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**Competition Policy and the WTO—Implications
for Developing Countries**

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Introduction

One of the dominant economic themes in the last quarter of this century has been the process of globalisation and a progressive international economic integration of the world economy. The movement is towards widening international flows of trade, finance and information in a single integrated global market. Globalisation has the fundamental attribute of increasing the degree of openness in most countries. The underlying rationale for globalisation is that free flows of trade, finance and information will produce best outcomes for growth and human welfare. However, it is inevitable that globalisation may initially, in an unequal world, throw up gainers and losers. It follows therefore that, if proper checks and balances are not laid down and complementary policies are not in place, the growth, welfare and income gaps across countries may widen.

As globalisation takes place and countries rely more on market forces, the question of ensuring competition and keeping markets functioning efficiently assumes increasing importance. In a globalising and liberalising world economy, the number of actual or potential entrants into foreign markets increases, giving rise to greater potential for

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competition in markets regardless of their geographical scope. Many countries have taken to measures designed to open competition in strategic sectors such as tele-communications, airlines, electricity generation and distribution, etc.

This paper addresses the role of competition policy in economic development, deals with the Indian competition law and gives a brief treatment on its implications for developing countries.

Competition Policy

Competition policy is essentially understood to refer to governmental measures that directly affect the behaviour of enterprises and the structure of industry. A coherent and pragmatic competition policy should be capable of enhancing competition in local and national markets. It is an instrument to achieve efficient allocation of resources, technical progress and consumer welfare and to regulate concentration of economic power detrimental to competition with flexibility to adjust to the changing international economic milieu. On a broad note, a well-designed competition policy should govern policies relating to globalisation, liberalisation and de-regulation as these may have an impact on competition. Of particular importance is the trade policy which impacts competition in the market significantly - whether positively or adversely - and thus has to be subservient to competition policy.

All countries do not have a competition policy. If they have, the objectives thereof differ from country to country depending upon the domestic circumstances and the historical past. Few countries have subjected competition policy to a clearly articulated coherent set of objectives. A fundamental question is often raised, whether competition is desirable in all cases and whether it should be always fostered. One view is that competition policy fosters economic efficiency, economic growth and international competitiveness. Another view is that competition policy promotes broad public interest and satisfies socio-political objectives like regional development and promotion of employment. Yet another view is that competition policy promotes welfare, meaning thereby total economic welfare, which would take into account the actual and potential cost-benefits to consumers as well

as to producers (Rao, 1998). While all these points of view can be harmonised, an underlying common thread in these views is that competition policy should have a *development dimension* as its core objective.

Competition policy can be analysed from the perspective of five elements:

- a) The need to curb, if not, eliminate anti-competitive practices;
- b) Application of competition policy to Governmental policies and in particular, trade policies;
- c) The need for creating an appropriate institution for adjudication of competition disputes and enforcement of competition law;
- d) The need to subserve consumer welfare and public interest;
- e) The need for competition advocacy and competition culture.

The first of the above elements is obvious, that any competition policy will have to prevent or eliminate anti-competitive practices of enterprises that impede the efficient functioning of markets. In the context of trade liberalisation and globalisation and increase in Foreign Direct Investment, anti-competitive practices are becoming not only more strident but also increasingly international in scope. *A vigorous competition policy is therefore necessary to respond appropriately to these concerns and to establish a climate that is conducive to investment and economic growth.* A well designed competition policy is imperative to maintain and encourage the process of market competition to promote economic efficiency in the interests of consumers.

The second element needs to be seen in the light of increased awareness and evidence of regulatory failure and the reversal of the tendency of regulation in many countries (OECD, 1992). Furthermore, there is increase in reliance on market mechanisms to promote economic progress, as exemplified by the widespread trend towards privatisation, de-regulation, adoption and enforcement of competition law, reduction in the scope of industrial policy, etc. (Jenny, 1997). Governments in many countries use various means to monitor the shaping of industry structures and to protect their national firms from the rigours of domestic

and international competition. With economic de-regulation, countries have taken to measures designed to eliminate public monopolies and to open up competition in strategic sectors such as tele-communications, electricity generation and distribution, airlines, railway, transport, etc. *The competition policy therefore needs to envelop in its ambit all public enterprises, statutory corporations, financial institutions, banks, cooperatives, etc. so as to ensure that their behaviour and conduct do not pejorate consumer interests. Indeed, the competition policy should have the positive objective of promoting consumer welfare.*

It is well known that many Governmental trade policies are executive in nature. Some of these policies may protect the domestic industries and local producers, thereby injuring competition in the market. The trade and industrial policies in some countries are designed on the premise that the State should lead the market and identify the industries that are strategically important. They want domestic competition, but have strict control over the entry of outsiders. The World Economic Forum has listed areas which need to be tackled if competitiveness of enterprises is to improve (World Economic Forum, 1997). For instance, the Forum observes that price controls and dual pricing lead to severe distortions. In India, restrictions on sugarcane prices and procurement, production capacities, dual pricing of outputs, restraint of exports and imports and many others have enabled the inefficient producers of sugar to continue and prevent the rise of a competitive industry (Rao, 1998). Likewise, reservation of products for small scale and micro enterprises has led to poor quality of output. Since many of them are suppliers of ancillaries to organised producers, it leads to the overall poor quality of products to consumers. Efficiency of such suppliers is poor because of the lack of skills, low capital availability, poor quality of machinery, heavy labour orientation, poor cost control, low output and poor quality of outputs. A policy designed to provide subsidised interest rates to small scale units or agricultural exports may lead to higher interest costs for the remaining sectors of the economy rendering the latter's exports less competitive or non-competitive.

But yet such Governmental policies or trade policies may have a justification of their own for the countries concerned in order to subserve

their goals, aspirations and needs. In the name of public interest, Governmental policies may be laid down to protect one specific interest group with no explanation of how or why the interest of such a group transcends all others. There is almost an unanimous view in India among the representatives of different Chambers of Commerce and Industry, Professional Institutes, Bar Associations and Consumer Associations and Groups that *competition in the market is a desirable objective, but that competition policy of a country should have flexibility to cater to its needs, aspirations and goals.* The caveat of flexibility has been suggested on the apprehension that if competition policy were to be given an unbridled run, it is possible that some of the multi-national companies and firms may oust or exit the domestic industries because of the former's financial and marketing clout.

While competition policy is a desirable objective and instrument for subserving consumer interest and consumer welfare, there is a *need to bring about the competition environment gradually rather than in one stroke.* In other words, till the domestic producers and suppliers get educated and exposed to competition and thereby address themselves towards enhanced efficiency, economies of scale and subserving of consumer interest (in the broadest sense of the term), the competition policy/law should be gradually strengthened and implemented. *A transition period of say 7-10 years may be provided to the domestic producers and suppliers to enable them to get ready to face competition, particularly at the global level, during which period, the implementation of the competition law and competition policy needs to be gradually strengthened, in a step by step manner in its application to the market. Competition should inform all trade and market policies.* In order to prevent abuse of the expression "public interest" by the Government, competition law should have provisions to test the Governmental policies on the touchstone of competition.

The third element is the creation of an institution for implementation and enforcement of competition policy/law. An important dimension of any competition policy or law is a set of provisions for its administration and enforcement. *A poor law or a poorly enforced law is worse than no law at all.*

There should be a *Competition Law Authority* to implement and enforce competition law. It should be independent and insulated from political and budgetary controls of the Government. The competition law should separate the investigative, prosecutorial and adjudicative functions. It should have punitive provisions for punishing the offenders, besides other remedial methods (reformatory). The statute should provide a system of checks and balances by ensuring *due process of law* with provisions for appeal and review. The proceedings of the Competition Law Authority should be *transparent, non-discriminatory and rule-bound* (Khemani, 1997).

The fourth element has important overtones for competition policy/law. Consumer interest and public interest are not synonymous and need to be distinguished. Consumers constitute a broad class of people who purchase, use, maintain and dispose of products and services. They are affected by pricing policies, financing practices, quality of goods and services and various trade practices. 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. It does not mean anything so narrow as the interests of a particular locality or of a small section of citizens.

The final element is the need for competition advocacy and competition culture. Education/advocacy is an important dimension of competition policy. It will ensure public awareness of competition principles and will keep competition and regulatory laws and policies up to date with the latest understanding of competition in the market place. Only a National Competition Agency or Council could serve as a focal point for advocacy efforts to promote market oriented economic reforms, competition policies and a national competition culture. The Competition Law Authority can itself be such an Agency. *The Competition Law Authority, in addition to its implementation and enforcement role, can be made to serve as an advocate for competition policy and for regulatory reforms and also for promoting a national competition culture.*

Linkage between Competition Policy and Trade Policy

The importance of the linkage between trade policy and competition

policy has been studied only recently and that too not in a structured manner. To the best available information, a detailed study of the linkage is yet to be made, though the process is now on. The recognition of the importance of the linkage is imperative in the context of the liberalisation and economic reforms regime that have been set afoot in many countries in the world. Wu and Chu in their paper prepared for the second conference on the Pacific and Basin Business have underscored the importance of the linkage (Wu and Chu, 1994). 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. (Khemani, 1997).

One can, after scanning the literature available, perceive the formulations of an intellectual rationale for globalisation. The phenomenon of globalisation is perceived as a means to *ensure not only efficiency and equity*, but also *growth and development* in the world economy (Nayyar, 1997). The neo-liberal model suggests certain analytical foundations for the intellectual rationale. It argues that Government is incapable of intervening efficiently. Government needs to be rolled back, wherever possible, so that the target is a minimalist State. The market is the preferred alternative as it is seen to generally perform better. The model further suggests that market prices conforming to international prices (as far as possible) should govern policies *on resource allocation and resource utilisation*. Finally, it suggests that national boundaries, national ideologies and domestic economic concerns should not act as constraints. The ideologues believe that such globalisation promises economic prosperity for countries that join the system and economic deprivation for countries that do not (Sachs and Warner, 1995).

This rationale has drawn support and reinforcement from changes in technology and a better understanding of organisational structure and behaviour, which have changed competitive conditions in the market, questioning the hitherto believed policies of direct regulation.

The general trend towards decrease in Government interference in

market mechanism and towards liberalisation and deregulation in many countries can be attributed to three reasons. The *first reason* is linked to the fact that there is a certain measure of *cavil* developed over the years, *on the ability* of the Government to promote the long run competitiveness of the economy through direct intervention. Industrial policy in many countries is no longer considered to be the powerful tool to promote economic development that it once was considered to be. The *second reason* is that Government *regulation* often *implies protection from competition* and a higher degree of concentration of market than what would result from free market forces. It is no secret that interest groups lobby to secure protection and are ready to pay for protection from competition. The *third reason* is that Government interference in market mechanism through a *policy of protection from competition* leads to a *reduction in the real income* of the citizens compared to the level they would enjoy, if competition prevailed. Regulated economies are often considered by the public to be unfair to the consumers. To quote Jenny (1997):

“The widely held perception that regulated economies in which competition is restrained through Government regulation are inefficient, undemocratic or unfair explains to a large extent why we have witnessed a pattern of changes in many countries over the last decade including deregulation of economies, privatisation and increasing reliance on competition in the market place.”

Competition – A Dynamic Concept

Professor J.M. Clark in his paper on “Workable Competition” conceived *competition* as an amalgam of factors that *stimulate economic rivalry*. He referred to competition as a dynamic concept, as it attempts to judge forms of industrial organisation and the policies of firms by reference to the extent to which they promote or hamper this rivalry. Competition according to him, describes the kind of market pressure which must be exerted to penalise laggards and to reward the enterprising, and in this way to promote economic progress. (Clark, 1940).

Prof. Schumpeter on the other hand has noted that the ordinary forms

of price competition favoured by economists and anti-trust bodies can at best only protect consumers against being charged excessive prices in relation to current levels of cost. He goes on to say that only the very large organisations which are protected from the full impact of competition, are capable of laying their hands on resources which permit them to bring innovations to fruition as well as to meet the risks of introducing them. Without the high profits, which their monopoly or dominance enables them to earn, the incentives and the means to innovate would be lacking (Schumpeter, 1942).

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 subserving consumer interest.* Trade laws and policies are primarily used for balancing the trade/export policies of other countries vis-a-vis both the national interest and demands of the domestic industry. On the other hand, the basic tenet of the competition policies is the inherent interest and welfare of the consumers and the efficient allocation of scarce resources. *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.*

Efficiency and Equity Facets

There are many facets to the concept of public interest, rendering any consensual definition difficult. However, many of the facets can be grouped under two principal headings namely *efficiency and equity*. The former concerns the technical and allocative efficiencies, which are basically economic in nature. Such efficiencies relate to cost minimisation, profit maximisation, optimal use of resources etc. The latter, namely equity, on the other hand, is a multi-dimensional social objective and very simplistically speaking, it can be linked to *free competition* in the market in the interest of consumers. *But these two facets, efficiency and equity, are not necessarily mutually exclusive social goals.* A crude theory can be that the efficiency facet can be fastened to public interest and equity facet fastened to consumer interest. This

theory suggests that there is subserving of public interest in efficient use of resources or in obtaining economic or technical efficiencies and subserving of consumer interest in the equitable supply of goods and service.

Strengthening and promotion of competition needs to be a key goal of economic policies, of not only developed countries, but also developing countries, least developed countries and countries in transition, while leaving room for its flexible application to take into account the specific characteristics and needs of individual countries. For the developing countries, in particular, flexibility in applying competition law and policy may be necessary in order not to impede efficiency, growth and development goals and coherence needs to be ensured between competition policy and other policies aimed at promoting development. *Competition policy should have a strong undercurrent of the development dimension, but should have some flexibility to take care of the needs of individual countries, particularly developing ones.*

Approach Desirable

Having said this, the following approach is suggested when there is the inevitability of a conflict between trade and competition policies:

- A. Competition should be a factor to be reckoned in the trade and market policies of a country.
- B. There should be a competition policy and of course a competition law, which should be so structured that they subserve by and large the consumers, consumer interest and consumer welfare. There should be a Competition Law Authority to implement the competition law and also to facilitate and shape the competition policy, from time to time.
- C. 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.*
- D. Public interest dimension can have primacy over consumer interest dimension in exceptional circumstances, for which a kind of 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.

- E. *Competition policy should inhere the development dimension in its approach and implementation.*

Competition Policy and Competition Law

Competition policy can be regarded as a genus, of which competition law is a specie. The former covers a whole array of executive policies and even approaches, whereas the latter is a piece of legislative enactment having the character of enforceability in a court of law. Government made decisions by way of executive policies and executive guidelines are pronounced in trade policy areas, in terms of which trade is regulated or even liberalised without the promulgation of a law or without the requirement of having to secure the approval of the legislature before applying the same.

In policies which are not having the cover of law, there is always the danger of discrimination, abuse of discretion and non-rule based decisions. *While one can easily appreciate the difficulties involved in covering and supporting every executive made competition policy by a legislative enactment, it is desirable that there is a codification of the principles in the competition law which should act as an umbrella framework for making executive policies.* Furthermore, such a competition law should have necessary provisions and teeth, to review any executive policy on the touchstone of competition and also have the power to require the executive to amend its policies, as may be necessary. This will ensure the spirit of competition in executive policies relating to trade and market.

The above mentioned observations have an important dimension, namely non-discriminatory application of the law. Usually and in most countries, competition law has surveillance over anti-competitive activities and conduct indulged in by private parties, including companies, firms, producers and suppliers of goods and services. Government enterprises and departments are generally excluded from such surveillance, but *should be treated like any private enterprise for*

the purposes of the application of competition law. Where a Government department is manufacturing and supplying goods and/or rendering services, they should be treated alike their counter-parts and competitors in the private sector and be subjected to competition law enforcement without any favour. The only restriction that may be built into this principle is that Government enterprises and departments engaged in any sovereign function (like defence, law and order, currency functions) may not be subjected to the rigours of competition law.

Swaminathan S. Aiyar, has made a pointed reference to the plethora of law and rules in India that explicitly protect favoured players, reduce competition and give discretion in decision making to politicians and bureaucrats in the name of public interest (Aiyar, 1998). He has observed that "public interest is frequently and unabashedly invoked to protect one specific interest group (unionised labour, small scale industries, handloom weavers) with no explanation of how or why the interest of this group transcends all others." He has provided the illustration of restrictive policies which impede competition like reservation of industries for the public sector (Coal, Railways, Postal Services, Insurance, Petroleum etc.), canalisation of exports and imports through the public sector (petroleum and some agricultural products), the jute packaging order (compelling fertiliser and cement producers to use jute rather than plastic sacks, resulting in leakage of material), reservation of items for the small scale sector and reservation of items for the handloom sector in support of his contention that many Governmental policies are anti-competitive in character. He has also referred to the Industrial Disputes Act which makes it impossible to retrench labour or close units without Government permission, even if the units are unviable and to the Urban Land Ceiling Act, which inhibits competition in using urban land. In the name of public interest, runs his further argument, protecting jobs leads to sacrifice of efficiency, raises potential costs and risks and discourages new investment. *All Governmental policies will have to be viewed through the competition lens to ensure that consumer interest and welfare and economic efficiencies and development dimensions are not pejorated.*

In many countries, procurement is reserved for domestic bidders

in tenders. The Kennedy round of GATT has created a plurilateral procurement system applicable to those GATT members who voluntarily opt to join it, but it is not mandatory for other GATT members.

Even though in certain specified areas, protection to domestic industry may be needed, it can be achieved through tariffication and appropriate import duties and through fiscal methods. There is no need to dilute the competition policy to protect domestic producers and suppliers. Tendering should not be tailored to protect domestic producers and suppliers.

Yet another area which is a cause of concern is the practice of transfer pricing. When trade takes place between two branches or subsidiaries of a multi-national corporation, the price of the transaction is so fixed as to shift the bulk of profits to the firm with the lowest tax liabilities. A company that under-invoices or over-invoices exports and imports is indulging in transfer pricing. Many industries appoint fully owned firms of their own to act as suppliers to or sales agents of a larger joint stock company with a large number of share holders and here, both the inputs and sale prices are manipulated to siphon off profits from the widely held company into the fully owned ones. There are some multi-nationals which impose sales or export restrictions on their branches in the importing countries to whom they supply technology.

The conclusion that follows is that competition law should envelop executive policies of the Government, besides a host of anti-competitive practices on the part of the market players so as to ensure the beneficial consequences of competition for the consumers in general and the public at large.

Exemptions and Exceptions

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. For instance, there is a large body of small scale sector enterprises operating in developing countries like India which provide considerable local employment, use local resources and raw materials and supply to local and sectoral

markets. Some of the products of such enterprises may be found eminently suitable for the local population, which does not set very high quality standards because of their impecunious conditions and even affordability qua very rigorous and high quality products. In the name of competition, the interests of such enterprises should not be injured, as all that will happen by the competition law holding its field, is to extinguish them and throw many people out of employment without any corresponding gain to the local population who will not be able to afford the high quality products and therefore will have to go without the products at all. This is not to say that high quality products need not be given to such consumers, but the emphasis is that in a given situation, there should be enough room for flexibility for a country to provide for exemptions and exceptions in its larger public interest.

Extra-Territorial Reach and Relevant Market

Some anti-competitive practices may have extra-territorial origin or extra-territorial impact. For instance, some mergers and acquisitions may have significant effects beyond the borders of the country in which the merging parties are based or have production facilities. A recent example is the merger of Boeing-McDonnell Douglas in which the parties' production facilities were located in the USA but their customers were located all over the world. The merger was cleared after review by the Federal Trade Commission of USA and the European Union, after the parties undertook certain commitments to the European Union (Federal Trade Commission, 1997). In such matters the concept of a "relevant market" for competition law purposes comes into play. "Relevant Market" has both a product and geographic dimension. Regarding the product dimension, the basic question to be answered is, with what other products and services does a particular product compete? Answering this question involves consideration of past evidence of consumer substitution patterns, the relationship between price movements and the demand for other substitutable products, econometric evidence etc. Geographic dimension involves identification of the geographic area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant

to geographic dimension are consumption and shipment patterns, transportation costs, perishability and the existence of barriers to the shipment of products between adjoining geographic areas.

The applicability of domestic competition law to arrangements entered into outside a country's borders, so long as such conduct has significant effects in the country, is important to the control of anti-competitive practices (See Scherer et al 1994). However, it needs to be noted that extra-territorial application of national laws entails some potential for conflicts between jurisdictions. International cooperation and in particular agreements incorporating principles of "positive comity" can be useful in minimising the actual extent of such conflicts between countries participating in such arrangements. *A caveat which has justification is that if a country wants to have extra-territorial reach of its competition law, it should allow other countries to have extra-territorial reach of their competition laws in its soil.*

As far as India is concerned, its Monopolies and Restrictive Trade Practices Act, has a provision that where any practice substantially falls within monopolistic, restrictive or unfair trade practices relating to production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, the Monopolies and Restrictive Trade Practices Commission can make an order under the Act *with respect to that part of the practice which is carried on in India.*

Indian Competition Law

Anti-Trust legislation is now an integral part of the economic life all the world over. It is present not only in the developed countries, but also in the developing countries. The Indian law on the subject known as the Monopolies and Restrictive Trade Practices Act (MRTP Act) was originally brought on the statute book in 1969, drawing its inspiration from the mandate enshrined in the Directive Principles of State Policy in the Indian Constitution. The said Principles aim at *securing social justice with economic growth.*

The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent

social revolution. Through such a social revolution, they seek to fulfil the basic needs of the common man and to change the structure of the Indian society. Their Lordships Messrs, Justice Hedge, Mukherjee, Ray and Chandrachud observed that the Directive Principles aim “at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution.....Our Constitution aims at bringing about a synthesis between ‘Fundamental Rights’ and the ‘Directive Principles of State Policy’ by giving to the former a pride of place and to the latter a place of permanence. Together, not individually they form the core of the Constitution. Together, not individually they constitute its true conscience” (Supreme Court, 1973).

The Indian law, Monopolies and Restrictive Trade Practices Act has drawn heavily upon the laws embodied in the Sherman Act and the Clayton Act of the United States of America, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, the Resale Prices Act, 1964 and the Restrictive Trade Practices Act, 1964 of the United Kingdom and also those enacted in Japan, Canada and Germany. The U.S. Federal Trade Commission Act, 1914 as amended in 1938, and the Combines Investigation Act, 1910 of Canada as amended in 1960, have also influenced the drafting of the Indian Act.

Premises on which the Act rests are unrestrained interaction of competitive forces, maximum material progress through rational allocation of economic resources, availability of goods and services of quality at reasonable prices and finally a just and fair deal to the consumers. An interesting feature of the statute is that it envelops within its ambit fields of production and distribution of both goods and services.

Thrust Areas

Three areas are covered by the regulatory provisions of the statute, *concentration of economic power, competition law and consumer protection*. A criticism is often voiced that the Act prohibits growth. This is fallacious and erroneous. The statute regulates growth, but does not prohibit it. Even in its regulatory capacity, it controls the growth only if it is detrimental to the common good. In terms of competition

law and consumer protection, the objective of the Act is to curb monopolistic, restrictive and unfair trade practices which disturb competition in the trade and industry and which adversely affect the consumer interest. A parallel legislation known as the Consumer Protection Act, 1986 has also come into being, which prevails in the realm of unfair trade practices. One could argue that the consumers need no special protection as they can be left to the market forces. But a perfectly competitive market is just a utopia and consumer sovereignty a myth. Products are of great variety, many of them are complex and the consumer has imperfect product knowledge. The supplier often has a dominant position vis-a-vis the buyer, who has little or no bargaining power in the market. There has been a growing realisation for not depending on the old doctrine of Caveat Emptor—“let the buyer beware”. The consumer, therefore, needs and deserves legal protection against certain trade practices, business methods and unscrupulous forces.

In many countries and in particular developing countries like India, a large number of consumers are illiterate and ill-informed and possess limited purchasing power in an environment where there is shortage of goods. Very often, one witnesses the spectacle of a large number of non-essential, sub-standard, adulterated, unsafe and less useful products being pushed through by unscrupulous traders by means of unfair trade practices and deceptive methods. Subtle deception, half truths and misleading omissions inundate the advertisement media and instead of the consumer being provided with correct, meaningful and useful information on the products, they often get exposed to fictitious information which tends to their making wrong buying decisions. Transparent information is missing and needs to be a goal to be chased.

The regulatory provisions in the MRTP Act apply to almost every area of business—production, distribution, pricing, investment, purchasing, packaging, advertising, sales promotion, mergers, amalgamations and takeover of undertakings. They seek to afford protection and support to the consuming public by reducing if not eliminating from the market monopolistic, restrictive and unfair trade practices. One of the main goals of the act is to encourage fair play and fair deal in the market besides promoting healthy competition. Under

the Act, a commission called the MRTP Commission has been set up to deal with offences falling under the statute.

Objectives

The principal objectives sought to be achieved through the MRTP Act are:

- i) prevention of concentration of economic power to the common detriment;
- ii) control of monopolies;
- iii) prohibition of monopolistic trade practices;
- iv) prohibition of restrictive trade practices;
- v) prohibition of unfair trade practices.

Out of these five, the first two have been de-emphasised, after the 1991 amendment to the Act. The emphasis has not only shifted to the three last mentioned objectives, but they have been re-emphasised. Yet to the extent monopolies tend to bring about monopolistic trade practices, the Act continues to exercise surveillance which existed prior to the 1991 amendment. This is because a monopolistic trade practice is understood to be synonymous with anti-competitive practice. Anything which distorts competition can lead to a monopoly situation. Anything which is likely to prevent or distort competition is regulated by the statute. Tersely, the Act is designed against different aspects of market imperfections. For instance, a merger which can increase the dominance of the combine or has resulted in a large share in the market can be looked at in terms of the provisions of the Act and the objectives governing them.

Monopoly is a concept of power which manifests itself in one's power to:

- i) control production, supply, etc.
- ii) control prices
- iii) prevent, reduce or eliminate competition
- iv) limit technical development
- v) retard capital investment
- vi) impair the quality of goods.

The legislation seeks to curb such power arising out of a monopoly.

Prior to the 1991 amendment, the Act essentially was implemented in terms of regulating the growth of big size companies called the monopoly companies. In other words, there were pre-entry restrictions in the Act requiring undertakings and companies with assets of more than Rs. 100 crores (about 25 million US dollars) to seek approval of Government for setting up new undertakings, for expansion of existing undertakings, etc. but consequent on the 1991 amendment *these pre-entry restrictions have been done away with, essentially because of the need for achieving economies of scale, for ensuring higher productivity and for securing competitive advantage in the international market.*

It was the perception and the experience of the Government that the pre-entry restrictions under the Act had outlived their utility and impeded the implementation of industrial projects. By eliminating the requirement of time-consuming procedure, it was felt that it would be possible for the productive sections of the society to participate in the maximisation of production and supply of goods and services.

The basic philosophy behind the Act was never to inhibit industrial growth in any manner, but to ensure that such growth is channelised for the public good and is not instrumental in perpetuating concentration of economic power to the common detriment. This philosophy has been so refined by the 1991 amendment that the MRTP Act has been restructured with emphasis on measures to curb and regulate monopolistic, restrictive and unfair trade practices which are prejudicial to public interest.

Dominance

In the Indian law, the criterion for determining dominance is whether an undertaking has a share of one-fourth or more in the production, supply, distribution or control of goods or services. When mergers or amalgamations come up for examination by the MRTP Commission, one of its important responsibilities is to evaluate the post merger/ amalgamation dominance in the market with reference to the common good and public interest. If the merger/amalgamation leads to unilateral

price fixation on the part of such dominant undertakings without any reference to the market and tends to extinguish smaller units and undertakings and douse competition, the Commission has the power to stop it.

Fostering Competition

Engendering competition is the touchstone on which both the MRTP Act and Consumer Protection Act have been drafted. The concept of public interest which includes consumer interest permeates the regulatory framework provided for the prohibition of monopolistic, restrictive and unfair trade practices in the two statutes. By bringing the public enterprises under the vice of the MRTP Act, they have been put on notice that by virtue of Government backing and Government ownership, they cannot exploit the consumers and indulge in practices to their detriment.

The extant Indian Competition Law, the Monopolies and Restrictive Trade Practices Act, 1969 needs to be considerably refined and amended to make it a comprehensive competition law for the country. Perhaps a new Competition Law may be designed and drafted. The new Competition Law should declare the competition principles and should be an effective instrument for engendering and protecting competition in the market in the interests of the consumers and the general public. Deterrent punishment should be provided in the statute for those who trench its provisions.

Mergers and Amalgamations

Mergers, amalgamations and acquisitions may be benevolent or malevolent. That they reduce competition and consequently trench competition law can be justifiably presumed. But in a benevolent merger, there could be advantages like resultant economies of scale, reduction in the cost of production and sale and gains of horizontal integration. There could also be more convenient and reliable supply of input materials and reduction of overheads and inventories. In a malevolent merger, competition becomes very often a victim. It may lead to exercise of market power and dominance in the market by the merged entity

to the detriment of consumers. A large unit may take into its fold an efficient and growing medium or small size undertaking and after the merger, may become complacent and suffer from deterioration over the years in its performance which may be prejudicial to public interest.

Instead of a mind set that all mergers are prejudicial to consumer interest, what needs to be done by the Competition Law Authority is to carefully evaluate the trade-off between reduction in competition and potential gains in economic efficiency. It is suggested that *a cost-benefit analysis be done by the said Authority to weigh the advantage and disadvantages of a merger and scrutinise efficiency arguments before adjudicating the question as to whether the merger is anti-competition in character.* The Competition Law Authority should be provided with multi-disciplinary experts to help in their endeavours.

Intellectual Property Rights and Competition

All forms of Intellectual Property have the potential to raise competition law problems. Intellectual property provides exclusive rights to holders to perform productive or commercial activities, but this does not automatically include the right to exert restrictive or monopoly power in a market or society. *What is called for is a balance between unjustified monopolies and protection of the property holders' investments.*

There is a growing recognition of the fact that a modern and well enforced Intellectual Property system is a strong imperative in the process of liberalising economic, industrial and trade policies. Industrial Property system needs to be used as a means for economic and technological development. *In order to benefit from the new directions consequent upon the TRIPS Agreement, developing countries need to improve their regulatory framework, laws and service, which will help increase inventive activity.* The provisions of TRIPS Agreement need to be understood in the context of enlightened national economic self-interest by each country. *The approach has to be de-politicised and a national and not a party interest position taken.* TRIPS Agreement can open new horizons for a country's industry and can ensure success through competition.

Developing countries need to study their IPR statutes in depth in order to identify the areas which need to be revised, updated or modified not only to conform to the TRIPS Agreement, but also to subserve the national interest without detriment. *They should also concentrate on using the flexibility in TRIPS Agreement to advantage.* While making amendments to the IPR statutes, appropriate measures will have to be put in place by each country in its competition law to prevent the abuse of Intellectual Property Rights or to prevent practices which unreasonably restrain trade or the international transfer of technology. Abuse of dominance, collusive action and abuse of exclusive marketing rights should be under the surveillance of competition law.

Investment and Competition

Considerations relating to competition and competition policy have relevance for all countries, particularly the developing ones, as they seek to liberalise and get more closely integrated into the world economy. Developing countries look at assistance and investment from overseas as a source of capital, technology, managerial know-how and market access for sustained economic growth and development. Experience suggests that in many countries, the policies designed towards a more open Foreign Direct Investment (FDI) regime are supported by policies towards greater deregulation of economic activity, greater reliance on market forces in their domestic economies and increased dependence on international trade and factor movements like those relating to capital and skilled human resources (Low *et al*, 1995). Sometimes, as a consequence of FDI liberalisation, some developing countries are compelled to undergo the pain of adjustment to competition, as the collective impact of FDI liberalisation, trade liberalisation and domestic economic reforms may give rise to competition concerns and conflicts. For instance, domestic industries which are intrinsically unviable face extinction, consequent on the said collective impact.

Trade policy, FDI policy and competition policy have a high degree of inter-dependence for ensuring efficient resource allocation and economic development and the three policy tools require to be appropriately configured so that *they are in harmony and mutually reinforcing.*

Foreign Investment Policy should essentially subserve the *development dimensions* of the beneficiary countries. For the developing countries in particular, an open investment regime should be a tool for enhancing economic growth and welfare. While exposure to competition in the long run generates efficiency and a more rational allocation of resources, the concerns of short-term injury to domestic industry or of excess capacity or diseconomies of scale should not be under-estimated, but should be studied by countries with a view to formulating their investment policy.

Competition policy and competition law should essentially govern investment policy. It is imperative that consequent on foreign investment, the enterprises involved in both the host and the home countries do not indulge in business practices to the detriment of the interests of the consumers. At the same time, the competition policy *should be flexible in application* that it does not impede growth or development goals of the investment receiving country. Special and differential needs of the developing countries in particular, will have to be kept in view along side their developmental objectives and national priorities. In other words, they should have the freedom to specify exemptions and exceptions in applying competition policy to investment policy. If mergers, amalgamations and acquisitions are chosen as the route for foreign investments, they should be placed under the surveillance of the competition law.

State Monopolies, Exclusive Rights, Regulatory Policies and Competition

State monopolies and public enterprises are the agents of the Government created to accomplish various socio-economic-political goals. They are designed to secure and subserve public policy objectives of the Government. Consequent on the process of liberalisation, privatisation and globalisation, there has been a trend recently towards de-monopolisation and privatisation of State monopolies and public enterprises. There is increasing recognition of the fact that competition is a key to improving the performance of State monopolies and public enterprises. In many developing countries, State monopolies, public

enterprises and exclusive rights have played an important role in the core and strategic sectors. They are designed to providing effective and universal supply of goods and services to all citizens on specified terms and at affordable prices. Some of them are operated in the interests of the vulnerable and weaker sections of society. Nonetheless *State monopolies and public enterprises need to be placed under the surveillance of competition law to prevent or minimise monopolistic, restrictive and unfair trade practices on their part*. Furthermore, efforts should be made to strike a harmony between competition on the one hand and the existence of State monopolies, public enterprises and exclusive rights on the other. What needs to be underscored is an appropriate blend of competition principles and Government policies towards State monopolies, public enterprises and exclusive rights directed for the welfare and interests of the impecunious sections of the society, particularly in the developing countries.

Finale

There is no panacea or magic formula for creating the desired harmony between the interests of competition (consumer interest) and the interests of the whole society (public interest). No one theory - economic theory - may fulfil the requirement for striking the harmony. Appropriate economic theories need to be redefined to be suitable as a tool for working out the desired harmony.

This paper may conclude with the following quote from Mr. Amartya Sen, Indian Nobel Laureate:

"One would like to avoid the danger of hollow purism that has made so much of modern economics unfit for actual use" (Sen, 1970).

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