments against Merger Control	398
B. Appropriate Design of Merger Control for Developing Countries	402
C. Special Challenges Facing Developing Country Authorities	409
III. Appropriate Welfare Standards	411
A. Total Welfare Standard	411
B. Consumer Welfare Standard	415
IV. Competitive Effects Analysis	419
A. Horizontal Mergers	419
B. Vertical Mergers	426
C. Conglomerate Mergers	428
V. Defenses	429
A. The Efficiencies Defense	429
B. Public Interest Exception	433
VI. Remedies	439
12. The Intellectual Property–Competition Interface	440
I. Overview	440
II. Competition and Laggard Innovation	443
A. Innovation in Context	443
B. Acquisition of Tacit Knowledge	445
C. Imitation	446
D. Process Innovation	449
E. Summing Up	450
III. Competition and Frontier Innovation	451
A. Frontier Innovation in Developing Countries	451
B. The Schumpeterian Model	456
C. The Arrowian Model	458
D. The Inverted U-Shape Relationship	459
E. Competition Law Enforcement and Innovation	463
IV. Various Approaches to the Intellectual Property–Competition Interface in Developing Countries	464
A. Outright Exemption	464
B. Limited Exemption for Proper Exercise of Intellectual Property Rights	465
C. A General Rule of Reason Approach	466
D. A Proposed Approach to the Patent–Competition Interface	466
V. Specific Conduct	470
A. Unilateral Refusal to License	471
B. Tying	476

13. Enforcement	478
I. Enforcement Challenges	478
A. Lack of Competition Culture and Legacy Competition Problems	478
B. Lack of Political Will	483
C. Lack of Authority Independence	486
D. Lack of Financial Resources	493
E. Human Resource Issues	495
F. Lack of Enforcement Powers	499
G. Lack of Availability of Data	501
H. Lack of Judicial Expertise	502
II. Other Enforcement-Related Issues	508
A. Enforcement Priorities	508
B. Criminal Sanctions	511
C. Leniency Program	512
D. Private Enforcement	513
III. Advocacy	514
A. Importance of Advocacy	514
B. Prerequisites for Successful Advocacy	515
C. Actual Advocacy Activities	516
D. Relationship between Advocacy and Enforcement	519
IV. Regional Enforcement of Competition Law	520
A. Benefits of a Regional Approach	520
B. Institutional Design Issues	523
C. Limitations of a Regional Approach	526
Conclusion	529
<i>Bibliography</i>	537
<i>Index</i>	565