

A Framework for the Design and Implementation of Competition Policy

by

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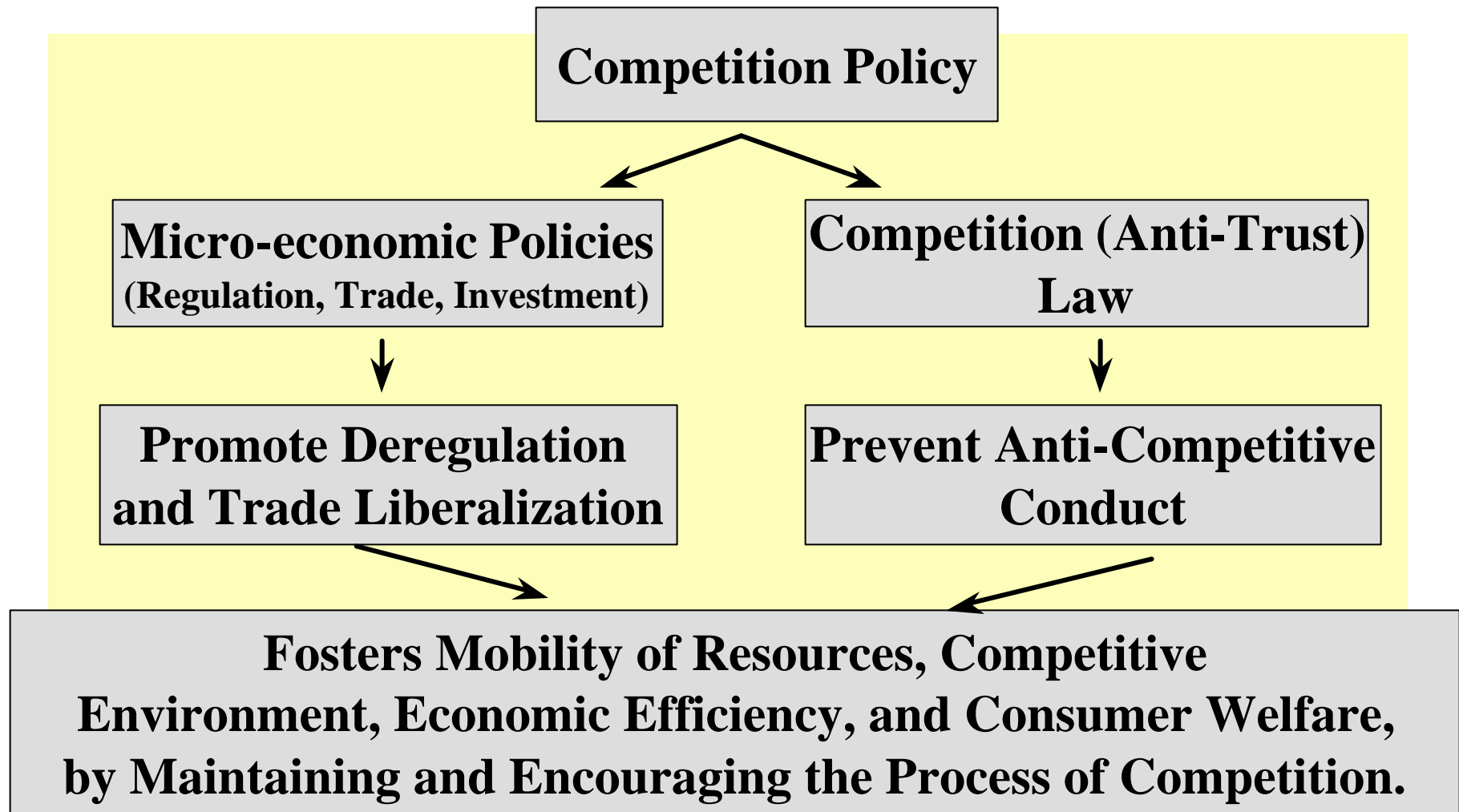
Investment Climate Department

Private Sector Development-Vice

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Competition Policy



Market Failure ⁽¹⁾

- When Markets Fail to Allocate Resources to Their Highest Value Uses,
- That is, by Re-allocating Resources from One Use to Another, Overall Welfare of Society can be Improved.

Possible Sources Of Public Restraints On Competition ⁽¹⁾

- Trade Policies
 - Tariffs and Non-Tariff Barriers
 - Anti-Dumping and Countervailing (CV) Duties
 - Discriminatory Export Practices
- Investment Policies
 - Exclusionary Lists
 - Ownership Restrictions
 - Licensing Requirements

Possible Sources Of Public Restraints On Competition ⁽²⁾

- Regulations
 - Sector Specific (Power, Transportation, Telecom....)
 - Natural Monopolies

Government Actions in these Areas can Impede or Encourage Competition. Objective should be to Re-orient Policies and Regulations towards Competition, Market-Based Solutions.

Is Trade Liberalization/Deregulation Sufficient To Foster Competitive Business Practices? (1)

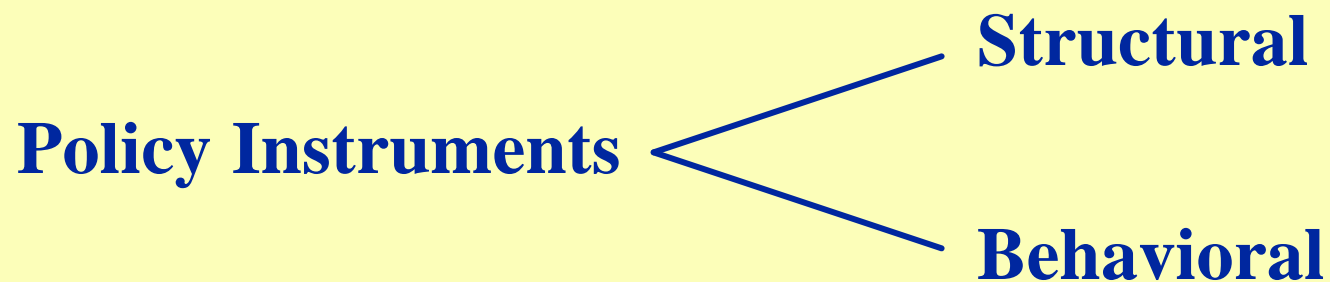
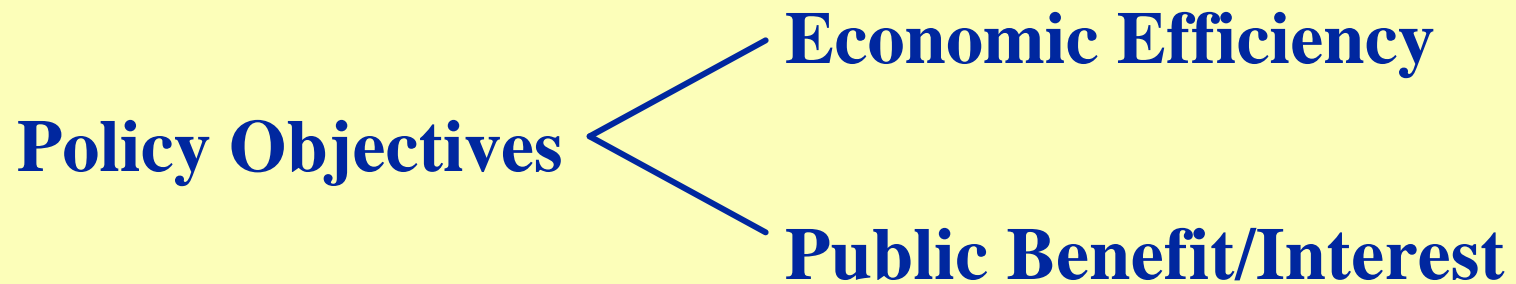
NO.

- Market Segmented by More Than Tariffs / Non Tariff Barriers / Regulations
 - Transportation Costs
 - Transaction Costs
 - Domestic And International Cartels
 - Non-Traded Products (Mainly Services)

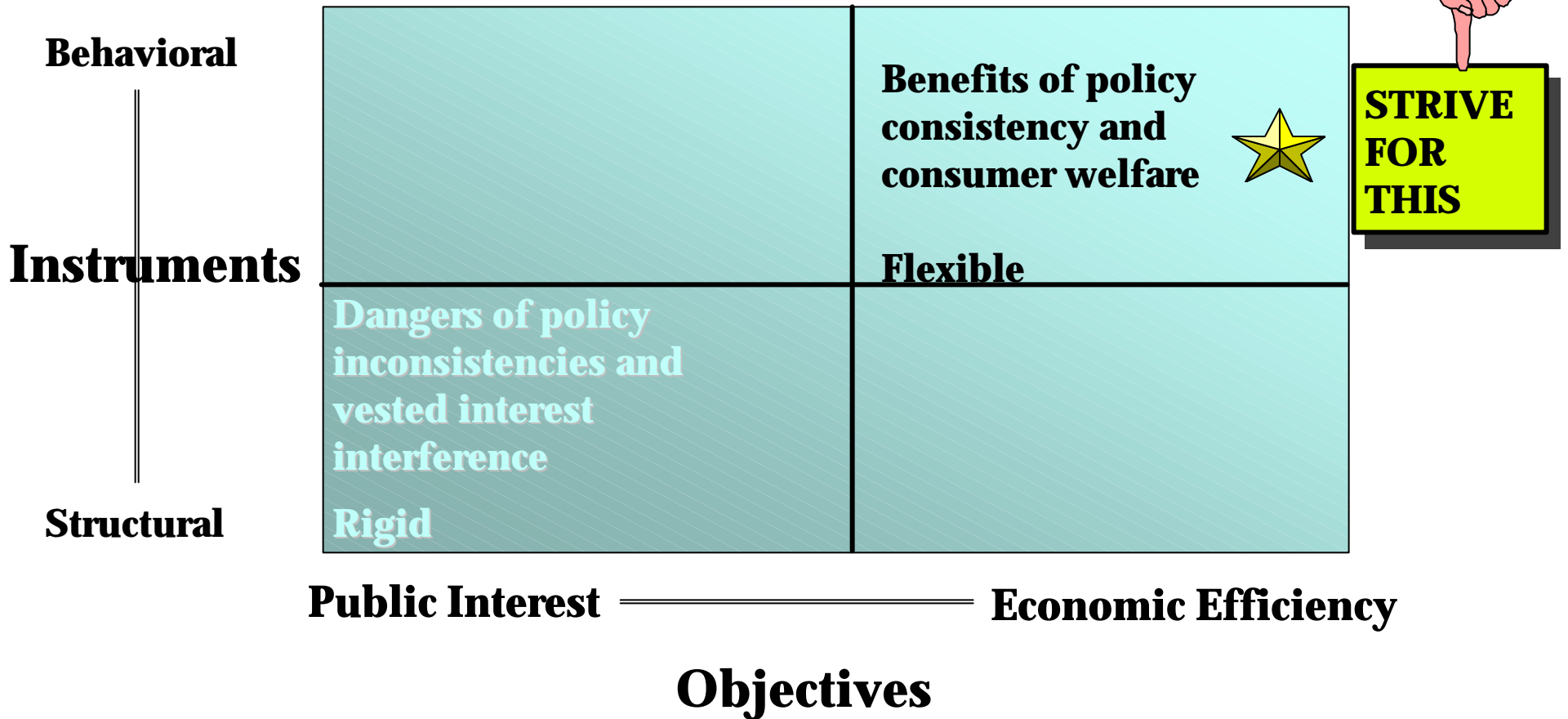
Is Trade Liberalization/Deregulation Sufficient?

- Seller-Buyer Explicit / Implicit Contractual Arrangement
 - Product And Technical Standards
 - Other Barriers To Entry
-
- Liberalization of Other Micro-economic Policies and Enforcement of Competition Law Complementary, Self Re-enforcing

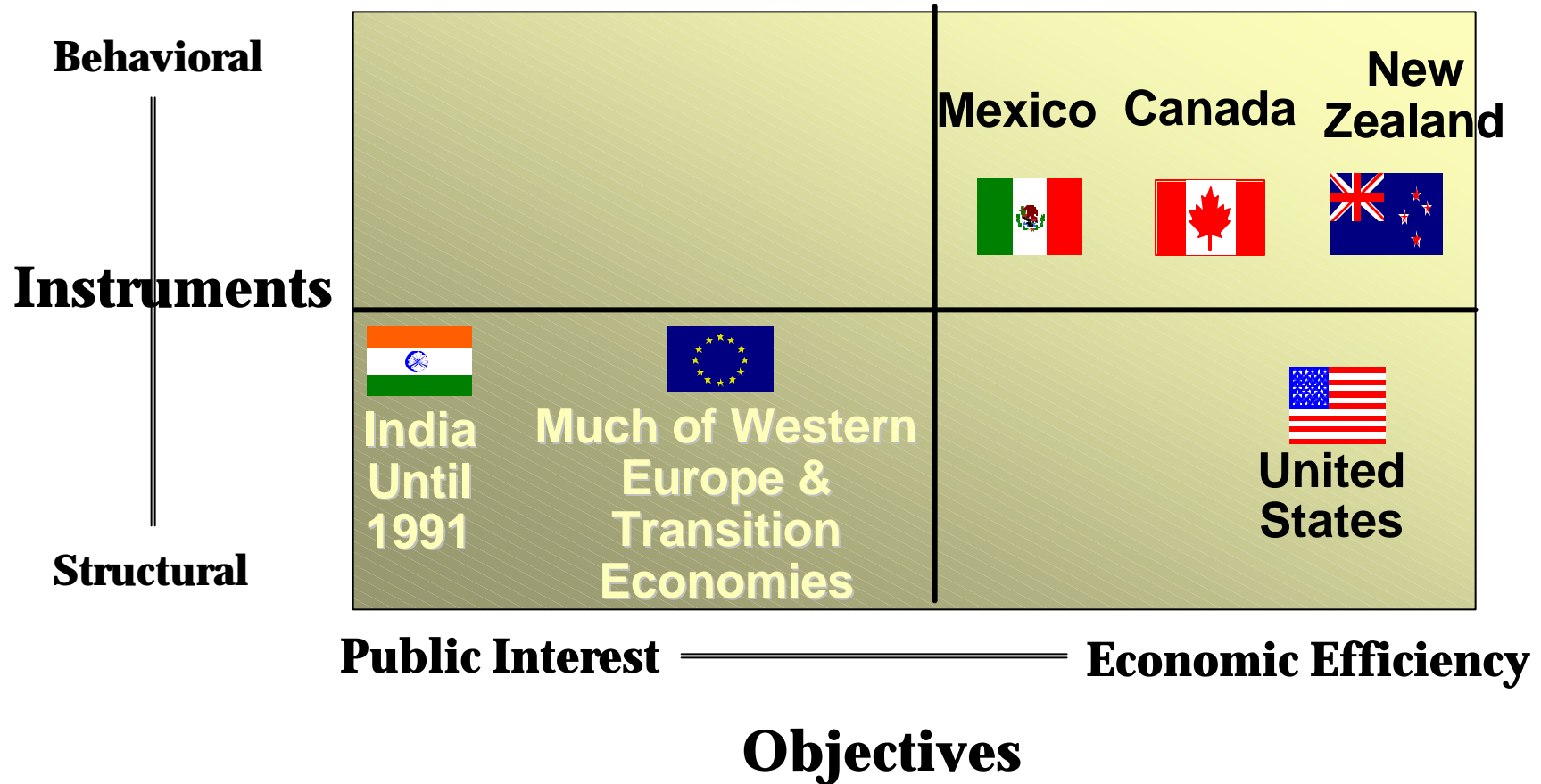
Competition Law: Objectives and Instruments



Alternative Approaches to Competition Law



Alternative Approaches to Competition Law



Focus Of Competition Law

- Various Types of Transactions Conducted in the Market Place as part of the Day-to-Day Business Activity of Firms.
- Various Types of Inter-firm Agreements, Ownership, Linkages, Associations and other Institutional Arrangement Exist.
- Vast Majority of these Transactions / Business Arrangements Do Not Pose Legal and/or Economic Problems.
- However, a Few do.

SCOPE OF COMPETITION LAW

Competition Law Should Be:

“General Law of General Applicability”

- All Firms (Economic Agents) Engaged in Commercial Activity
- Both Public (State Enterprises) and Private Sectors

Few Exceptions/Exemptions. These Vary by Country But Rationale for Exemptions Should Be Clear.

Per Se Vs. Rule Of Reason ⁽¹⁾

- Some Types Of Business Arrangements Restrictive Of Competition Clearly Undesirable
 - Example: Horizontal Agreements Between Firms (Cartels, Collusion) To Fix Prices and/or Allocate Markets
 - No Tenable Economic Justification From Societal Viewpoint
 - Per Se Illegal Approach

Per Se Vs. Rule of Reason ⁽²⁾

- Some Types Of Business Arrangements While Restrictive Of Competition May Not Necessarily Be Undesirable
 - Example: Mergers And Acquisitions, Vertical Agreements Between Firms (Manufacturer - Distributor) Such As Exclusive Dealing, Resale Price Maintenance (RPM) Efficiency Enhancing
 - Rule of Reason -- Balance Of Probabilities Approach

Market Power ⁽¹⁾

- Competition Law Targets at “Exercise of Market Power” by Firms.
- Public Policies Restricting Competition Facilities Market Power.
- As Do Certain Business Practices and Market Structures.

Market Power ⁽²⁾

- Ability of Firm, Unilaterally or in Collusion with Others, to Profitably Raise Price and Maintain it over a Significant Period of Time Without Competitive Response by other Existing and/or Potential Firms (Hypothetical Monopolist Concept).
- Exercise of Market Power Gives Rise to Reduced Output -- Higher Prices.

Other Consequences of Market Power

- Concentration in Market for Goods and Services.
- Incentives for Ownership Concentration.
- Rent Seeking and Undue Political Influence.
- Lack of Accountability and Transparency.
- Corruption, Bribery and Preferential Treatment.
- Limits Economic Opportunities, and Broad Base Participation in National Economy.
- Undermines Competitiveness Sustainable Economic Development.

How Can Market Power Be Curbed⁽¹⁾

- ❖ Specific Application of Competition Law Against Private Restraints To Business In Markets
 - ◆ Prohibition Of Price-Fixing And Other Collusive Agreements. Severe Fines And Penalties
 - ◆ Prevent Abuse Of Dominant Market Position (Monopolistic Behavior)

How Can Market Power Be Curbed⁽²⁾

- ❖ Prevent Concentration Via Controls Of Merger And Acquisition Activity
- ◆ But, Also Develop Broad Base Pro-Competition Micro-Industrial Policies, e.g., Reduce Barriers To Entry Against New (Domestic and Foreign) Firms
- ◆ Foster “Contestable” Markets
- ◆ Strike Balance Between Compliance vs. Enforcement of the Law
- ◆ Undertakings/Consent Decrees/Bench-Mark Competition
- ◆ Competition Advocacy Role

General Design Of Competition Law ⁽¹⁾

- Essentially Structure -- Conduct --
Performance Paradigm
- Structural Provisions
 - ◆ Monopoly (Dominant Market Position)
 - ◆ Mergers
 - ◆ Other Inter-Corporate Relationships (Ex: Joint Ventures)

General Design Of Competition Law ⁽²⁾

❖ Behavioral Provisions

- ◆ Horizontal Restraints: Collusion (Price-Fixing Agreements, Market Sharing Territorial Arrangements, Bid Rigging, Conscious Parallelism), Price Discrimination
- ◆ Vertical Restraints: Resale Price Maintenance, Exclusive Dealing
- ◆ Refusal To Deal, Price And Non-Price Predation, Other Anti-Competitive Practices

❖ Performance-Implicit

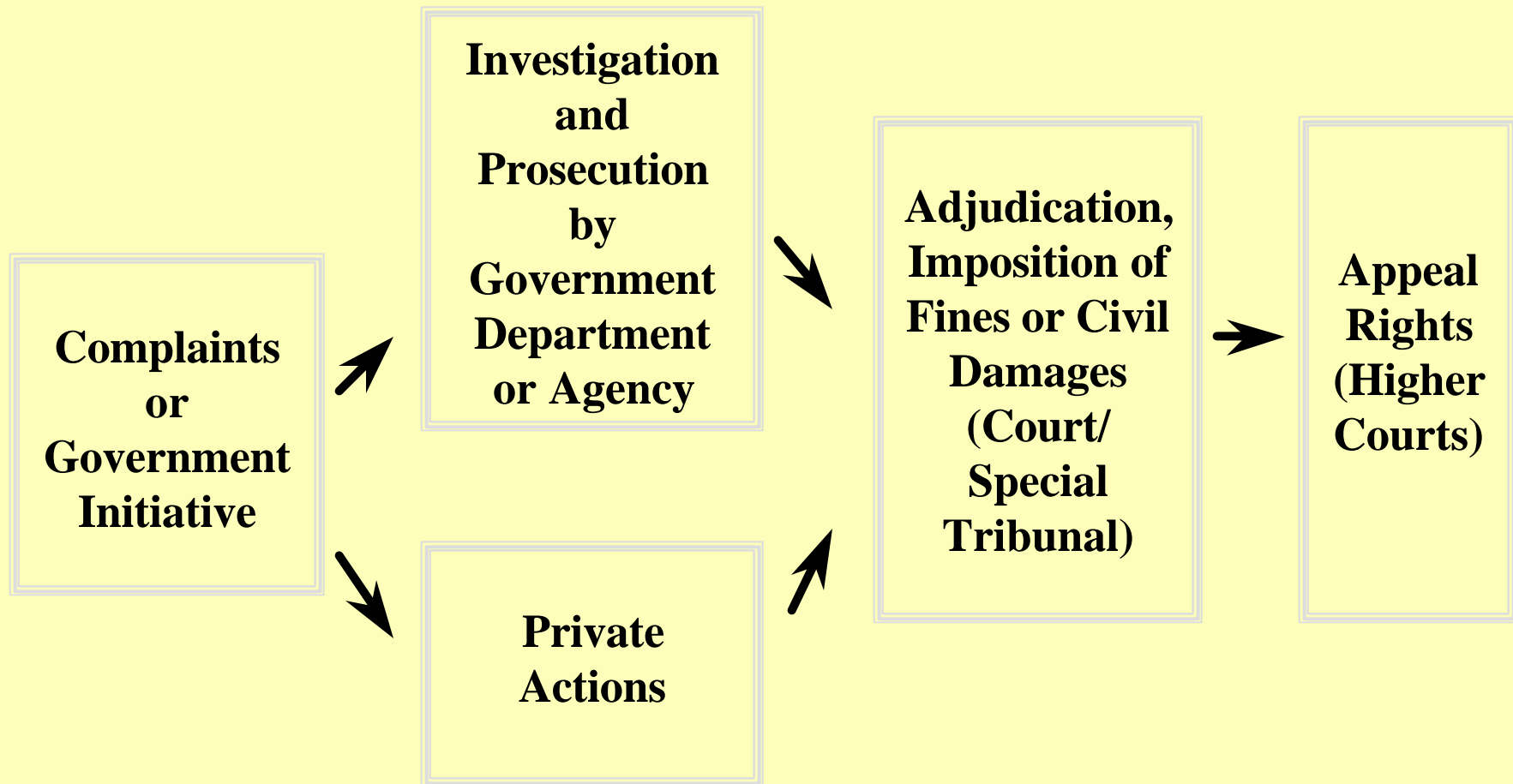
Other Special Provisions

- ❖ Specialization Agreements
- ❖ R & D Co-operatives
- ❖ Policy Linkages With:
 - ◆ Intellectual Property
 - ◆ Tariffs
 - ◆ Economic Regulation of Infrastructure (Power, Transportation, Telephone, Water....)
 - ◆ Other Economic Areas (e.g., Financial Markets...)
- ❖ General Role in Government Policy Formulation

EXAMPLES OF EXCEPTIONS/EXEMPTIONS

- Labor Union Activity re: Collective Bargaining
 - Charitable Organizations
 - Underwriting: Issuance of Insurance and Investment Securities
 - Financial Services (Debatable)
 - Amateur Sports Leagues
 - Professions-Setting Education-Qualification Standards
- et. al.

Competition Law: Administration and Enforcement



Administration And Enforcement Of Competition Law ⁽¹⁾

Division Of Principal Responsibilities

- **Investigation:** Competition Agency
 - Complaint-Driven, From Firms and Consumers
 - Weight Should Be Given to Complaints by *Customers vs. Competitors*
 - Authority To Gather Evidence While Safeguarding Business Confidentiality
 - Separate Office Accountable To Legislative Assembly
 - High-Quality, Well-Paid Staff

Administration And Enforcement Of Competition Law ⁽²⁾

- Enforcement: Competition Agency and / or
Judicial Authority, *plus* (?)
- Individual / Class Private Actions
 - Redress Mechanism For Complainants, With
Safeguards To Avoid Frivolous Actions

Administration And Enforcement Of Competition Law ⁽³⁾

- Adjudication: Courts And / Or Specialized Tribunal
 - Requires Expertise In Business, Economics and Law
 - Decision Subject To Appeal
- Advocacy: Competition Agency
 - To Ensure Competition Issues Are Considered In Government Policy Formulation

Administration And Enforcement Of Competition Law ⁽⁴⁾

Overall System Of Checks and Balances,
Ideally With Separation of Investigation,
Enforcement and Adjudication.
Independence from Political Interference
(Policy and Budget)

Implications For Countries ⁽¹⁾

- Overly Aggressive or “Regulatory” Approach Can Impede Competition, Investment, Business Confidence
- Overly Lax Can Entrench Monopolies
- Complex Area, Substantial Staff Expertise and Institution Capacity Building Required
- Opportunities For “Jump-Starting”

Implications For Countries ⁽²⁾

- Focus On Selective, Critical Areas:
 - Strong Competition Advocacy Role, Especially Aimed at Lowering Policy-Based Barriers
Important Interface with Privatization, Regulatory Reform and Other Government Policies
 - Clear Rules Against Collusion
 - For Abuse Of Dominance and Mergers, Apply Law Sparingly (that is Only in Most Clear/Blatant Cases-Violations of the Law)
Until Staff and Institutional Expertise Develops

Implications For Countries ⁽³⁾

- Enhance Business Certainty Through Policy Statements and Guidelines. Critical for Attracting and Increasing Domestic and Foreign Investment
- Foster Public Education and Support
- Careful Attention to Effective Checks and Balances in Application of Law, to Minimize Stakeholder Influence and “Capture”

Importance Of Competition Advocacy ⁽¹⁾

- ◆ Generally No Single Institution / Focal Point In Government For Competition
- ◆ Inter-Governmental-Departmental Conflicts -- Different Mandates
 - ⌘ Trade Policy
 - ⌘ Privatization
 - ⌘ Regulation & Provision of Infrastructure
(Power, Transportation, Telephone, Water....) Services
 - ⌘ Industrial / Regional Development

Importance Of Competition Advocacy ⁽²⁾

- ◆ Stakeholders -- Interest Groups
- ◆ Need For Transparency – Accountability
- ◆ Different Institutional Designs
 - ⌘ Publicity / Moral Suasion / Public Debate
 - ⌘ Voluntary / Informal / Formal-Statutory Role
- ◆ **PREFERRED APPROACH: Formal-Statutory Role**

Concluding Messages

- ❖ Competition is a Vehicle--*Not* an End in Itself; Focus on Economic Efficiency
- ❖ Conditions Economic Environment in Which Business Activity Is Conducted
- ❖ Reduce Barriers To Mobility Of Resources
- ❖ Protect Competitive Process, *Not* Competitors

Concluding Messages

- ❖ Emphasis on Business Conduct (Market Power), *Not* Market Structure (Concentration or Firm Size)
- ❖ Distinct from Regulation-*Avoid* “Regulating Competition”
- ❖ ❖ Effective Competition Reduces Need for Intervention

Concluding Messages

- ❖ A “Framework Policy” -- 4th Cornerstone of Government Economic Policies, Along With Monetary, Fiscal And Trade Policies
- ❖ Competition Should Be Integral To:
 - * Government-Business Relations
 - * Business Culture and Ethics