Challenges in Implementing a Modern Competition Regime in Developing Countries: The Case of Pakistan

- May I, first of all, thank the relevant staff of the World Bank, including, in particular, Andrew Stone, Lead Private Sector Development Specialist, for inviting me to participate in this very interesting workshop. I am going to talk about the challenges entailed in instituting a modern competition regime in a developing country environment with specific reference to my own experience in Pakistan.

- The purpose of competition law and policy in a market-based economy is in essence to ensure that manipulative and unfair trade practices are restrained, that exploitative dog-eat-dog tendencies are contained, that the market does not malfunction, that new business entrants are not discouraged, and that instead of the laws of the jungle, rational commercial conduct prevails and a level playing field is enforced for the benefit of all economic agents.

- Proper implementation of accepted competition norms is essential if the magic of the market place – as Mrs. Thatcher called it – is to actually work and show beneficial results. The absence of an effective competition regime in a country is now universally regarded as constituting a grave lacuna in the investment climate of that country.

- Anti-competitive behavior, specially cartelization, saps the vitals of the private sector and the economy as a whole. It is interesting to see how hardened abuses of monopoly power and cartelists themselves seek the protection of competition laws when they, as consumers, face anti-competitive behaviour by their suppliers or vendors.

- Recognizing all this, in 2007, the Government set up the Competition Commission of Pakistan, i.e. CCP, replacing the previous, moribund, anti-trust agency, called the Monopoly Control Authority set up way back in 1970 under a now antiquated law i.e. the Monopolies and Restrictive Trade Practices Ordinance. CCP is designed to be a state-of-the-art quasi-judicial, quasi-regulatory, law enforcement agency that investigates and penalizes anti-competitive conduct like, for example, abuse of dominance by an enterprise and also collusive behavior or cartelization on the part of several enterprises. In addition, most importantly, the Commission is
expected, like any modern competition agency, to encourage and promote sound norms of competition through advocacy and persuasion i.e. it also tries to enforce accepted norms of competition through means other than law enforcement.

- The law establishing CCP, i.e. the Competition Act, is based on the principles embodied in the Treaty of Rome and global best practices. I am referring to Articles 81 to 82 of the Treaty, now Articles 101 and 102 after the Lisbon protocol. The Commission is mandated to enforce free competition in all spheres of economic activity --- whether in the public sector or the private sector, regulated or unregulated, documented or undocumented --- in order to enhance economic efficiency and to protect the consumer from anti-competitive behavior.

- Now, this is all very well, but the fact of the matter is that the Commission encountered huge challenges, basically on three fronts -- cultural, socio-political, and outright, vicious opposition by vested interests.

- Firstly, let us look at the cultural aspects. Remember, Pakistan is in Asia – South Asia – and the outlook and approach in Asia, i.e. the Asian ethos, is remarkably feudal despite the fact that large swathes of Asia have either been socialist for considerable periods of time or have shamelessly flirted with socialism. Asians are not fazed at all by abuse of dominance, collusive behavior, exploitation etc albeit they would consider it shocking if those with wealth and power were not charitable and generous towards the needy and dispossessed. This is the way the cookie crumbles in Asia – this is the Asian paradigm. Robber barons are generally speaking acceptable – even welcome – in Asia as long as they are the “giving” sort!

- In Asia, most people appear to take anti-competitive behavior in their stride and consider it a part of life. Thus competition or anti-trust enforcement does not come naturally to Asians. This is not dissimilar to the situation in the Middle East.

- Secondly, apart from the cultural aspect, there are a number of socio-political factors which have prevented developing countries, including Pakistan, from pursuing a well-defined, holistic, and robust competition enforcement regime. The regulatory and law enforcement environment in most developing countries is actually an almost impossible format. I am talking about the lack of political will to support competition enforcement, the constant threat to the independence of the competition agency, the lack of resources made
available to implement anti-trust programs properly, the dysfunctionality of the judicial system weakening the competition agency’s ability to enforce, the propensity of other government agencies to act contrary to the spirit of the competition law, and the fact that the needed technical skills are often in short supply.

• You will appreciate that in such a formidable environment, a competition agency necessarily operates from the back foot and does not really have the luxury of adopting any kind of holistic “integrated compliance strategy” or an over-arching problem-solving approach based on indentified concentrations, vulnerabilities, and patterns of non-compliance and all those nice things one reads about! Of necessity, most competition agencies in the developing world have to take a reactive approach dealing with whatever “comes through the door”. It is only in some of the more sophisticated jurisdictions that the agency may have graduated just one step to ‘picking important problems and fixing them’.

• Thirdly, at an even more fundamental level, a new competition agency is challenged by strong, politically connected, vested interests that are inimical to the induction of a modern competition regime. This “opposition” has essentially two objectives: one, a significant dilution of the competition law; and two, substantial weakening of the competition agency either by arranging the appointment of unsuitable persons to key positions in the agency or by ensuring that the agency is not adequately funded. The big question always is whether or not the Government succumbs to the pressures brought to bear by these vested interests.

• I have spelled out briefly the daunting problems a new competition agency is likely to face in the developing world. Needless to say it is necessary for each new agency to carefully formulate and implement a viable strategy to deal with these problems in the light of its particular circumstances.

• I would now like to share with you the strategy successfully implemented by the Competition Commission of Pakistan, which, I believe, for the most part, would be relevant for very nearly all new competition agencies. Now, what were the elements of this strategy?

• First, make all out efforts to secure a few “quick wins” i.e. expeditiously take a few strong enforcement actions in sectors that are of consequence to ordinary people and against persons with power and influence, and widely publicize these actions in order to
show that the Commission can make a difference that it means business, and that it has guts and gumption.

- **Second**, build a coalition of support by reaching out aggressively to the media, consumer associations, professional bodies, chambers of commerce, sectoral business associations, think tanks, etc.
- **Third**, engage in strong advocacy efforts albeit the Commission was fully conscious of the fact that advocacy would only be effective as a complement to enforcement action and not in and of itself. Importantly, the Commission’s advocacy efforts also emphasized, in fact stressed, that the competition regime facilitates and supports business enterprise.
- **Fourth**, be overtly a part of the Government’s economic machinery and ostensibly in sync with its declared economic policy but at the same time openly and publicly confront the Government on selected matters such as the question of funding for the Commission or regarding any violation of the competition law by the Government, whether in letter or spirit.
- **Fifth**, develop research capacity and come out with carefully researched publications such as sectoral competition assessments, state of competition reports, and other competition-related research papers in order to demonstrate intellectual depth and also to demonstrate that the competition regime is really supportive of business enterprise and fosters business growth.
- **Sixth**, hire competent and qualified staff, provide them learning opportunities, and retain them by ensuring high morale. The question is: how can high morale be achieved? If staff is underpaid and over-worked, it is usually bad for morale; if staff is overpaid and under-worked, it is also bad for morale; overpaid and over-worked has always been my aim – it improves morale but is it enough! Actually I find, based on my experience in establishing two regulatory institutions, that feelings of pride in the institution engendered by the institution’s bold actions that have far-reaching consequences plus a benign, intellectually stimulating and friendly work environment plus strong and purposeful leadership with clear vision contributes to high morale and the institution becomes an “employer of choice” that can attract and retain quality staff.
- **Seventh**, publicly articulate and meticulously follow an operational policy creed that has four pillars, i.e.
  (a) adopt an enlightened and progressive approach encouraging business growth;
(b) facilitate and assist businesses in resolving problems in relation to compliance with the law;
(c) be transparent albeit respect the confidentiality of business sensitive information; and
(d) strive to be efficient, and professionally competent thereby reducing the agency’s enforcement costs as well as compliance costs for businesses.

- Eighth, achieve through pristine conduct of unimpeachable integrity and professionalism, a high level of moral authority, as a consequence of which the agency’s pronouncements would carry extraordinary credibility. It is the agency’s condemnation that must matter and economic agents should be very concerned regarding what the agency has to say about them! Whether or not the agency’s decision is upheld by the courts, it is the agency’s considered opinion that, above all else, must be accepted and prevail with the public at large. In Pakistan’s case, it is moral authority of this exalted nature that rendered the agency truly effective vis-à-vis the public, the business community, the Courts and the Government.

- Let me assure you that the strategy I have just outlined was a thumping success in Pakistan, and in the first three years of its existence, the Commission was not only able to implement the competition law in its entirety but also it was acknowledged as a model by other developing countries and in the halls of the International Competition Network. Let me outline what was accomplished during these three years:

- First, insofar as enforcement actions are concerned, the Commission moved very quickly and decisively against cartelization in various sectors, collusive tendering, abuse of dominance, unacceptable concentrations, and deceptive marketing practices. The parties affected included several banks, cement companies, sugar companies, the largest refinery, all three stock exchanges, cellular companies, a leading business school, a Government-sponsored trust, several leading newspapers, a professional association, PIA, Pakistan Steel Mills, TCP, and two fertilizer companies held by an Army Trust.

- Second, the Commission examined and granted some 200 pre-merger clearances, including one that was taken to the second phase of examination; and further, about 200 potentially competition-reducing agreements were exempted on grounds of economic merit,
both with and without conditions, under gateway provisions of the law.

- **Third**, extensive and focused advocacy efforts were also undertaken, including active sessions of a Competition Consultative Group comprising representatives of sector-specific regulators, senior business and financial sector executives, academics, and media persons.

- **Fourth**, the Commission issued a total of five policy notes to the Government and Government agencies on various aspects of public policy and regulation which were patently adverse to accepted competition norms. Remarkably, in four instances, the Commission’s viewpoint was either fully or partially accepted by the relevant Government department or agency.

- Apart from these policy notes, the Commission also held open hearings and publicly announced its opinion with respect to two competition issues. One related to fixation of minimum retail prices at the behest of the taxation authorities; and the second was regarding discriminatory tax treatment favoring a particular category of undertakings in a sub-sector of the economy.

- **Fifth**, structurally, the Commission has –
  (i) instituted an advisory service to assist business undertakings comply with the competition law, including an “Acquisitions & Mergers Facilitation Office” to provide advice with respect to the Commission’s merger clearance regime;
  (ii) an Office of Fair Trading or OFT was set up to address issues pertaining to deceptive marketing practices;
  (iii) a comprehensive set of Frequently Asked Questions and their replies as well as a variety of operational guidelines were published; and
  (iv) an “Informants’ Rewards Scheme” was instituted to give cash rewards of up to Rs. 5 million payable in four stages, to “whistleblowers” who confidentially expose cartels and other violations of the Competition Law.

- **Sixth**, the Commission has also issued two reports on the “State of Competition in Pakistan” which are essentially based on the Commission’s own experience of grappling with competition issues and its perspective of competition vulnerabilities. In addition, based on substantive, empirical research, the Commission published competition impact assessments with respect to several important economic sectors, including cement, sugar, banking, fertilizer, power etc.
I might mention that the Commission’s performance in addressing deceptive marketing practices, through its Office of Fair Trading, has been ground-breaking, and in three landmark Orders the Commission has, among other matters, kept the onus squarely on the undertakings that publish the impugned deceptive advertisements by construing the word “consumer” in its widest amplitude as the “ordinary consumer” without qualifying it by pre-fixing words like “reasonable” or “prudent”.

In determining culpability with respect to deceptive advertisements, the Commission also held that:
- it is not necessary to establish actual deception;
- disclaimers in fine print cannot correct deceptions in the main body of the advertisement;
- incomplete or half statements could tantamount to being misleading or false;
- it is not necessary to show that the false or misleading claim in the Ad was in any way material to the consumer’s decision to purchase the product;
- it is not necessary to establish actual harm;
- in financial products, there must be clarity regarding the rate of return using the principles contained in the US Truth in Savings Act as a benchmark; and
- the term “goods” in Section 10 of the Competition Act means both “goods” and “services” – to exclude “services” would be absurd!

It is, however, important for all of you to note that in line with the experience of many developing countries, the experience in Pakistan has also been that a variety of politically well-connected mafias and vested interests --- which included some of the parties against whom the Commission acted or proceeded against --- have done their best to either effectively destroy the competition law or weaken the Commission. Time alone well tell as to whether they will succeed in these efforts. So far they have not, largely as a result of a concerted, herculean media onslaught by the Commission.

I have seen in many countries – and Pakistan is no different – that the people against the competition regime are almost invariably very few but they are powerful and voluble whereas those supporting it are many but they are weak, lukewarm, and very much less vocal. It is imperative that advocacy efforts be directed to ensuring that the media, the civil society, right-thinking business elements, and above
all, the Government fully understand the benefits of having a modern competition regime, duly enforced without fear or favor.

• Thank you. That is all I had to say for the present.