
Introduction

1.1 The Middle East in geographic terms

Very few regions in the world have given rise to uncertainty in terms of geographical definition as has the ‘region’ known as the Middle East. Whilst everyone agrees that the word ‘Middle’ is used to refer to the *middle* of other (neighbouring) regions, there has been little consensus – whether within the academic community, within political or diplomatic circles or within any other community or indeed among these communities themselves – in relation to where the outer-boundaries of this ‘middle area’ lie or exactly how ‘East’ should one go when attempting a geographical definition in this case. From the various definitions, which have emerged over the years, it would appear that defining the Middle East is an exercise that is ‘relative’ rather than ‘absolute’ depending on, among other factors, geographical perspective as well as political, social, cultural and ethnic factors.¹ Thus, if one considers the geographical definition of the Middle East commonly used within the United States of America (USA), one would find that it is a definition that has in large part rested on two important components of US foreign policy, namely the Arab–Israeli or Israeli–Palestinian conflict and the interest in and security of the vast oil resources in the Arabian/Persian Gulf.² Hence, the Middle East according to this definition would appear to include Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen.³ To this list of countries, however, recently Afghanistan appears to have been a country that many in the USA believe should be added,

¹ This may explain the existence of a few (though not widely used) synonyms for the term Middle East. These include ‘Southwest Asia’, ‘Near East’ and ‘Western Asia’.

² One could add the recent war in Iraq and the occupation of that country as a third component.

³ Interesting here is the exclusion of Turkey as a Middle Eastern country.

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Maher M. Dabbah

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presumably because of the US ‘war on terrorism’, which is also a component of US foreign policy.

Academically, however, the Middle East appears to have been defined more broadly. Academics often define the area as one that includes: Algeria, Egypt, Libya, Tunisia and Sudan (despite being North African countries), Bahrain, Israel, Iran, Iraq, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen. To this list of countries, some would add, Afghanistan, Pakistan and Turkey; and there are those who have advocated a broader definition and would even consider all of the following countries as Middle Eastern: Azerbaijan, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan.

1.2 Geographical coverage of the book

Arguably, a rather influential factor in having such divergence in definition (and thus feeding the uncertainty of the geographical definition of the Middle East) has been the existence of Israel. Indeed, the above-mentioned definitions could be said to come within two broad, competing categories. According to the first category, the Middle East is a geographic area comprising the Arab countries and Israel. The other definition, however, includes the Muslim countries and Israel which would mean that in addition to covering Afghanistan, Iran, Pakistan and Turkey a geographical definition of the Middle East ought to cover the five countries of Muslim Central Asia.

Whilst undoubtedly one would need to include Israel in the group of countries comprising the Middle East, it is questionable whether all of the above-mentioned countries should be taken into account when defining the Middle East geographically. For the purposes of the present book, the Middle East is defined as a geographic area made up of all of the following: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates and Yemen. It is this author’s hope that this definition or selection of countries will not be considered as capricious. The aim is to offer a definition that is neutral in geographical terms insofar as is possible. This author is fully aware that in certain quarters these selected countries are referred to geographically as the ‘Middle East and North Africa’. However, there are many uniting factors justifying grouping all of these countries together as Middle Eastern ones, most notably in terms of culture, language and religion.

1.3 The global significance of the Middle East

It is highly doubtful whether the global significance of the Middle East can be rivalled by that of another geographic region or area in the world. Middle East topics and debates transcend boundaries and reach the most remote places in the world. Whether in the world's most powerful capitals or the world's smallest villages and communities, the Middle East is often the subject of heated discussions and debates.

The huge global significance of the Middle East is extremely unique and rests on the most powerful factors found within the arenas of religion, politics and economics. More often than not the aspects of this significance are *negative* rather than *positive*, especially when one considers the bitter conflicts of the region, the constant potential for dangerous confrontations and the ever-widening circles of vicious violence. From a historical perspective this is a particularly shocking and painful account of a region widely recognised as the birthplace of civilisation and peace-founding religions, including Christianity, Islam and Judaism.

1.4 Sharpening the focus

It is a well-known fact these days that competition law has very rapidly and in a relatively short period of time developed into an international phenomenon, with over one hundred jurisdictions – with different types of economies, legal systems and political regimes – having introduced some form of competition law within their domestic systems and with no fewer than thirty countries at present seriously considering following suit. This undoubtedly is an impressive geographical expansion of a highly specialised branch of law which very few other branches of law have seen. In no small part, this expansion has been the direct result of very important developments occurring in the second half of the last century. Notable among these developments are: the clear shift on the part of many countries towards capitalism; the increasing reliance by countries on the market mechanism; and, above all, the growing belief by an increasing number of countries in the value of competition as a reliable tool to benefit local consumers, support the liberalisation of markets and achieve economic efficiency in both domestic and international markets.

Interestingly, however, this development of competition law and policy globally seems to have fallen short of extending adequately to the whole of the Middle East. Indeed, currently only ten of the region's

twenty-one countries have a specific competition law and policy in place. Out of these ten countries, fewer than four have fairly adequately developed competition law and policy. Moreover, it is truly the case that in not a single Middle Eastern country (MEC) has competition law developed into a mature branch of law with a sound and strong policy to support it.

1.5 The foundations of competition law and policy in the Middle East

The points made in the previous section, among other things, convey the impression that normally one would not associate the origins, development or the topic of competition law and policy more generally with the Middle East. There may be various explanations for this, ranging from the fact that none of the existing competition law regimes in the Middle East is remarkably or particularly advanced whether in terms of having competition law understanding or culture or in terms of enforcement of the law, to the fact that the region has not seen the kind of significance given to competition law and policy as in other parts of the world, such as Western Europe or North America. Added to this ‘spectrum’ of explanations there is of course the fact that the Middle East is an area that has come to be known in the world more widely as a region of conflict, bloodshed or in the least painstaking way an area of vast oil resources; in light of this perhaps it should be understandable that these matters have come to occupy centre stage in those countries and as a result have pushed debates on competition law and policy to the sidelines. As its central theme, however, the following chapter in particular, will seek to demonstrate – through laying bare the supporting evidence – that the roots of competition law and policy in the region can be traced to the seventh century. In this way, the idea of having a healthy process of competition in the market place, which is worth protecting, and guaranteeing the freedom of market operators to compete is an old and well-established one within the region.

1.6 The five issues

Competition law and policy have been developing in different MECs with particular emphasis in the process being placed on five key (and largely interlinked) issues. The efforts of MECs to focus on these issues should be applauded; although, as the discussion in later chapters will

reveal, further work is necessary to develop the understanding of the 'link' between these issues and competition law.

1.6.1 Foreign direct investment

Views diverge with regard to the exact relationship between competition law and policy and foreign direct investment (FDI). At one end of the spectrum, there is the view that the existence of the former – with its aim to guarantee competitive markets – would encourage the latter. Therefore, according to this view foreign firms and investors are expected to be attracted to a competitive environment, especially one in which the competition rules are consistent or similar both in letter and application to those prevailing in major jurisdictions, most notably the European Community (EC) and the USA. At the other end of the spectrum, there is the view that foreign firms and investors might be more inclined to invest in countries where the national government maintains a 'protectionist' policy of state control and planning in relation to certain sectors of the economy with an imperfect competition environment. The belief is that they will be able to benefit from such a stance by national governments and be guaranteed the advantages of a quiet life.

It is important to note that these views have been suggested on the assumption that FDI is possible in the relevant jurisdiction(s): it is important to remember that not all countries have maintained a policy of allowing foreign participation in all sectors of the economy, though the position that has come to prevail globally has increasingly been in favour of allowing and encouraging such participation. This position has come to be adopted by most (if not all) MECs in recent years. Currently, heavy emphasis is placed on FDI in MECs and there has been a growing recognition that competition law should be adopted and utilised for the purposes of encouraging FDI in local economies.⁴ In some MECs competition law is being used as one of the main tools to attract and foster foreign participation in the local economy. MECs therefore appear to have embraced the former, as opposed to the latter, view on the relationship between competition law and FDI mentioned above.

⁴ Notable examples here are Egypt, Jordan, Lebanon, Libya, Syria and the United Arab Emirates. In all of these countries a strong link has been identified between competition law and FDI. The experience of these countries will be discussed in later chapters.

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1.6.2 *Economic growth and poverty*

One of the most serious problems facing all MECs is poverty, which in the case of many MECs is widespread. This problem has grown in recent years with little success being achieved in practice in fighting poverty and reducing it. Of course, the fact that many parts of the region are embroiled in conflict and confrontation does not help at all in this regard; with an increasing number of people becoming displaced and losing their home and income the situation can only deteriorate in the future.

There are several ways in which a government may reduce poverty among the local population. One way is through encouraging economic growth and empowering its poor or disadvantaged citizens. The idea here is not a 'Robin Hood' style of taking away from the rich in order to give to the poor, nor is it 'empowerment' in the current South African context. Rather, it is more about pursuing a sensible economic strategy, which could offer disadvantaged citizens productive employment and access to vital resources, such as land, capital and investment. Of course the success of this depends on various factors. Among these is whether the strategy is based on social responsibility. Equally important, however, the success of the strategy would require establishing crucial links between disadvantaged citizens and markets through ensuring that the latter would function in a way that would generate benefit for the former. Making markets function in this way would demand, among other things, having important economic policies in place. A crucial policy in this regard is competition policy.

The link between efficient markets and the interests of disadvantaged people has been highlighted rather well in the work conducted by the World Bank.⁵ A central component of this link is the existence of efficient markets, which in turn requires that activities within those markets be not distorted especially through anti-competitive or abusive behaviour of firms. The desirability and necessity of having a competition law and policy in place in the country concerned is thus apparent. It does not require a great deal of imagination to picture how the disadvantaged would be affected much more adversely than the rich by anti-competitive or abusive behaviour. For a rich person paying a higher price for a product does not usually entail a particular economic

⁵ The World Bank has repeatedly pointed out that efficient markets help generate growth and expand opportunities for the disadvantaged. See for example, the *World Development Report 2000/2001*, available at www.worldbank.org.

hardship and the possibility for seeking substitutes or alternative supplies in other places is a real one. For the disadvantaged, however, such a situation can have serious consequences in practice as the higher price would mean that financing important aspects of life such as education becomes much harder and the possibility open to rich citizens is virtually non-existent in their case.

1.6.3 Corporate governance

The topic of corporate governance is one that was neglected for many years in most MECs and has only recently come to receive particular attention and focus in different parts of the region. Many MECs are turning their attention to this topic having realised that corporate governance is a crucial factor in attracting foreign investment and enhancing investor confidence. Additionally, with the strong interest on the part of many MECs for an increased integration into the global community, closer attention has come to be given to the need to improve corporate governance domestically. In doing so, these countries are following the examples furnished by developed countries and taking note of the guidance, general principles and codes of practice which have come to be produced by key international organisations, most notably the World Bank and the International Monetary Fund (IMF).

Competition can play a major role in enhancing corporate governance. It would not be difficult to think of a situation in which a firm that is subject to no competitive pressure whatsoever – whether within or from outside the market – and is the only or one of very few firms in the market – could easily become inefficient and its management becoming lax in their approach, with no real drive for innovation or ‘burning desire’ for efficiency, especially in cases where such a firm is able to charge for its products whatever price it desires. In such a situation, the management of the firm would feel comfortable and safe in the knowledge that the firm is unlikely to be ‘threatened’ or its quiet life disrupted, and one adverse consequence that may follow from this situation is a tendency towards or even an engagement in anti-competitive behaviour or abusive conduct. Furthermore, in these situations firms tend to have access to capital through local and international banks. Among other things, such access to capital enhances the economic power of these firms, arms them with a significant business advantage and may even reduce their drive for efficiency further. Hence, the widely held belief is that competition can address this undesirable situation and on the

whole it can deliver key benefits in terms of enhancing economic efficiency – notably productive efficiency – in the market and lead to maximisation of consumer welfare.

The focus which has come to be given to corporate governance in different MECs has nonetheless been narrow in its scope, with its focus being devoted almost exclusively to intrinsic factors of corporate governance, namely issues such as the need to protect shareholders' interests, adherence to codes of conduct by senior corporate management and general issues dealing with conflicts of interest among the officers of a firm. However, it is crucial to appreciate that corporate governance is equally concerned with extrinsic factors, most notably the environment in which the firm conducts its business activities and the type of economy prevailing in the relevant country. For this reason, the existence of conditions conducive for competition under the umbrella of such factors can lead to good practices of corporate governance and may in some cases be rather vital to achieve this.

Corporate governance in MECs may be improved significantly through enhancing competition in local markets. To achieve this, however, those countries not only need competition legislation in place but also the necessary mechanism for its effective enforcement. This would necessitate the existence of an independent competition authority with the necessary capabilities and powers to conduct investigations and reach binding conclusions. It would also require a system of checks and balances with an effective judicial branch and the formulation of public policies that do not hinder competition. In relation to the latter, a pro-competitive institutional structure and the function of competition advocacy can play a major role. These two issues will be introduced here with a brief overview; an evaluation of their existence in the region and their application in practice will be conducted in later chapters in relation to different MECs.

1.6.4 Institutional structure and design

Introducing competition laws and designing competition policies in MECs is important and helpful, though seeking to promote competition through these two steps might not be sufficient by itself. MECs are small economies and for this reason their approach to competition law should be suited to the size and type of their domestic economies. The particular geographic location of MECs and their unique political, social and cultural circumstances make this all the more important.

Local institutions – including mainly competition authorities but also other public authorities – within MECs have an important role to play in promoting competition and building an environment in which competition and economic growth, as opposed to anti-competitive situations, will flourish. The approach being suggested here involves creating institutional structures and designs, which are pro-competitive. This approach would entail building institutions, which operate in an efficient and transparent manner, by introducing and implementing suitable, clear and user-friendly rules and guidelines. These rules and guidelines must be suitable to the specifications of the local economy and the legal system in use; they must be clear in order to support legal certainty; and they must be user-friendly in order to ensure they offer the necessary help and comfort to firms and other parties with direct or individual concern under the relevant competition law regime. Above all, to build their pro-competitiveness these institutions will need to design and implement concrete action plans for the purposes of removing artificial barriers to entry in local markets and those facing trade and investment more generally, most notably barriers caused by government rules and regulations. The issue of institutional structure and design has received some recognition in some but by no means the majority of MECs. Some MECs have even introduced rules subjecting competition officials to strict standards in relation to issues such as ‘conflict of interest’ and ‘confidentiality’ with serious penalties in case of a breach of these rules by an official; interestingly, in some jurisdictions these penalties may be heavier than those imposed on firms found to have committed a breach of the competition rules.⁶

1.6.5 Competition advocacy

It is generally perceived that damage or harm to the process of competition in the market place is only likely to occur through the anti-competitive behaviour or abusive practices of firms. Whilst this is the most common situation bringing about adverse effect or distortion to competition, it is equally important to appreciate that such harm is also possible without there being any involvement by firms or the occurrence of anti-competitive behaviour or abusive conduct. The most obvious arena where this may arise is that of public policy formulation and

⁶ An example here can be found in the case of Egypt and Saudi Arabia. See p 246 and p 205 below respectively.

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institutional design. There are many situations where public policies facilitate anti-competitive behaviour or abusive conduct on the part of firms and perhaps equally as many situations where such behaviour is offered protection or cover by the state whether through exemption or through a policy decision not to investigate and punish the behaviour or conduct in question.⁷ At one level, the possibility of these situations arising raises the interest in and the necessity for competition law to be adopted. Where such a law is introduced and a competition authority is established it would be relevant to ask whether the mandate of such an authority should extend beyond mere enforcement of competition law towards engaging in competition advocacy.

It is crucial – given how complex economic development and regulation have become – that competition authorities participate in the formulation and design of domestic economic policies and other relevant policies, which impact on the process of competition in the market and its conditions. Such participation by a competition authority is desirable in order to ensure that competition considerations receive adequate recognition and expression in order to facilitate important economic objectives such as lowering of barriers, enhancing deregulation and promoting market liberalisation. In acting in this way, a competition authority would ‘advocate’ competition law, a task which carries many important advantages. These advantages include facilitating an influential role for the authority to play in the formulation of various public policies. Through this role the competition authority will have the opportunity to ensure that competition concerns arising from new policies are clearly highlighted; where relevant, the competition authority may also be in a position to propose suitable alterations or alternatives to such policies. The competition advocacy role described here essentially provides a ‘safety valve’ in the mechanism for policy design and formulation. Furthermore, the role has an added advantage of making the future enforcement functions of the competition authority considerably easier, especially when it comes to such authority directing its competition advocacy at the business community and consumers.⁸ The latter task of competition advocacy has huge benefits

⁷ See Dabbah, ‘The development of sound competition law and policy in China: an (im)possible dream?’ (2007) *World Competition* 341.

⁸ In relation to the business community, competition advocacy could take a variety of forms: publishing enforcement decisions or at least publicising summaries of decisions reached in individual cases in the media and press releases; adopting guidelines on specific areas of competition law and policy which are often appreciated by firms who wish to observe the