Module-4

Trade Liberalisation and Competition Policy

S. Chakravarthy[*]

This module is written under a research grant from the Economic Affairs Division of the Commonwealth Secretarial, London to CUTS International, Jaipur. Views expressed in this module are those of the author and not necessarily reflect those of their institutions and of the Commonwealth Secretariat and CUTS International.

[*] Consultant on Competition Policy and Law; Email: chakravarthy38@gmail.com

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Acronyms

CCI	Competition Commission of India
CIS	Commonwealth of Independent States
COL	Ceylon Oxygen Limited
FTC	Fair Trade Commission
GATS	General Agreement on Trade in Services
EC	European Commission
IGL	Industrial Gases Private Limited
IPRs	Intellectual Property Rights
LPG	Liberalisation, Privatisation and Globalisation
M&As	Merger and Acquisitions
MCOT	Mass Communication Organisation of Thailand
MNCs	Multi-National Corporations
MRTPC	Monopolies and Restrictive Trade Practices Commission
NBL	National Breweries Limited
NTBs	Mon-Tariff Barriers
OECD	Organisation for Economic Cooperation and Development
OPEC	Organisation of Petroleum Exporting Countries
SOEs	State Owned Enterprises
TRIPs	Trade Related Aspect of Intellectual Property Rights
UBC	United Broadcasting Corporation
WTO	World Trade Organisation

1. Introduction

Competition policy is generally regarded as "those government measures that directly affect the behaviour of enterprises and the structure of industry" (Khemani et al, 1996). The objective of competition policy is to promote efficiency and maximise welfare. In the presence of competition, welfare maximisation is synonymous with allocative efficiency. Competition policy involves putting in place a set of policies that enhance competition in local and national markets.

Competition policy has extensive interface with other governmental policies. By and large, the interface is positive, as there are complementarities in objectives between them. However, in areas such as trade, investment and regional development policies, conflicts may often arise. The extent of consistency, or its lack, in different governmental policy measures, can support or thwart the objectives of competition policy. One of the important governmental policies is the trade policy (in the context of the trend in the World today, it may be called the Trade Liberalisation Policy).

This Module addresses issues related to the trade liberalisation and competition Policy. The paper gives a 'Prefatory Background' to provide a backdrop followed by the definitions of various tenets under the competition policy. Section 3 focuses on the necessity of the competition policy, while Section 4 analyses the comparative study of trade liberalisaton and competition policy. Section 5 lists issues for 'Group Discussion'.

1.2. Prefatory Background

Significant government involvement alongside dominance of large state-owned enterprises (SOEs) characterised the approach and policies of most developing countries in the past, particularly after the 1950s. Many of them set in motion the economic liberalisation process during the 1980s and 1990s, which was essentially driven by Liberalisation, Privatisation and Globalisation (LPG). In other words, there was a conscious shift from what may be styled "command-control' regime to 'market economy'.

There is a growing realisation that in developing countries, the shift to 'market economy' does not necessarily produce competitive outcomes as potential benefits are often thwarted by market-distortionary practices but on the other hand, produce undesirable outcomes (Brusick et al, 2004). One of the undesirable outcomes is the slew of anti-competitive practices that may be perpetrated by some of the players in the market economy. Distortions to the market process arise when enterprises competing with one another adopt restrictive or unfair practices like fixing prices (with rivals in collusion), setting prices at lower than cost in order to eliminate competitors from the market, taking advantage of a monopoly situation and charging unreasonable prices, refusing to supply or indulging in boycott, etc.

Less of governmental control, less importance for SOEs and more free play for private enterprises may be welcome for entrepreneurs, industrialists, service providers and consumers, but there are apprehensions among even the supporters of 'market economy' that unbridled *laissez faire* approach could result in a 'might is right' situation. The fear is that without some reining in of anti-competitive practices (especially by the private players), the perpetrators of such practices with size in their favour may lead the market emasculating the small and the impecunious. Big would survive and the small would fall by the wayside. One solution felt to be desirable is the

promotion and fostering of ‘competition’ in the market. Competition policy and law need to be designed to encourage competition and to curb, if not eliminate, anti-competitive behaviour of enterprises in the market and of other market players.

2. What Is Competition Policy?

2.1 Competition, Competition Policy and Competition Law

Competition may be conceived as an amalgam of factors that stimulate economic rivalry (Clark, 1940). Competition policy is a subset of competition, and its (competition policy’s) subset is competition law. Competition policy involves, as noted above, a slew of policies that enhance competition in local and national markets. Its subset is legislation, namely, competition law, designed to prevent anti-competitive business practices and unnecessary government intervention. An effective competition policy promotes the creation of a business environment, which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition.

2.2 Executive (governmental) Policies

Most executive policies of the Government are made at the Minister’s level or by the cabinet. They are also made at the level of officers (or civil servants) in the Government. Some minor executive decisions are made at the local level too, like municipalities. All decisions are not necessarily competition-compatible. By and large, executive decisions are claimed to tethered to what is known as “public interest”, which requires some delineation, as it means many things to many people. In the name of public interest, many governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behavior. In the name of the so-called “common man”, the expression “public interest” is invoked by the Government. The said expression sometimes covers consumer interest and sometimes overrides it. What is public interest? How is it distinguished from consumer interest? The following section answers these questions.

2.3 Consumer Interest and Public Interest

Often consumer interest and public interest are considered synonymous. But they are not and need to be distinguished. Consumer is a member of a broad class of people who purchase, use, maintain and dispose of products and services. Consumer interest is affected by pricing policies, financing practices, quality of goods and services and various trade practices. Hence, consumers have to be distinguished from manufacturers who produce goods and wholesalers or retailers who sell goods. Public interest, on the other hand, is something in which the public or the community at large has some pecuniary interest or some interest by which their legal rights or liabilities are affected. The expression “right” means a well-founded claim, an interest, concern, advantage or benefit. Public interest does not mean anything so narrow as mere curiosity or as the interests of a particular locality or of a small section of citizens or of a group of consumers.

An important ethical delineation of public interest comes from the philosopher Rawls (1971). According to him, while protecting sectional interest, it is imperative that the social and economic equities for the larger public are protected by governmental legislative/executive policies. In other words, the mixture of sectional and general interests will have to be so balanced that a consensus

emerges as to what constitutes public interest within the frame of reference of a particular society and culture. There is a well justified apprehension that in the name of "public interest", governmental policies may be fashioned and introduced which may not be in the ultimate interest of the consumers particularly in the long run.

Governmental legislative/executive policies generally cover the larger public interest in a country, while competition policy covers a smaller group of consumers in the country. It is desirable to keep in view that while competition policy is a desirable objective, it has to be laced with certain safeguards for a limited period to protect the domestic industry, till it is enabled to stand up to and face competition, particularly from overseas (imports). In other words, if competition policy were to be given an unbridled run, it may benefit the consumers and serve consumer interest, but it is quite possible that some of the MNCs may oust or extinguish the domestic industries because of the former's financial and marketing clout.

The apprehension is that many domestic industries, which have invested their capital and labour and other resources, may not be able to stand up to competition with giants and conglomerates, which, with their size and economies of scale, will have an advantage in the competitive market. Public interest may get hurt and even prejudiced, if competition policy is allowed an unruly run. Competition policy benefits consumers but oftentimes it conflicts with public interest. The Colombian case (see Box 1) illustrates the tight rope balance between public interest and competition normally encountered by competition agencies and governments.

Box 1: Balance between Public Interest and Competition

Right to free competition was incorporated in the Constitution of Colombia when the government issued a Decree No. 2.153 in 1992. The Decree was designed to stimulate competition in the market, improve the efficiency of the economy and foster the interest of consumers.

The beer industry in Colombia is highly concentrated in the hands of a few powerful enterprises controlling most of the production in the country. One of the enterprises was Bavaria, a large producer of beer. Leona, a large manufacturer of soft drinks constructed a beer plant and gave competition to Bavaria. Leona's beer operations did not proceed at the expected levels of profitability and therefore it offered its beer business for sale. Bavaria made a bid for the same and succeeded. Bavaria and Leona coming together meant concentration and dominant power in the market potentially detrimental to competition and to consumers. Both Bavaria and Leona requested for approval of the integration. The proposal to integrate was approved.

In according the above approval for integration, the paramount consideration was that one of the beer manufacturers (Leona) would not survive without integration. Death of Leona would mean retrenchments and loss of capital already invested. Integration avoided this. This is a typical case of balancing public interest (by allowing integration) and competition.

Source: Oliveira (2006)

3. Why is Competition Policy Needed?

3.1 Benefits of Competition Policy

Definition of "competition" and its relevance for the economy have been addressed in the previous section. What is needed is a range of government policies to enable the economy to conform to the basic market principles. Trade policy, industrial policy, privatisation, de-regulation, regional policy and labour and social policy all need to be conducted in a manner compatible with the market mechanism for an economy to function as efficiently as possible. These policies need to be conducted in a complementary manner and it is important that a mechanism exists for incorporating the "competition dimension" within government decisions on such policies. Experience suggests that, in the process of transition to a less regulated and more open economy, the existence and application of competition policy can usefully support other policy initiatives[†].

In support, there is empirical evidence of the benefits of competition policies *vis-à-vis* economic development, greater efficiency in international trade and consumer welfare listed in a report[‡]. The evidence suggests that the consumer and producer welfare and economic growth and competitiveness in international trade have all flowed out of competition policies and further notes that competition rewards good performance, encourages entrepreneurial activity, catalyses entry of new firms, promotes greater efficiency on the part of enterprises, reduces cost of production, improves competitiveness of enterprises and sanctions poor performance by producer. Box 2 analyses the empirical evidence.

Box 2: Evidence that Competition is Beneficial

"In the Netherlands[§], it has been calculated that the average annual consumer loss arising from collusive practices or restrictive regulations in several service sectors amounts to 4,330-5,430 million guilders (around US$2.1-2.7bn). Data relating to the US[**] shows that a bid-rigging conspiracy for the sale of frozen seafood which was eventually prosecuted had an average mark-up over the competitive price over a one year period of 23 percent and the break down of price-fixing conspiracies in some industries has led to steep declines in manufacturing costs[††]. It is true that cartels may sometimes facilitate adjustment, but vigorous competition may be more effective in forcing rationalisation of industries, particularly in larger markets. An examination of some exempted rationalisation cartels in Germany[‡‡] (several different types of cartels are allowed under the German competition law, subject to certain conditions) found that they had promoted the viability of the producers in the industries concerned, but there was little evidence that they had contributed to productivity and efficiency improvements, while they had resulted in higher prices and less output".

There is enough testimony to underscore the benefits that flow from redesigned government policies in favour of competition. For instance, in the EU[§§], the implementation of the policy of removal of barriers to

† See APEC (1999).

‡ See UNCTAD (1997).

§ See Hendrik P. Van Dalen (1995).

** See Luke M. Froeb et al (1993).

†† See Scherer F.M. and David Ross (1990).

‡‡ See David B. Audretsch (1989).

§§ See Commission of the European Communities (1996).

trade is estimated to have increased income by 1.1-1.5 percent over the period 1987-93 and to have created 30,000- 90,000 jobs and to have decreased inflation by 1.0-1.5 percent. Around half of this is attributed to increases in competition and efficiency improvements.

In a note*** presented to the Standing Committee on Finance, Lok Sabha Secretariat, the benefits gained in different economies, consequent on economic reforms and competition policy were highlighted. The Standing Committee on Finance of the Indian Parliament was examining the Competition (Amendment) Bill 2006 and it summarised the benefits of competition policy as follows:

"In simple terms, competition leads to lower prices, better products and wider choice. According to economic theory, competition maximises consumer welfare and it promotes allocative and productive efficiency. It also encourages innovation. Free and fair competition protects freedom of trade and prevents abuse of economic power and thus promotes economic democracy".

The aforesaid empirical evidence (see Box 2) demonstrates that strengthening and promotion of competition need to be a key goal of economic policies, of not only developed countries but also developing countries and LDCs and countries in transition. It may be worthwhile here to examine the linkages between competition policy, efficiencies and development.

3.2 Competition Policy, Economic Efficiencies and Development

In a competitive market, in the absence of government interventions, asymmetries of information, impediments to entry and exit of firms (impediments to contestable market) and anti-competitive practices by enterprises, prices and quantities are likely to settle down to levels that generate economically efficient outcomes. In other words, the competitive market is likely to attain static efficiency. The concept of efficiency is relevant and is used in discussing the objectives of competition and, in particular, the objectives of competition policy. The concept has two strands, the static and the dynamic.

Static efficiency refers to the maximisation of the benefits of exchange between the producer and the consumer. In other words, static efficiency seeks to maximise the sum of the producer surplus and the consumer surplus in a given market at a point of time. Dynamic efficiency refers to the maximisation of the sum of such surpluses over time. This maximisation reckons the impact of technical progress, innovation and investments of various types†††. Kolasky and Dick (2002) viewed dynamic efficiency as one which would examine the conditions under which technological know-how and the set of feasible products optimally could be expanded over time through means such as learning-by-doing, research and development (R&D) and entrepreneurial creativity.

A well conceived competition policy and effective competition law enforcement are likely to result in the rational allocation of resources and in making market outcomes move towards efficient outcomes. While this hypothesis may be generally true of static efficiency, it may not always be true of dynamic efficiency. In other words, competition could impede the realisation of

*** See Competition Commission of India (2006).

††† See Evenett S (2004).

dynamic efficiency and there could occur trade-offs between competition policy and dynamic efficiencies. Four arguments leaning on Evenett (see footnote 9) could be mentioned for this:

1. Developing economies generally do not have well functioning factor markets, like stock exchanges and bond markets. They are unable to create institutions that support the operation of markets such as bankruptcy codes, efficient contract enforcement etc[‡‡‡]. This inability impacts negatively for achieving dynamic efficiencies.

2. A second trade-off between competition policy and dynamic efficiency may occur when firms need to attain a certain size in order to compete effectively in the global market. Sometimes, state action in developing countries encourages forced mergers and acquisitions (M&As) and seeks to create national champions. The size of a firm may enhance its competitiveness because of the economies of scale, of its better ability to raise funds and of its enhanced ability to successfully innovate. Economic patriotism or economic nationalism may have the support of the government of a country, but it is not competition-compatible. Box 3 demonstrates as to how economic nationalism trumped competition in Thailand.

Box 3: Creation of National Champions Stumps Competition

Prior to 1998, Thailand had two cable television service operators, namely, the International Broadcasting Corporation and the United Television Network. In February 1998, the operators merged to become the United Broadcasting Corporation (UBC). The public sentiment was against this merger, as there would be no competition between the two operators and that instead there would be a monopoly.

The Mass Communications Organisation of Thailand (MCOT) is a state enterprise holding television licensing authority in Bangkok. MCOT approved the merger of the two operators on the ground that the operators needed to consolidate, given the cost hike following a sudden sharp devaluation of the Thailand currency 'Baht' in June 1997. Following the merger, around a year later, UBC raised its monthly subscription fee for its 'gold package', namely, the subscription package with the largest number of channels. The increase was about 22.5 percent in the subscription fee. The steep increase in the subscription fee was investigated by an Expert Committee essentially on two questions, as to whether the price increase was excessive and as to whether the cable monopoly was abusing its market power. Despite the Committee producing a voluminous report indicting the monopoly, the Trade Competition Commission of Thailand[§§§] decided against taking any action against the monopoly and remitted the matter to MCOT, which had originally approved the merger. Nothing has been heard of the matter subsequently.

1. Innovation, in many areas, could be the principal source of competition and there could be no barriers to entry by new firms. In such areas, current monopoly profits would act as a spur to innovation and the creation of new products and processes. Governments may feel that it may not be necessary to promote rivalry and competition in these markets (Scherer, 1992 and Djankov et al, 2002 and De Soto, 2000).

2. Maximising rivalry leads to inefficient outcomes in natural monopolies and in some network industries. In a natural monopoly, due to overwhelming economies of scale, a

‡‡‡ See Lardy N (1998)

§§§ See Deunden, Nikomborirak (2005).

market is most efficiently served by a single supplier. In network industries, externalities are present, like in computer software, and they usually have advanced technologies. If a small number of firms each supply a different product to a large number of consumers, then the externalities generated for consumers may well exceed any adverse impact on prices that may follow from a high degree of market concentration. The fact that large output levels can create network externalities may impel consumers to prefer concentrated market outcomes.

Like-wise, arguments could be advanced that promoting rivalry between firms enhances dynamic efficiencies. Axiomatically, competition may be regarded as contributing to innovation, productivity and growth. In other words, effective and appropriate enforcement of competition law may lead to efficiency gains in the dynamic sense. Five perspectives leaning on Evenett (see footnote 9) can be argued in support.

1. More intense the presence of competition in product markets more will be the pressure on firms to lower costs. Bearing testimony to this is the result of a survey across a wide spectrum of US industries. The survey**** found that competition significantly strengthened the efficiency of firms and improved economic performance over time. A quote of Judge Learned Hand††††, the well known US jurist captures this perspective. He observed:

"Possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy…Immunity from competition is a narcotic and rivalry a stimulant to industrial progress".

That inter-firm rivalry enhances efficiency draws support in a survey analysis relating to Eastern Europe and members of the Commonwealth of Independent States (CIS). In this survey, Djankov and Murrell‡‡‡‡ found that the product market competition had been a major force behind improvements in enterprise productivity in the transmission economies as a whole. Their analysis cited another survey§§§§ of over 3,300 enterprises in 25 transition economies that demonstrated that reduction in market concentration impacted positively on firm efficiency. To sum up, intense competition between firms sharpens incentives to cut costs and to improve productivity.

Benefits of economic reforms, particularly trade reforms, may not be realised without effective enforcement of competition law. This is because of the apprehension that the reductions in official trade barriers may be replaced by anti-competitive private practices. The Competition Agency***** of Argentina found that despite far-reaching trade liberalisation designed to drive domestic prices lower, the consumers did not succeed in experiencing lower prices because of the anti-competitive prices of private enterprises. The Agency concluded that effective national competition policies are vital to reap the benefits of reforms and economic development.

**** See Winston, C (1998).

†††† See United States Vs Aluminum Company of America, 148 F.2d, 416, 427 (3d Cir. 1945)

‡‡‡‡ See Djankov, S and Murrell, P (2002).

§§§§ See Carlin, W. et al (2001).

***** See Contribution by Argentina to the WTO's Working Committee on the Interaction between Trade and Competition Policy, Document W/63, Geneva, 1998.

Appropriate enforcement of competition law enhances the attractiveness of an economy as a location for foreign investment. Furthermore, it is likely to maximise the benefits that flow from such investments†††††. In other words, efficient enforcement of competition regime will add transparency to a country's commercial landscape attracting foreign investment. Competition in product markets stimulates both product and process innovations. Ahn‡‡‡‡‡ in his review of theory and evidence in a Working Paper noted that:

"Competition has pervasive and long-lasting effects on firm performance by affecting economic actors' incentive structure(s), by encouraging their innovative activities and by selecting more efficient ones from less efficient ones over time".

Innovation itself is a result of market interactions. Firms that are not currently competing with each other in the existing product markets may be competitors in markets for future innovations. Competition in such markets can be undermined by mergers or other anti-competitive markets. Competition law enforcement can contribute to dynamic economic performance in innovation markets. In other words, rivalry in the market for future innovations could be protected by effective enforcement of M&As laws and competition laws.

The pros and cons outlined above of the effects of competition policy on efficiencies and development, if weighed, drives home the positive impacts on efficiencies and economic development and lends, as Evenett (2004) on the basis of his study of the experiences of some countries puts it, 'credibility to the view that active and appropriate enforcement of competition law… reinforced national development strategies'.

For the developing countries, under developed countries and transition economies, competition policy is essential, for their economic growth and development. It not only strengthens market processes but also helps to lower costs and prices and increases consumer welfare besides fostering sound business discipline, culture and ethics.

4. Elements of Competition Policy and of Competition Law

4.1 Competition Policy and Its Interface with Other Governmental Policies

It has been noted above that competition policy could be in conflict with other governmental policies. If multiple objectives are allowed to rein in the competition policy, conflicts and inconsistent results that surface may be detrimental to the consumers. For instance, promoting small businesses and maintaining employment could conflict with attaining economic efficiency. With this kind of small business objective, competitors rather than competition may be protected. In addition, such concerns as community breakdown, fairness, equity and pluralism cannot be quantified easily or even defined acceptably.

††††† See WTO (1998).

‡‡‡‡‡ See Ahn (2002).

These concerns have logic of their own and it may be inevitable that they should be taken care of in governmental policies. But it needs to be underscored that attempts to incorporate such concerns may result in inconsistent application and interpretation of competition policy, besides dilution of competition principles. The peril is that the competitive process may be undermined, if too many objectives are built into the competition policy and too many exemptions/exceptions are laid down in dilution of competition principles.

The central exercise therefore is to pursue an appropriate competition policy without being constrained by or conflicting with other public policy objectives. Within this exercise, the main issue is the priority attached to competition policy objectives in the overall framework of governmental policies. For this purpose, it is necessary to list governmental policies that impact on competition policy. Micro-industrial governmental policies that may support or adversely impinge on the application of competition policy would include:

- Industrial policy
- Reservations for the small scale industrial sector
- Privatisation and regulatory reforms
- Trade policy (tariffs, quotas, subsidies, anti-dumping action, domestic content regulations and export restraints - essentially WTO-related)
- State Monopolies policy
- Labour policy

In addition, there could be other sector-specific policies in environment, healthcare, and financial markets that may restrict rather than promote the objectives of competition policy. The formulation and implementation of these and other policies need to be tuned to take into account competition principles. Indeed, competition policy can be regarded as the fourth cornerstone of governmental economic framework policies along with monetary, fiscal and trade policies.

4.2 Contours of Competition Policy

The scope of competition policy is broad and essentially includes all governmental measures that directly affect the conduct and behaviour of enterprises and the structure of industry with the objective of promoting efficiency and maximising welfare. To the extent the implementation of competition policy requires legal backing; there is need for a competition law, which, therefore, has a more specific focus and is, as a result, necessarily more limited in scope. Thus, whereas the former covers a whole array of executive policies and approaches, the latter is a piece of legislative enactment having the character of enforceability in a court of law.

There are a number of laws that directly or indirectly have an impact on economic activity and competition. Executive decisions of the government that do not have the legislative backing also have an impact on economic activity and competition behaviour. As the pre-requisites for competition policy are achieved and economic activity is gradually less subject to State interventions, the need for a competition law to give effect to the competition policy becomes more important. The focus of the law will be on preventing anti-competitive behaviour that is welfare reducing.

The underlying premise is that free markets work to provide the desired economic outcomes, but that markets can do this, only if the process of competition in these markets is protected from abuse. It follows that the only legitimate goal of competition law is the maximisation of economic welfare. In this way, the competition policy will be effective in promoting equity and economic development through maximising welfare and achieving a more efficient resource allocation.

Therefore, Competition Agency needs to be governed by the principles of competition in its adjudicatory effort. In other words, primarily, its objective needs to be to act as an effective instrument for engendering and protecting competition in the market in the interest of maximising national welfare. It has therefore to deal effectively against specified anti-competitive practices and for this purpose will have to be clothed with powers to mete out deterrent punishment to those who trench competition and violate the provisions of competition law.

4.3 Design and Implementation of Competition Policy

The principles that generally govern the designing and implementation of competition policy are listed as follows by Khemani (1997):

1. Competition policy and the economic liberalisation (particularly, trade policy) policy should be governed by the principles enunciated in the competition law.
2. Competition law should provide for a Competition Agency and for a system of checks and balances by ensuring due process of law with provisions for appeal and review.
3. Competition Agency should be independent and insulated from political and budgetary controls of the government.
4. Competition law should separate the investigative, prosecutorial and adjudicative functions.
5. Competition law should have punitive provisions for punishing the offenders besides other remedial methods (reformatory).
6. The proceedings of the Competition Agency should be transparent, non-discriminatory and rule-bound.
7. Competition Agency should have a positive advocacy role in shaping policies affecting competition.

4.4 Elements and Focus of Competition Law

There are three areas of enforcement that provide the focus for most competition laws today:

- Agreements among Enterprises
- Abuse of Dominance
- Mergers or, more generally, Combinations among Enterprises

Although there are differences in emphasis and interpretation across countries, and over time within countries, the purview of the laws in most countries is generally limited to these three areas. These three areas are not mutually exclusive and there is considerable overlap between them. A number of actions that constitute abuse of dominance could infringe the law regarding agreements among enterprises. The actions are similar though the causes might be different. In spite of the

inevitable duplication that follows from this classification, it provides a useful taxonomy for organising the thinking about competition law.

4.5 Agreements among Enterprises

Firms enter into agreements, which may have the potential of restricting competition. A close study of the competition laws in the world will show that they make a distinction between "horizontal" and "vertical" agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel.

There are provisions in most competition laws, which list *per se* anti-competitive practices. Those, which are not *per se* anti-competitive practices, have to be examined on what is known as the "rule of reason" approach. The former will be regarded anti-competitive, by way of a legal fiction and such practices are always prohibited. The latter kind of practices will be decided on their anti-competitive character, by the rule of reason approach, which, in other words, implies that the Competition Agency will examine each case in terms of facts and circumstances placed before it, prior to bringing about an order of indictment or of exoneration. Thus, those practices, which carry or are likely to inflict potential injury and prejudice to consumers inherent in them, are listed in the *per se* illegal category and those that (axiomatically) do not are listed in the "rule of reason" category. Agreements relating to the following are generally classified under the *per se* category:

- Agreements regarding prices (cartels);
- Agreements regarding quantities, which include agreements aimed at limiting or controlling production, supply, markets, technical development,, investment or provision of services;
- Agreements regarding bids (collusive bidding or bid rigging); and
- Agreements regarding market sharing.

The following agreements, *inter alia*, will be subjected to the "rule of reason" test:

- Tie-in arrangement
- Exclusive supply agreement
- Exclusive distribution agreement
- Refusal to deal
- Resale price maintenance

Cartels are one of the most egregious horizontal agreements. Case laws/experiences of a few countries relating to cartels fixing prices etc., are described in Boxes 4 and 5 to demonstrate how pernicious and injurious to consumers the practice is.

4.6 Cartels Hurt Consumers

Cartels are horizontal agreements between enterprises, which fix prices, limit production, allocate areas or consumers amongst themselves, all designed to enrich themselves at the cost of consumers. The Angolan import cartel is a good illustration (see Box 4).

Box 4: The Angolan Cartel

Chirwa[§§§§§] examined supply of consumer goods in Angola in 2004-05. According to him, an oligarchy of eight groups comprising Brazilians, Portuguese, Lebanese and Arabs, was importing the bulk of consumer goods for the citizens of Luanda, capital of Angola. The *modus operandi* of these groups was to tie up with local Angolan partners and run joint ventures. In other words, these groups constituted an import cartel and operated through joint ventures. This cartelisation prevented those who wanted to operate as individual importers and thus created a strong entry barrier.

The cartel also hindered the domestic producers from competing with the imported goods because of price differential, the imported goods being distinctly cheaper. As a result, the cartel ousted the domestic manufacturers from the market. The import cartel could pool their resources in the joint ventures and outcompeted the domestic producers. One could argue that this cartelisation was in the interests of the consumers, as they could get consumer goods at cheaper prices. But the counter argument is that some individual importer(s) could have secured the imported goods cheaper than what the cartel could supply. Furthermore, after the domestic units closed, the cartel could raise the prices to the detriment of the consumers.

The now famous (or infamous) case of Vitamins cartel merits mention here as illustrative of the manifest adverse effect on consumers particularly in the developing countries (see Box 5).

Box 5: International Vitamins Cartel

An analysis of the damage caused by an international vitamins cartel is revealing. Vitamins constitute an important ingredient/product supplied to the food processing industry and the animal feed industry. Producers of vitamins formed a cartel dividing up the world market for different types of vitamins during the 1990s and fixing prices. There were detailed arrangements involved in the administration in the cartel, including careful budgeting, market allocation, price fixing and so on. The cartel was prosecuted. Roche paid fines of US$500mn and the total fines collected exceeded US$1bn in the US alone.

The overcharges paid by 90 countries importing vitamins were estimated. For instance, many Latin American countries witnessed their vitamin import bills escalate by more than 50 percent. Damage-wise, India incurred overcharges of more than US$25mn. About 10 European countries suffered an overcharge of about US$660mn. All the 90 importing countries put together suffered overcharges by US$2.7bn during the 1990s[******]. By and large, hardcore cartels maintain higher prices in developing countries than the developed countries. The poor countries directly or indirectly bear the cost of this unlawful practice in terms of higher prices and reduced choice.

4.7 Dominance and Its Abuse

"Dominant Position" could be defined (as in the Indian competition law, Competition Act, 2002) in terms of the "position of strength, enjoyed by an enterprise, in the relevant market, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favour". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact

§§§§§ See Chapter 37 by F.S. Chirwa in CUTS (2006).

****** See Clarke and Evenett (2003).

that even a firm with a low market share of just 20 percent with the remaining 80 percent diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60 percent market share along with the remaining 40 percent held by a competent competitor may not be in a position to abuse its dominance because of the key rivalry in the market.

Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" may, perhaps be an aberration. With this suggested broad definition, the regulatory authority will have the freedom to fix errant undertakings and encourage competitive market practices, even if there is a large player around. Abuse of dominance is key for competition law in so far as dominant enterprises are concerned.

Before assessing whether an undertaking is dominant, it is important to determine what the relevant market is. There are two dimensions to this – the product market and the geographical market. The factors that are germane to the Competition Agency for determining the "Relevant Product Market" and the "Relevant Geographic Market" are given in Table 1. The determination of 'relevant market' by the Competition Agency has to be done, having due regard to the 'relevant product market' and the 'relevant geographic market'.

Table 1: Relevant Product and Relevant Geographic Market

Relevant Product Market	Relevant Geographic Market
• physical characteristics or end-use of goods; • price of goods or service; • consumer preferences; • exclusion of in-house production; • existence of specialised producers; and • classification of industrial products.	• regulatory trade barriers; • local specification requirements; • national procurement policies; • adequate distribution facilities; • transport costs; • language; • consumer preferences; and • need for secure or regular supplies or rapid after-sales services.

Relevant market was the focus in a case relating to the merger of two airlines (see Box 6).

Box 6: Merger of Two Airlines

The Boeing-McDonnell Douglas merger is a good case[††††††] on the relevance of the market in merger regulation. Boeing wanted to acquire its jet aircraft competitor McDonnell Douglas. This attracted competition law. In connection with this merger (acquisition), Boeing entered into contracts with three large American airlines to be their exclusive supplier of commercial jet airplanes for 20 years. Even though the merger was on the US soil, the European Commission (EC) exercised its jurisdiction in the matter on the ground that many countries, particularly Europe, constituted the relevant market. The logic behind the said contention of the EC was that after the merger, there were only two suppliers, namely, the merged

[††††††] See Fox (1998).

entity and Airbus Industries, an European Consortium, thus reducing the number of market players in supplying jet aircraft from three to two. The EC saw the exclusive contracts as an emanation of Boeing's increased dominance (its share of the commercial jet aircraft market was estimated to increase to about 70 percent upon merger with McDonnell Douglas). The EC also feared that the contracts would unfairly foreclose the European Consortium from access to a substantial part of the market. It ultimately allowed the merger to proceed only on the condition that Boeing should forego the exclusivity of the contracts and share technology of McDonnell Douglas.

To assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently. Some important factors that determine 'dominance' are listed in Box 7.

Box 7: Some Important Factors Germane to Determine Dominance

Dominance is determined by taking into account one or more of the following important factors[‡‡‡‡‡‡]:

- market share of the enterprise;
- size and importance of the competitors;
- economic power of the enterprise including commercial advantages over competitors;
- dependence of consumers on the enterprise;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; or
- countervailing buying power.

4.8 Abuse

Abuse of dominance having an adverse effect on competition occurs, if an enterprise, *inter alia:*

a) directly or indirectly, imposes unfair or discriminatory prices or conditions on sales/purchases
b) limits or restricts
   (i) production of goods or provision of services or market therefore; or
   (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
c) indulges in practice or practices resulting in denial of market access.

Unfair condition in sale of goods is a practice of abuse of dominance described in Box 8.

Box 8: Unfair Condition of Sale is Abuse of Dominance

Poulina was and is a giant poultry firm in Tunisia. Even though there were 1500 small producers of chicken and eggs, Poulina dominated the market. Originally Poulina was poultry and egg producer but it took on the role of providing inputs to the small producers to enable them to produce poultry and eggs. Poulina compelled its distributors to carry only its products, even if the products of other suppliers did not compete

[‡‡‡‡‡‡] The factors are extracted from the new Indian law, Competition Act, 2002.

with those of Poulina. For this, Poulina imposed a condition on its distributors that they would assume responsibility for any economic or health related infractions. The Competition Council of Tunisia[§§§§§§] ruled that the conditional sales constituted abuse of dominant position and imposed a big fine of 240000 Tunisian Dinar (US$194000).

Discriminatory behaviour and any other exercise of market power leading to the prevention, restriction or distortion of competition is an offence of abuse of dominance. Box 9 describes a discriminatory behaviour prejudicial to competition. Limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers constitutes abuse of dominance (see Box 10).

Box 9: Discriminatory Rebates and Abuse of Dominance

Production and distribution of oxygen gas and related products were in the hands of Ceylon Oxygen Limited (COL) to the extent of 80 percent of the market from the 1930s. In 1993, Industrial Gases Private Limited (IGL) entered the market as COL's competitor. Soon IGL noted that COL had started indulging in practices constituting abuse of its dominant position. IGL complained to the Fair Trade Commission (FTC) of Sri Lanka that COL was resorting to predatory pricing, evidenced by a reduction in the deposit fee on oxygen cylinders from Sri Lanka Rupee 8,500-3000 (US$78.81-27.81) and by a decrease in the maintenance charges from Sri Lanka Rupee 75-55 (US$0.69-0.51) after IGL's entry. IGL pointed out that COL had entered into agreements with bulk purchasers making it compulsory on them to purchase their entire requirements only from COL for an agreed time period.

IGL further alleged that COL was offering substantial discounts on different types of gases and cylinder charges on a discriminatory basis. FTC identified and held three courses of conduct as anti-competitive, namely, predatory pricing, discriminatory rebates and exclusive dealing. It is another matter, however, that the Court of Appeal held that FTC did not have jurisdiction to investigate such practices[*******]. Discriminatory rebates (or discriminatory behaviour) are an exercise in abuse of dominance.

Box 10: Limiting Technical Development Impedes Fair Competition

Japanese manufacturers of personal computers decided to install Microsoft's Windows OS, which carried some audio-video (AV) function in their computers. For this purpose, a licensing agreement was drafted by Microsoft. Windows OS was enjoying immense popularity and the Japanese manufacturers expected, rightly so, to receive support from consumers. Aware of its dominance in the market, Microsoft incorporated what was known as 'Immunity Provision' in the licensing agreement. The said provision provided that the licencees were precluded from suing, prosecuting or assisting in any judicial, administrative or other proceedings of any kind against Microsoft for infringement of the Japanese manufacturers' patents. Some of the Japanese manufacturers of personal computers owned patents in AV technologies. Because of the 'Immunity Provision', the Japanese manufacturers were barred from enforcing their patent rights against Microsoft, even when Microsoft was found to be exploiting or infringing them (patents).

The Japanese Fair Trade Commission ruled that the licensing agreement was having the potential of causing the Japanese manufacturers to lose their competitive edge in developing the technology relating to

[§§§§§§] See Lahouel Mohamed El Hedi (2003).
[*******] See CUTS (2002).

the AV function and that it was impeding fair competition in this area of technology. The provision was directed to be deleted from the agreement[†††††††].

4.9 Predatory Pricing

One of the most egregious forms of abuse of dominance is the practice of predatory pricing, which occurs, where a dominant enterprise charges low prices over a long enough period of time so as to drive a competitor from the market or deter others from entering the market and then raises prices to recoup its losses. Predatory price means the sale of goods or provision of service, at a price, which is below the cost of production of the goods or provision of services, with a view to reducing competition or eliminating the competitors (see. Box 11).

4.10 Mergers (Combinations) Regulation

Combinations include mergers, amalgamations, acquisitions and acquisitions of control. For the purposes of the discussion that follows, mergers regulation has been reckoned. As in the case of agreements, mergers are typically classified into horizontal and vertical. In addition, mergers between enterprises operating in different markets are called conglomerate mergers. Mergers are a legitimate means by which firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit. From the point of view of competition policy, it is horizontal mergers that are generally the focus of attention. As in the case of horizontal agreements, such mergers have a potential for reducing competition. In rare cases, where an enterprise in a dominant position makes a vertical merger with another firm in an adjacent market to further entrench its position of dominance, the merger may provide cause for concern. Conglomerate mergers should generally be beyond the purview of any law on mergers.

Box 11: Eliminating Competition is Critical for Predatory Pricing

Beer industry is highly concentrated in Zimbabwe. National Breweries Limited (NBL) is the largest firm in the beer sector in that country with a market share of 90 percent. It has a national distribution network. Challenging the near monopoly of NBL, Nesbitt Brewery entered the beer market but confined its operations only to the town Chiredzi in the country. NBL, on the other, hand was operating throughout the country. NBL organised a beer promotion campaign in Chiredzi much to the discomfort of Nesbitt. The promotion campaign included offer of free snacks and T-shirts, lucky draw tickets, free beers and substantial price reductions. The promotion campaign was held only in Chiredzi, where Nesbitt is based. NBL's prices for beer were below its normal landed costs in that town. Nesbitt complained to the Competition Commission. The alleged practices were found to be predatory within the relevant provisions of the Competition Act, 1996 of Zimbabwe. The Commission[‡‡‡‡‡‡‡] made NBL to sign an undertaking that it would desist from future promotional activities primarily aimed at driving Nesbitt out of the market. Eliminating competition or competitors is an important and critical element in the offence of predatory pricing.

Thus, the general principle, in keeping with the overall goal, is that mergers should be challenged only if they reduce or harm competition and adversely affect welfare. Mergers (Combinations) need a detailed economic analysis on the competition perspective. The factors that need to be taken into account for the purpose of determining whether a combination would have the effect of

††††††† See CUTS (2006).

‡‡‡‡‡‡‡ See UNCTAD (2002).

or be likely to have an appreciable adverse effect on competition (see Box 12). There is, in addition to the three main strands of competition law, namely, Agreements among enterprises, Abuse of Dominance and Mergers, a fourth strand found in some competition laws. That strand is competition advocacy.

4.11 Competition Advocacy

Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. An OECD[§§§§§§§] report noted:

"In virtually every member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This 'advocacy' … can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some Competition Agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting".

Box 12: Factors Relevant for Merger Analysis

- The actual and potential level of competition through imports in the market;
- The extent of barriers to entry to the market;
- The level of combination in the market;
- The degree of countervailing power in the market;
- The likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- The extent of effective competition likely to sustain in a market;
- The extent to which substitutes are available or are likely to be available in the market;
- The market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- The likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- The nature and extent of vertical integration in the market;
- The possibility of a failing business;
- The nature and extent of innovation;
- Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Note: These factors are extracted from the new Indian law, Competition Act, 2002.

The High Level Committee[********] has viewed successful competition advocacy in the Indian context in terms of the following:

§§§§§§§ See OECD (1997).

******** See Chakravarthy (2000), where the Committee is referenced.

1. Competition Commission of India (CCI) must develop relationship with the ministries and government departments, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare.
2. CCI should encourage debate on competition and promote a better and more informed economic decision-making.
3. Competition advocacy must be open and transparent to safeguard the integrity and capability of the CCI. When confidentiality is required, CCI should publish news releases explaining why.
4. Competition advocacy can be enhanced by the CCI establishing good media relations and explaining the role and importance of competition policy/law as an integral part of the government's economic framework.

4.12 Exceptions and Exemptions

Competition laws generally have provisions for accepting and exempting certain practices from their application. An example of such provisions is that IPRs are often kept outside the ambit of competition law. This is done in the interests of innovation and creativity. In other words, IPR licensing agreements may impose conditions (possibly anti-competitive) as may be necessary for the purposes of protecting IP rights already created. The rationale for this exception is that the bundle of rights that are subsumed in IPRs should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind.

No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services. But competition law should address anti-competitive practices arising out of IPR implementing (licensing) agreements and also unreasonable conditions attached to such agreements that may have nothing to do with the bundle of rights that normally accompany Intellectual Property. Box 14, below provides the perspective.

Box 13: Conflict between IPRs and Competition Law

The conflict between IPRs and the competition law came up before the Monopolies and Restrictive Trade Practices Commission (MRTPC)[††††††††] in India. The Commission observed as follows:

"Applying the above principles to the controversy at hand, it seems ….., that a certificate of registration held by an individual or an undertaking invests in him/it, an undoubted right to use trade mark/name etc. so long as the certificate of registration is in operation and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted. If however, while presenting the goods and merchandise for sale in the market or for promotion thereof, the holder of the certificate misuses the same by manipulation, distortion, contrivances and embellishments etc. so as to mislead or confuse the consumers, he would be exposing himself to an action -----of indulging in unfair trade practices. It will, thus, be seen that the provisions of the Monopolies and Restrictive Trade

†††††††† See MRTP Commission (1994).

Practices Act would be attracted only when there is an abuse in exercise of the right protected ………" This principle was reiterated in Manju Bhardwaj's Case by the same Commission[‡‡‡‡‡‡‡‡].

Grant back is generally regarded as anti-competitive. It does not allow promotion of advancement of technology, which is a necessary condition for competition. Box 14 shows an anti-competitive practice in an IPR licence. Patents create some kind of a monopoly for the holders for a specific period of time. Royalties on patents increase the prices of the goods manufactured under the licences given by the holders to licensees. In the area of health care, medicines and drugs become expensive to the extent that they are beyond the reach of the poor. Box 15 illustrates this concern.

Box 14: Grant Back Is Anti-Competitive

Pilkington is a famous well-known British glass manufacturer. It entered into patent and licensing arrangements with several manufacturers worldwide. The licenses restricted manufacture in specific territories, shipment by each licensee of glass outside designated territories and sublicensing and imposition of field-of-use. What is more, the licences provided for grant backs to Pilkington on improvements done by the licensees. Pilkington's patents on float glass process had expired in early 1980's but the licensees were still subject to the restrictions unless the licensees could prove that all of the licensed technologies were publicly known. If the licensee was a US company or firm, it was restricted from exporting its eon glass manufacturing technologies and was also prevented from taking overseas bids. In this scenario, the over claim on the part of Pilkington came in the way of competition. In particular, the secret behind its technology was over claimed[§§§§§§§§] by Pilkington in such a way that it deterred or prevented the licensees from inventing around Pilkington's patents. Pilkington, through the restrictive licences limited and controlled competition in the world market.

Box 15: Health Care Concerns of the Poor

There has recently been a controversy in South Africa over access to medicines at affordable prices. The issue at stake was the South Africa's Medicines and Related Substances Control Amendment Act, which allows the country to provide medicines at prices that its population can afford by resorting to imports from cheaper sources of supply. This provision was challenged by the pharmaceutical majors in the global market as being violative of the TRIPs Agreement. They contended that the rights enjoyed by the patentees in the patent regime introduced after the implementation of the TRIPs Agreement would be severely curtailed, if the South African law on affordable medicines were used by the Government[*********]. The issue that arose was whether enhancing of the rights of the patent holders (like MNCs) in a disproportionate manner could lead to the emergence of oppressive monopolies and this could manifest itself in high prices.

Such a situation is difficult to condone in critical sectors like pharmaceuticals in developing countries, particularly those from South Asia and Africa, where a majority of the poor do not have access to modern medicines. The remedy possibly lies in operationalising the objectives and principles of the TRIPs Agreement provided for in Articles 7 and 8, which refer to several public policy objectives that the Agreement should fulfill. Further, the use of compulsory licences should not be considered as violation of TRIPs. The Doha Declaration at the WTO Ministerial Conference in 2001 on this area has been a welcome

‡‡‡‡‡‡‡‡ See MRTP Commission (1996).

§§§§§§§§ See US vs Pilkington, Civ No. 94-345, 59 Fed. Reg. 30604, 1994.

********* See Biswajit Dhar (2001).

step in the right direction. The Declaration affirmed that public health concerns would supersede commercial interest.

Yet another exception to the applicability of the provisions relating to anti-competition agreements is the right of any person to export goods. In a manner of speaking, export cartels are generally outside the purview of competition law in most jurisdictions. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments.

Competition laws have provisions empowering the government to exempt from their application, a class of enterprises, a practice, an agreement etc in public interest. Every country should have the flexibility and freedom to provide for certain exemptions and exceptions to competition law or even competition policy having regard to its specific needs and circumstances particularly relating to its trade and economy.

4.13 Enforcement

It cannot be gainsaid that the effectiveness of competition law in addressing anti-competitive practices, hinges on the degree of enforcement action by the Competition Agencies and the role of the Judiciary in its enforcement. Enforcement procedure vary across legal systems on such issues as the balance between public and private enforcement, the powers of Competition Agencies or the nature and level of penalties and sanctions that may be imposed against parties engaged in anti-competitive practices.

The application of competition law requires a complex economic, legal and factual assistance as well as broad fact-finding powers so that the Competition Agency is in a position to obtain the relevant and necessary information. The orders of the Competition Agency should be capable of legal implementation with a provision for deterrent punishment for non-compliance. Administrative and judicial procedures should be subject to standards of due process both for the charged parties and complainants. In this context, the Competition Agency should have adequate enforcement staff and budgetary support.

4.14. Effective Machinery

The gains sought through a competition law can only be realised with effective enforcement. Weak enforcement of competition law can, in some economies, be as significant an impediment to market access as the absence of competition law. Weak enforcement often reflects a number of factors such as inadequate funding of the enforcement authority. It can also reflect the enforcement agency's lack of political independence.

5. Trade Liberalisation and Competition Policy Link (Interface)

The process of LPG in general and the process of deregulation and liberalisation in particular have to some extent obfuscated the distinction between trade and competition policies. Many countries and business houses have adopted global strategies, which are a cause of increasing economic inter-dependence. In order to regulate such business strategies, governments of various countries have been working on the nature, scope and application of trade and competition policies.

5.1 Linkage

The importance of the linkage between trade policy and competition policy has been studied only recently[†††††††††]. The recognition of the importance of the linkage is imperative in the context of the liberalisation and economic reforms regime that has been set afoot in many countries in the world. It has been argued[‡‡‡‡‡‡‡‡‡] that international trade and competition policy measures complement and buttress each other in promoting trade, market access, global economic efficiency and consumer welfare and that the promoting of objectives of a liberal trade policy supports the objectives of competition policy and vice versa.

In a broad sense, competition policy can be said to refer to policies directly aimed at enhancing the scope for competition between firms. It is concerned with both government interventions that have implications on the competitive environment and private sector anti-competitive practices. Competition policy is important because it fosters economic efficiency, encourages firms to offer consumers good price/quality options and increases the international competitiveness of downstream users. It seeks to promote the efficient allocation of resources by means of open and competitive markets.

Trade policy, on the other hand, primarily regulates competition amongst firms across national boundaries. Competition policy and liberal trade policy seek to achieve the same objective namely economic efficiency. In a manner of speaking, competition policy seeks to achieve economic efficiency by liberalising domestic markets and by having laws that protect and promote competition. A liberal trade policy seeks to achieve economic efficiency by liberalising markets by removing the barriers to trade at the border. Free trade and competitive behaviour are thus necessary conditions for efficiency. The Chart next page visualizes the interface between Trade Policy and Competition Policy.

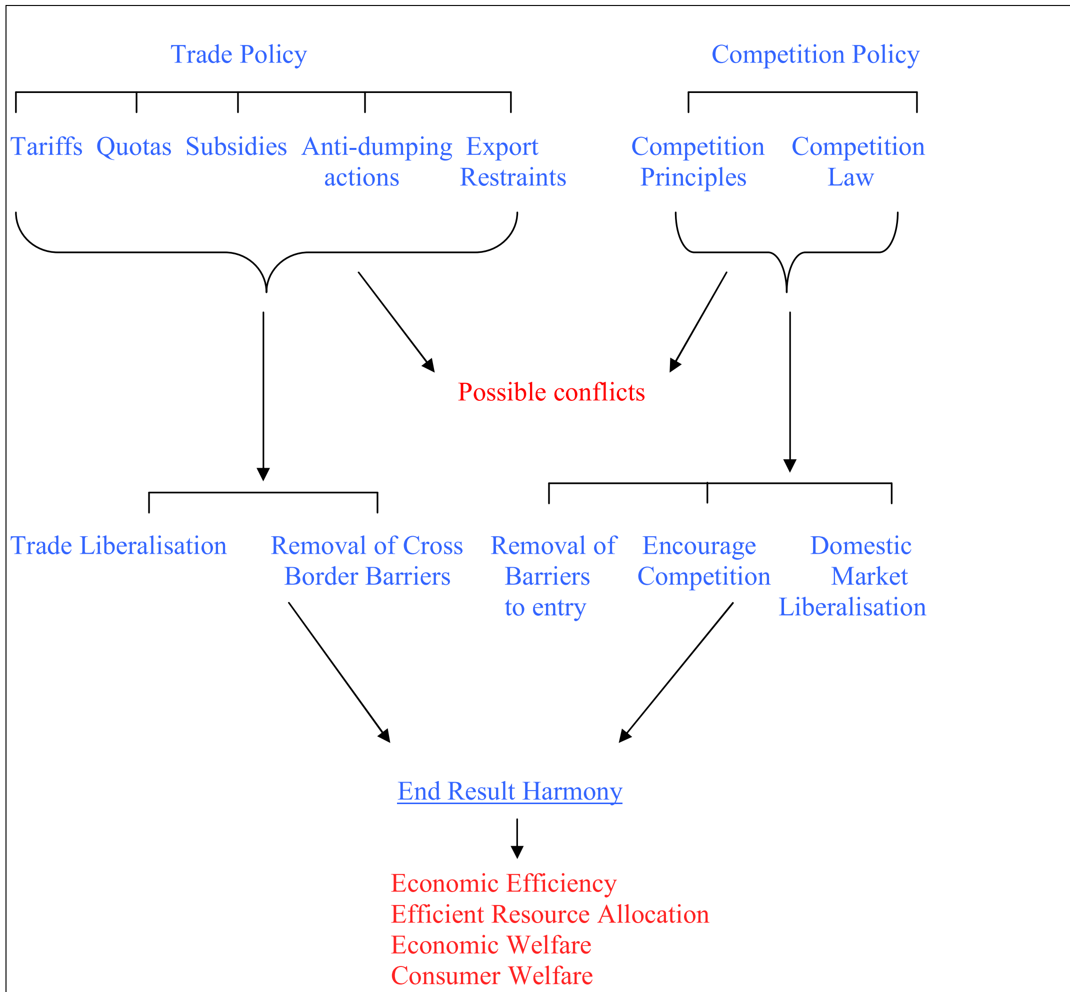
There is recognition that competition laws have been an increasingly important driver of growth, efficiency and innovation in many market economies. Recognition of the central role of competition laws in advancing these objectives has spread dramatically in recent decades to all regions of the world with the result that today approximately 130 countries have competition laws, many of them formulated and brought into force during the past 10 years. As more and more countries embrace competition principles, they have also sought to deregulate markets where competition can be fostered.

The interest in the interactive and interface aspects of trade and competition policy stems from perhaps the following four factors. First, when barriers like tariffs are reduced or eliminated, there is a risk that private barriers to trade may replace them and nullify the benefits of trade liberalisation. Private barriers may be in the form of collusive output control and price increases. For instance, Organisation Petroleum Exporting Countries (OPEC) is a very strong combine which seeks to control the output of crude oil and prices from time to time.

††††††††† See WTO (2001).

‡‡‡‡‡‡‡‡‡ See APEC (1999).

Chart 1: Trade Policy and Competition Policy Interface



Second, governments are equally concerned with the adverse impact that inappropriate or inefficient regulations have on economic performance. Weak enforcement of competition principles is likely not to lead to expansion of trade and investment opportunities and a more productive economy but on the other hand, the lurking danger of private anti-competitive conduct replacing public conduct may assume a real shape. Third, with the distinction between domestic and international markets getting more and more blurred, through globalisation, many links exist between trade and competition policies in multiple jurisdictions. As enterprises globalise their operation to take advantage of the benefits of transportation and telecommunications, the current trade and competition policies may not be adequate to meet the challenges. Fourth, in a number of

areas governed by WTO Rules like General Agreement on Trade in Services (GATS), specific competition policy issues are emerging.

Economic theory suggests that trade liberalisation fosters national welfare in the context of a competitive domestic market. Liberalisation spurs domestic producers to enter external markets, which offers export opportunities. This facilitates the producers to increase their output and to cut costs through economies of scale. When competition increases among producers (coupled with competition from exporters abroad due to trade liberalisation), they affect efficiencies, they bring in better quality in goods and they serve consumers better. Consumers, both domestic and foreign, benefit as a consequence.

In the real world politic in many developing countries, domestic producers may be unable to effect efficiency improvements in an enhanced competition environment. As noted earlier, economic patriotism may dictate governments to protect domestic enterprises from competition from external sources. Import tariffs, encouraging national champions, creation of non-tariff barriers (NTBs) and resort to anti-dumping measures are some of the measures adopted by the governments.

Large producers seek to protect their market share through resort to anti-competitive practices as forming cartels, abusing a dominant position or manipulating intellectual property rights (IPRs). They may develop exclusive arrangements with retailers to prevent imports into the domestic market. In other words, they tend to create private anti-competitive barriers to neutralise trade liberalisation.

Thus, both governmental trade policies and conduct of private parties constitute a threat to competition in terms of distortion of competition in the market and of restraints in trade. It is in such real world politic that an effective competition policy could challenge anti-competitive practices and effective enforcement of competition law could control, if not eliminate them.

5.2 Desirable Approach

The approach (see Box 16) may be beneficial and least harmful when there is the inevitability of a conflict between trade and competition policies. In the said approach, there is the mention of an attempt at a negative list. This means exemptions and exceptions to competition policy. In other words, a listing of situations to bring about a balance between consumer interest and public interest and to bring about a harmonisation of conflicting interests needs to be attempted which will rein in the competition policy and even the trade policy. The test to be applied is that of reasonableness of a restrictive practice or anti-competitive practice in a given situation.

Box 16: Desirable Approach

- Competition should be a factor to be reckoned in the trade and market policies of a country.
- There should be a competition policy and of course a competition law, which should be so structured that they sub-serve by and large the consumers, consumer interest and consumer welfare. There should be a Competition Agency to implement the competition law and also to facilitate and shape the competition policy, from time to time.

- The trade policy of a country should at all times reckon the contours of the competition policy and law. There should be enough flexibility in the competition and trade policies to deal with the specific needs and requirements of a country.
- Public interest dimension can have primacy over consumer interest dimension, in exceptional circumstances for which a kind of a negative list may be attempted but such exceptions and exemptions should be few and far between and should not be allowed to dilute competition as far as possible. Care should be taken not to allow public interest to be abused to circumvent competition.
- Competition policy should inherent the development dimension in its approach and implementation.

The case rulings in Box 17 below offer some justification of restrictive practices in specific given circumstances, though they could be anti-competition.

Box 17: Anti-Competition Justified In Some Circumstance

It was ruled in the Raymond Woollen Mills case[§§§§§§§§§§] by the MRTPC in India that "the essence of justification is that a given practice produces one or more of the beneficial effects... …It is like balancing a see-saw or the scales of a weighing machine. On one side are the benefits claimed and on the other, extent of injury to the public. The standard to judge a given trade practice is that of public interest."

In Nordenfelt case[**********], it was held that "it is sufficient justification and indeed it is the only justification, if the restriction is reasonable, that is, in reference to the interest of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time, it is in no way injurious to the public".

It has been noted earlier that trade liberalisation and competition policy are complementary to each other and that neither can fully achieve its objects without the other. Given this premise, an appropriate approach would be to adopt competition policy simultaneously with trade liberalisation and other economic reforms such as privatisation and deregulation. In this way, competition policy would act as a catalyst for economic reforms and development based on market-oriented principles.

While an open trade policy will be supportive of competition policy objectives, it is not always that the former will be a guarantor of competition in all circumstances. Governmental policies, particularly those that give rise to restraints and distortions in trade practices and the market, may be a threat to the attainment of competition objectives. All trade policies may therefore be required to fall within the framework of competition principles. Trade policies laid down by the government include measures relating to industrial policies, domestic regulations, licensing requirements, discriminatory standard-setting practices, State monopolies and State trading enterprises, all of which may be restricting competition domestically and impeding market access to foreigners. In the interest of the consumers and free and fair trade, it is necessary to have an effective competition policy to ensure that trade policies fall within the contours of competition principles.

§§§§§§§§§§ See MRTP Commission (1979).

********** See Nordenfelt Vs Maxim Nordenfelt Guns and Ammunitions Co. – AC 535, 1894.

Often trade policies and competition policies may not be in tandem. It is imperative for every country that both trade and competition policies are directed towards its economic growth and development while sub-serving consumer interest. Trade laws and policies are primarily used for balancing the trade/export policies of other countries vis-à-vis both the national interest and demands of the domestic industry. On the other hand, the basic tenets of the competition policies are the inherent interest and welfare of the consumers and the efficient allocation of scarce resources. Therefore, while it is necessary to ensure that trade liberalisation, deregulation and globalisation lead to enhancement of competition, it is equally necessary to establish a mechanism that ensures a healthy competition in a globalised economy.

6. Group Discussion Issues

Effective implementation of a Competition Policy Regime

The following issues are suggested for group discussion:

1. Distinction between Competition Policy and Competition Law

2. The discussions may revolve round the contents of Sections 1 and 3.

3. Distinction between 'Public Interest' and 'Consumer Interest'

4. The discussions may revolve round the contents of Section 1 particularly under the title and 'Consumer Interest and Public Interest'.

5. Benefits of Competition Policy.

6. The discussions may revolve round the contents of Section 2 and in particular the analysis under the title "Competition Policy, Economic Efficiencies and Development".

7. Elements of Competition Policy and of Competition Law.

8. The discussions may revolve round the contents of Section 3.

9. Interface between Trade Liberalisation and Competition Policy.

10. The discussions may revolve round the contents of Section 4.

11. Effective Implementation and enforcement of Competition Policy/Law.

The discussions may revolve round the contents of Section 3 and in particular under the titles "Enforcement" and "Effective Machinery" and under the title "Desirable Approach" in Section 4.

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