THE NEED AND RATIONALE FOR AND THE OBJECTIVES OF COMPETITION POLICY AND COMPETITION LAW

Dr. S Chakravarthy*

1. Introduction

One cannot miss the process of globalisation and progressive international economic integration that has enveloped the world economy in the last three decades. 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 market increases, giving rise to greater potential for 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.

In this paper, the need for and the rationale behind competition policy and law have been given a treatment, while bringing out the distinction between competition policy and competition law. There is also a discussion on the linkages and potential conflict between competition policy and other governmental policies (like industrial, fiscal, labour etc). Competition policy for any country cannot lie in a vacuum and requires a crucible of what one may call “pre-requisites of other policies”. A discussion of the said pre-requisites is included in this paper before the design of competition policy and law is drawn. To start with, the concept of competition requires to be captured to prepare the ground for the main narration.

2. Competition – A Conceptual Background

In this section, an attempt has been made to trace the conceptual underpinnings of “competition” followed by arguments in support of the need for a competition regime. Before the said trace, the contextual Liberalisation, Privatisation and Globalisation (LPG) syndrome, which has been adopted by

* Dr. S. Chakravarthy is a civil servant by profession in India. He was Member, Monopolies and Restrictive Trade Practices Commission and also Member, High Level Committee on Competition Policy and Law appointed by Government of India. He was also Member of the Competition Law Drafting Committee and Advisor to Government on Competition Policy and Law. Presently, he is Advisor/Consultant on Competition. He is a consultant to World Bank, ADB etc.
Contact Email address: chakravarthy38@hotmail.com and chakravarthy38@gmail.com

most countries in the world, has been commented upon with a view to placing competition in perspective germane to this paper.

LPG SYNDROME

The world economy has been experiencing a progressive international economic integration since 1950, particularly in the last three decades. There has been a marked acceleration in the process of LPG during the last quarter of the 20th century and the current initial years of the 21st century.

The economic factors which have been instrumental in this process of globalisation are the dismantling of barriers to international economic transactions, the development of enabling technologies and emerging forms of industrial organisations.

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.

Jenny (1997) has noted that in the developed countries, one of the striking features of the past fifteen years has been the reversal of the tendency of regulation and increasing reliance on market mechanisms to promote economic progress as exemplified by the widespread trend towards privatisation, deregulation, **adoption and enforcement of competition law**, reduction in the scope of industrial policy etc (emphasis added).

In many countries of the world, during the pre-LPG regimes[1], many a device was used, ranging from price control to soft planning, participation in the economy by State owned enterprises, allocation of public procurement, control of foreign direct investment, regulation of entry, public subsidies etc. Governments also used 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 deregulation, countries have taken to measures designed to eliminate public monopolies and to open competition in strategic sectors such as Telecommunications, Electricity Generation and Distribution, Airlines, Railway Transportation etc. There has been an increasing trend towards introduction of competition in the economic activities of many countries, developed, developing and least developed.

[1] The introduction of the LPG regime varies from country to country in terms of timing, contents and coverage.

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 mooted by government in many countries is no longer considered to be a 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 savings 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**" (emphasis added).

3. 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 Antitrust 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).

The debate goes on even now.

4. COMPETITION POLICY

The expression "competition policy" encompasses a wide range of governmental policies, affecting both competition and restrictive business practices.

THE NEED FOR A COMPETITION POLICY

Definition of "competition" and its relevance for the economy have been dealt with earlier. Competition policy is a subset of competition, and its (competition policy's) subset is competition law. Competition

policy is defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry" (Khemani, R.S. and Mark A. Dutz, 1996). The objective of competition policy is to promote efficiency and maximise welfare. In this context, the appropriate definition of welfare is the sum of consumers' surplus and producers' surplus. It is well known that 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. These would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. Its subset is legislation designed to prevent anti-competitive business practices and unnecessary government intervention - competition law. 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. Where this is not possible, it requires the creation of a suitable regulatory framework in the form of competition law, for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Economic reforms and liberalisation (particularly trade liberalisation) alone are not sufficient to promote competition and there is a need for a separate competition policy.

What is needed is a range of governmental policies to enable the economy to conform to 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 governmental 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 (APEC, 1999).

All governmental policies, particularly trade policies, ultimately have at their consummating point, the consumer. Consumer welfare and interest aim at the charter of economic liberty designed for preserving free and unaffected competition as the rule of trade. The premises on which the charter rests are unrestrained interaction of competitive forces, maximum material progress through rational allocation of economic resources, availability of goods and services of acceptable and good quality at reasonable prices and finally a just and fair deal to the consumers.

Competition as a factor must have primacy in policy formulations. Genuine competition will engender quality of goods and services at reasonable prices with unfettered access to the consumers to them. **COMPETITION SHOULD INFORM ALL GOVERNMENTAL POLICIES, PARTICULARLY TRADE AND MARKET POLICIES.**

BENEFITS OF COMPETITION POLICY

In support of the view above, there is empirical evidence of the benefits of competition policies vis-a-vis economic development, greater efficiency in international trade and consumer welfare, listed in a report (UNCTAD, 1997). The evidence, albeit referring to experiences of developed countries, indicates substantial benefits from the strengthening of the application of competition policy principles in terms of "greater production, allocative and dynamic efficiency, welfare and growth." It further concludes that the consumer and producer welfare, economic growth and competitiveness in international trade have all

flowed out of competition policies, deregulation and surveillance over Restrictive Business and Trade Practices. Noting 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 producers, the empirical evidence in the report suggests that competition ensures product quality, cheaper prices and passing on of cost savings to consumers. The report also observes that competition promotes two types of efficiencies, namely, static efficiency (optimum utilisation of existing resources at least cost) and dynamic efficiency (optimal introduction of new products, more efficient production processes and superior organisational structures over time) (UNCTAD, 1997).

There is enough testimony to underscore the benefits that flow from governmental policies consciously designed in favour of competition. For instance, in the European Union, the implementation of the policy of removal of barriers to trade is estimated to have increased income by 1.1 – 1.5 per cent over the period 1987 – 93 and to have created 30,000 – 90,000 jobs and to have decreased inflation by 1.0 – 1.5 per cent. Around half of this is attributed to increases in competition and efficiency improvements (Commission of the European Communities, 1996).

Therefore, strengthening and promotion of competition need to be a key goal of economic policies of countries---developed, developing, least developed and those in transition. But, in order to achieve the goal, competition should leave 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.

The expression "competition" refers to the process of rivalry among firms and market structures conducive to such rivalry. The expression "competition policy" ought to aim at preserving and promoting competition and also at influencing the formulation and/or implementation of governmental policies or measures (trade policies) affecting competition and at enforcing competition law against Restrictive Business and Trade Practices.

5. COMPETITION LAW

It has been noted, *supra*, that competition policy is a subset of competition, and that its (competition policy's) subset is competition law. 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 seen often to impact the market by way of regulating and facilitating the activities of the various players therein 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 could 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 the executive policies, particularly those relating to trade and market.

The above mentioned suggestion has 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 in the interests of consumers, it is eminently desirable to **treat government enterprises and departments 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.

6. COMPETITION POLICY AND OTHER GOVERNMENTAL POLICIES – LINKAGES AND POTENTIAL CONFLICT

Taking the trade policy and the small scale industries policy as examples of governmental policies, the linkage and possible conflict between those policies and competition policy have been described below. 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. 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).

Trade laws which regulate trade policies and competition laws which regulate competition policies, have a certain common core objective namely to maximise economic welfare by improving the environment for more efficient resources allocation. They are regarded to have complementary effects as well as contradictory effects with each other (Messerlin, 1996 and Iwata, 1997).

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. "It is the complete framework of laws, regulations, international agreements and negotiating stances adopted by Governments to achieve legally binding market access for domestic firms"[2]. A trade policy addresses two broad and interrelated issues. First, it seeks to create trading

[2] Please see the Dictionary of Trade Policy Terms – Walter Goode – Centre for International Economic Studies, University of Adelaide.

opportunities to ensure freer trade by removing tariff and non-tariff barriers. Second, it seeks to ensure fair trade by eliminating anti-competitive practices in international trade. This second objective is more difficult to define and achieve. Fair trade implies the creation of an equitable trading system where the conduct of trade is governed by the competitive advantage of market players rather than the economic power and influence of government. A liberal trade policy is no longer restricted to the consideration of reduction of traditional border restrictions such as tariff and import licensing but the consideration of the reduction of non-tariff barriers including sanitary, phytosanitary measures and technical regulations which limit cross-border access. It aims to address domestic and export subsidies and other forms of assistance, which discriminate in favour of domestic producers.

Thus 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 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. As traditional barriers fall, the incentive for collusion and similar practices increases. For instance, OPEC is a very strong combine which seeks to control the output of crude oil and prices from time to time. 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 globalize 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 GATS, specific competition policy issues are emerging.

The interface between the two policy areas – competition and trade – has locomotion because of their common objective of economic efficiency. Both these policy areas seek to enhance welfare through economic efficiency and encourage competitive and market oriented directions.

One of the significant issues arising in the interface between trade and competition policies is the use of competition laws to gain market access in countries where exist vertical and horizontal restraints, which create barriers to entry. It is lamented often that the barriers erected by dominant firms, sometimes with the acquiescence of their Governments impair the benefits that would otherwise be attained through liberalised trade. Goldman (1996) suggests that there is need for examination of such issues, particularly competition-related. Trade policies, therefore, could be anti-thetical to competition.

A source of tension in many countries, particularly the developing ones, is the priority attached to competition policy relative to the rank order assigned to other governmental policies, including policies that have the support of statutes. Given the extensive interface, competition policy has with other governmental policies, there are areas in which the respective objectives may be complementary such as

in the case of initiatives directed at de-regulation and privatisation of State-owned corporations. However, in other 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.

Trade policies could be prejudicial to competition. During the last decade, anti-dumping instrument has been used by India (like many other countries including the US) to protect its domestic industries, for the reason that import dumping was causing material injury to them.

Box 1 below describes the anti-dumping action relating to silk as constituting a protectionist policy, protecting the domestic producers.

IMPORTED SILK IN INDIA FACES THE WALL OF PROTECTIONISM

BOX 1

The State of Karnataka in India is a famous silk producing region. There are a large number of Karnataka-based organisations representing silk producers. The Central Silk Board set up by the government is at Bangalore. The Board, on behalf of various associations representing the power loom silk fabric producers, alleged dumping of silk fabrics weighing 20-100 gms per metre originating from the People's Republic of China. The allegations were investigated by the Director General of Anti-Dumping and Allied Duties (DGAD) of the Government of India functioning under the Commerce and Industry Ministry. DGAD found evidence of dumping and has levied hefty anti-dumping charges on various Chinese firms. The popular varieties of silk covered by this levy are crepe, georgette, chiffon and habutai.

The government is already imposing anti-dumping levy on raw silk. And now in addition, silk fabrics are getting subjected to the levy. The duties are between 40 and 50 percent. Trade policy (an offshoot of economic nationalism) in the form of levying anti-dumping duty on raw silk and silk fabrics manifests to protect the domestic producers against competition from abroad (Verma and Subramaniam, 2006). **Thus in this case, Trade policy militates against competition.**

If multiple objectives are allowed to rein in the competition policy, conflicts and inconsistent results may surface 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. India has been following a policy for decades encouraging and protecting the small scale industrial sector. There are both efficient and inefficient small scale units and well-managed and ill-managed ones. Competition principles would dictate the theory that inefficient and ill-managed firms should exit from the market. The concern implicit in this theory is that exit of such firms will render employed persons being thrown out of employment, thus aggravating the unemployment situation in the country. It cannot be denied that the small scale sector generates significant employment but it does so at a considerable cost to the exchequer by way of loss of revenue entailed by a plethora of exemptions from indirect taxes available to this sector of the economy. Thus, while a policy for the welfare of the small scale sector cannot be regarded as unreasonable, it must be tempered by the knowledge that it involves heavy costs. 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.

While the theory that inefficient firms even in the small scale industrial sector should exit from the market, they should be given an opportunity to face the challenge of competition and improve their performance and efficiency over a transition period after which no special consideration need be given to them. To put them on notice and to give them this transition period is a desirable caveat to govern competition policy/law. This is being suggested, conscious of the fact that this tantamounts to some dilution of the spirit and concept of competition, but yet one needs to be alive to the risk that unbridled competition may prove disastrous in developing countries (like India), wherein certain sections of people and sectors of industry, need the umbrella of governmental protection.

In addition, such concerns as community breakdown, fairness, equity and pluralism cannot be quantified easily or even defined acceptably. These concerns have logic of their own and it cannot be gainsaid 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.

Implementation of competition policy risks becoming captive to the political process, if it attempts to serve different interest groups, which may not be conducive to maintaining or promoting effective competition. Political process is not necessarily in consonance with public interest. It is more often than not, in consonance with private interest. While the public interest approach to competition policy is perceived to permit the consideration and balancing of different economic, social and political objectives, private interest is unlikely to effect any such balance. Irrespective of whether public interest or private interest is at centre stage in a given situation, the fact remains that the independence with which the policy can be administered can easily become constrained. Competition becomes captive to political process.

The Pakistan example in Box 2 next page illustrates this. Another case, this relating to Thailand (Box 3 next page) bears testimony to competition having been trumped by political inaction or pressure.

The foregoing analysis places the linkages and possible conflicts inherent in the interface between competition policy and other governmental policies. It will therefore be in order to examine the issues germane to the framing of a catena of pre-requisites before a competition policy is put in place.

COMPETITION CAPTIVE TO POLITICAL PROCESS

BOX 2

The Monopoly Control Authority (MCA) in Pakistan has the responsibility, *inter alia,* to conduct enquiries into restrictive agreements and trade practices. When the cement manufacturers in Pakistan increased the sale price of a bag (50 kgs) of cement from Rs. 135 to Rs. 235 in October 1998, the MCA initiated an enquiry into the causes of the price increase after noting that the cement manufacturers were indulging in price cartelisation. The All Pakistan Cement Manufacturers Association (APCMA) informed the MCA that the reasons for the increase were increase in the cost of inputs and higher taxes. After collecting data, MCA found that the costs of inputs had not gone up except power tariff and that too only marginally. The taxation levels had actually been reduced. Cartelisation was manifest among the members of the APCMA and was against public interest, according to the MCA. MCA directed the cement manufacturers to cease cartelisation and revert to the pre-October 1998 price level. Furthermore, it imposed a fine on an each manufacturer and ordered that the consumers may be compensated against verifiable claims. However, the cement manufacturers refused to comply with the order of the MCA and challenged the same in the High Court and obtained stay orders. Thereafter, the Ministry of Commerce, disregarding the supposed independence of MCA, persuaded the latter to close the case. It held negotiations with APCMA, lowered excise duty on cement and fixed the price of a bag of cement at Rs. 200. Competition became captive to politics and pressure lobby (CUTS, 2006).

POLITICAL PRESSURE STUMPS COMPETITION

BOX 3

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 in the subscription fee was about 22.5 %. The usurious increase in the subscription fee was investigated by an expert committee essentially 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 the 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 (Deunden, 2005).

7. PRE-REQUISITES FOR COMPETITION POLICY

The central exercise 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
- Financial and fiscal policy
- 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.

In a paper presented to the Expert Group[3], Swaminathan S. Aiyar, (a member of the Group) 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 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 fertilizer 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 job leads to sacrifice of efficiency, raises potential costs and risks and discourages new investment.

It is common to find national governments seeking to follow the policy of 'protectionism'. Economic nationalism (including protectionism) and creation of national champions are policies which often stem from patriotism as a factor. Patriotism is a herd-instinct in human beings. This manifests in the form of the subjects and policy makers of a country attempting to protect their interests and sometimes manifests in the form of following an approach usually known as "beggar thy neighbour". Creating national champions and adopting a policy of protectionism, essentially to protect the domestic producers *vis a vis* foreign suppliers are policy approaches of many a country.

[3] Expert Group, 1999. The author chaired the Group.

European Commission's Member in charge of Competition Policy, Ms. Neelie Kroes spared no words in slamming the policy of protectionism and of creating national champions. Kroes' (2006) attack may be seen in Box 4 below. She styles the policy of protectionism as out-dated and harmful to competition.

KROES SLAMS PROTECTIONISM AND NATIONAL CHAMPIONS

BOX 4

Kroes (2006) speaking at the Villa d'Este Forum on 'Intelligence 2006 on the World, Europe and Italy' in Cernobbia, Italy said that, 'We cannot allow ourselves to be side-tracked by the out-dated rhetoric of protectionism'. Opposition to protectionism was the central theme in her speech and she made an important point that national champions may look appealing but usually hurt competition. On national champions, she made a significant comment as follows:

> "….. let's be under no illusion: it is markets and not politicians that pick the winners and artificially-created national champions may have short-term appeal but this is often to the long-term detriment of European competitiveness and European consumers".

Referring to the policies of Spain, France and Italy advocating the creation of national champions and referring in particular to France brokering a marriage between energy companies Suez and Gaz de France to create a national champion, she commented that concentration in markets would make it difficult for new suppliers to enter them, would give the national champion the market power to raise prices and would be detrimental to consumer interest.

Many countries of the industrialising genre have consciously encouraged and cultivated the policy of creating national champions. It is the government that generally is behind such policies. Amsden (2001) has observed:

"National leaders…, private or public, all shared one characteristic: *they tended to be a product of government promotion".*

National champions are generally created through policies of discrimination against foreign firms. Such policies, while encouraging domestic firms to merge or amalgamate, are designed to discourage or prohibit foreign firms from merging with or buying domestic firms. This is by law effectuated by providing in the statute itself a stringent procedure for regulating foreign firms' mergers with domestic firms and in juxtaposition providing a benign or lenient procedure for regulating mergers of domestic firms. Thus discrimination against foreign firms may be built into the competition statute. Such discrimination may be inflicted against foreign firms, not necessarily by law, but by following separate regulatory procedures implying thereby that mergers of domestic firms may be treated differently than the mergers involving a foreign firm(s). This discriminatory policy proceeds on the patriotic premise of economic nationalism and of promoting national champions.

In its presentation to the third OECD Global Forum on Competition in 2003, the Republic of Ireland frowned upon the policies of some countries creating national champions at the cost of competition rules (Ireland, 2003). Box 5 below captures the essence of its presentation[4].

[4] The passage in Box 5 leans on Box 3.1 of the Issues Paper of Evenett (2004).

NATIONAL CHAMPIONS NOT AT THE COST OF COMPETITION RULES

BOX 5

In its submission to Third OECD Competition on Global Forum, the Republic of Ireland expressed its disagreement on the policies of some countries, particularly small, creating national champions. Its arguments run as follows:

> "National champion advocates argue that applying the principles of competition policies in small economies can be harmful because firms are precluded from achieving the necessary scale to compete internationally. Accordingly, industrial policy should encourage national champions, and normal competition rules should not apply. There are however, several reasons why trade-off between competition and other policy goals [including] industrial policy can be considered small or even non-existent" (Ireland, 2003).

Ireland argued that creating national champions may increase concentration in the domestic market and that thus there may be a strong case for enforcing competition law. In other words, national champions should not be encouraged at the cost of competition rules. Its arguments further run to emphasise that "….small economies have all the more reason to apply competition rules more vigorously in the importation and distribution sectors, and doing this would ease any adverse domestic implications from national champions….." Another logic in the argument of Ireland was that encouragement of national champions would mean that enforcement of competition law placed greater weight on export competitiveness rather than on domestic consumers' welfare.

Ireland negatived the assumption that larger domestic firms like national champions have greater export competitiveness. In stating this, Ireland drew support from Porter's thesis that the discipline earned by firms from intense competition in the domestic market is the best stimulus to success abroad and that their experience of competing successfully in the domestic market provides them an enormous advantage when they expand into foreign markets (Porter, 1990). Creation of big firms and national champions may result in a substantial reduction in the degree of rivalry between domestic firms and reduction in competition in the market, which in terms of Porter's thesis, would not render them competitive in the international market.

Thus, Ireland expressed its disagreement on the wisdom of encouraging national champions through protectionism and through benign enforcement of competition law on domestic firms, particularly when they combine to become big firms or national champions.

The Expert Group (1999) observed that 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.

8. ROAD MAP FOR COMPETITION

In the previous sections, the need for a competition policy and an appropriately designed competition law have been argued and recommended. 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. While competition policy of a

country (particularly, the developing ones) should inhere the development dimension, the policy itself should have enough flexibility to meet its specific needs.

9. Contours Of Competition Policy

It is evident from the discussion in the foregoing sections of this paper that the scope of competition policy is broad and essentially includes all governmental measures that directly affect the conduct and behavior 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. Competition law, 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.

10. Design And Implementation Of Competition Policy

The following principles (see Khemani, 1997) could govern the designing and implementation of competition policy and competition law.

1. The competition policy should envelop governmental policies in every sector. In other words, governmental policies should be governed by the principles of competition.
2. The competition law should provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.
3. The Competition Law Authority 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 Law Authority should be transparent, non-discriminatory and rule-bound.
7. The Competition Law Authority should have a positive advocacy role in shaping policies affecting competition.

11. Competition Law Coverage

Competition law needs to be drafted with a lot of care and attention, keeping in view the needs, goals and aspirations of a country. There cannot be a 'one size fits all'. The law could (with variations for countries) rest on three pillars, namely,
1. Anti-competitive agreements
2. Abuse of dominance, and
3. Merger/amalgamation/acquisition regulations.

Some competition offences are pernicious in character and may need to be outlawed straightaway. They are known as ***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 shall always be 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 Law Authority will examine each case in terms of facts and circumstances placed before it, before bringing about an order of indictment.

The *per se* rule is rooted in the provisions of the US law and has a parallel in most legislations on the subject. The Australian law prohibits price fixing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law (Competition Act, 1998) endorses certain agreements to have an appreciable effect on competition (presumption is however rebuttable).

The US Supreme Court[5] explained the rationale behind the ***per se*** rule and observed that certain agreements were ***per se*** illegal. To quote, the Supreme Court:

" [t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use….. it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved…".

Under the rule of reason, the effect on competition is found on the facts of the case, the market, the existing competition, the actual or probable prejudice to competition etc. The
US Supreme Court[6] observed as follows:

"Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable".

Box 6 next page, which is a case of United States, decided by that country's Supreme Court illustrates these principles.

---

[5] Northern Pac. R. Co. v. United states, 356 US 1

[6] Board of Trade of City of Chicago v US-246 US 231 (1918)

PER SE RULE AND THE RULE OF REASON DISTINGUISHED

BOX 6

A conspiracy case was brought against Standard Oil Co. of New Jersey that it had acquired a majority of stocks of a large number of companies in the oil industry in order to fix the price of crude, refined oil and products thereof and also in order to limit production and restrain trade and commerce. Anti-competitive practices levelled against Standard Oil were preferential and discriminatory practices, contracts with competitors and acts eliminating competition. In its decision, the US Supreme Court[7] observed that the competition law may not have defined restraint of trade but has fixed a standard by defining the ulterior boundaries, which could not be transgressed with impunity. The Court further observed that the power to fix the prices, whether reasonably exercised or not, involves the power to control the market and to fix arbitrary and unreasonable prices; agreements which create such potential power may well be held to be unreasonable by themselves or unlawful restraints without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed.

The above decision draws a line between the ***per se*** rule and the rule of reason, the line being the ulterior boundaries which should not be transgressed with impunity. If the law lays down the boundaries, transgression is a ***per se*** offence. If not, the rule of reason will apply.

Suggested ***per se*** anti-competitive practices are:-

Horizontal restraints like –

a) Price fixing
b) cartels
c) collusion to restrict out-put, technical development etc
d) bid-rigging
e) allocation or division of markets/consumers

Illustrative anti-competitive practices that need to be covered by adjudicative process of **"rule of reason"** are:-

Vertical restraints like –

i) resale price maintenance
ii) refusal to deal
iii) exclusive dealing
iv) territorial restrictions
v) tie-up sales and tie-up credits
vi) full line forcing
vii) transfer pricing
viii) joint ventures

Futhermore, the following anti-competitive practices lend themselves to the **"rule of reason"** approach.

[7] Standard Oil Company of New Jersey vs. US – 221 US 1 (1911)

a) abuse of market dominance
b) abuse of intellectual property rights
c) special privileges for public enterprises
d) special privileges for the small scale sector
e) dumping of products

In addition to the above, mergers, amalgamations and acquisitions and acquisitions of control (all these could be styled 'combinations') would need to be placed before the Competition Law Authority for prior[8] approval before the event takes place. This is because a merger or amalgamation including acquisition reduces the number of players in the field and can and often does limit competition.

12. Ethiopian Scenario

Reforms

Major reforms, changes in investment policy and changes in trade policy effected by Ethiopia are captured in the Table 1 below:

Reforms in Ethiopia

Table 1

Major Reforms	Change in Regime 1991	Consequent on change in regime, Ethiopia abandoned socialist economic system and made transition to a market-oriented economic system
	Industrial Development Strategy (adopted since 2001)	The Strategy recognized private sector as the engine of growth and industrial development. Among the fundamental principles emphasized in the Strategy are coordination between Government and the private sector and Government's commitment to work towards creating enabling environment for the private sector. It identified priority sub-sectors to drive the industrialization process.
Landmark Changes in Investment Policy	Investment Proclamation, 2003 (amended several times)	The Proclamation encouraged private sector investing in areas formerly reserved for the Government - Defence Industries, Hydropower Generation, and Telecommunication Services etc. In reality, investment in Telecommunications and Defence has been in partnership with the Government and State owned enterprises are sought to be privatized.
Landmark Changes in Trade Policy	Comprehensive Trade Reform Program, 1993	The Program dismantled quantitative restrictions and reduced the level and dispersion of tariff rates. Currently quantitative import restrictions are applied only to used clothes, harmful drugs and armaments for security reasons.

[8] Some competition laws do not require prior approval. Many competition laws specify threshold limits for combinations to fall within the ambit of regulation.

COMPETITION LAW AND POLICY

Ethiopian Government issued a Trade Practice Proclamation (No. 329/2002), in April 2002, and which was proclaimed on April 17, 2003 under Proclamation No. 329/2003, to promote competition in the domestic markets. Its major objective was to secure a fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices and to safeguard the interests of consumers, through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services.

The salient features of the Proclamation are:

- Any agreement that restricts, limits, impedes or harms free competition, in the process of production or distribution, is regarded as anti-competitive. It includes jointly fixing prices, collusive tendering as to determine market prices, market or consumer segmentation, allocation of quota of production and sales, refusal to deal, sell and render services, etc;

- In the course of commercial activities, any practice that aims at eliminating competitors through different methods is considered an unfair practice. The different methods include, amongst others, creating confusion with respect to the products or services offered by an enterprise; damaging the goodwill of another enterprise unjustifiably; misleading the public with respect to the activities, or products or services, of an enterprise; restricting, impeding or weakening the competitive production and distribution of any commercial good or service; importation of goods at prices less than the actual market prices in the principal market of the country of origin, with the intent to destroying or injuring the production of such goods in the home country; trading in goods imported for humanitarian purpose; etc; and

- Unfair imposition of excessively high or low selling price or service fee, or withholding supply or any pre-emptive behaviour to impede entry into markets; misleading commercial statements or notices; hoarding, diverting or withholding goods from normal trade channels; selling at a price that does not cover production cost to eliminate fair competition; etc, are regarded as abuse of dominance.

The Proclamation also deals with other aspects related to competition, such as indication of prices of goods, labels on goods, distribution of basic goods, issuing and keeping receipts, etc.

INDUSTRIAL POLICY

In terms of industrial policy, most of the 7 countries covered in the 7Up3 study project have undergone drastic changes over the last couple of decades or so. The winds of change started blowing from the mid-eighties, though visible changes took place much later in some of these countries. The overall industrial environment has become much more liberalised in these countries, and in particular, Ethiopia and setting up a business unit is much easier, though often the procedural delays are there.

PREVALENT OF ANTI-COMPETITIVE PRACTICES

The study of CUTS in the 7Up3 project found out that collusive behaviour or price-fixing is quite common in all project countries, particularly Ethiopia. Several cases of price-fixing have also been

reported in the media. The cartels very often worked under the sham covers of Business or Trade Associations. The individual enterprises, in these cases, did not seem to have any choice other than doing likewise with the whole 'family', otherwise they would face serious trouble including danger to their lives. The Associations are predominantly composed of big players and consequently their indulging in anti-competitive practices is to the detriment of the consumers. In the African scenario, the prevalence of Anti-competitive Practices in 7 countries covered by the 7Up3 study[9] may be seen in the Table 2 below and in particular, that in Ethiopia.

THE MOST COMMON ANTI-COMPETITIVE PRACTICES IN 7UP3 COUNTRIES

TABLE 2

	Botswana	Ethiopia	Malawi	Mauritius	Mozambique	Namibia	Uganda
Collective price-fixing	+++	+++	+++	+++	+++	+++	+++
Market sharing	+++		++	+++	++	+++	
Bid-rigging	++	+++	+++	++	++	+	+++
Tied selling					+	++	
Resale Price Maintenance			+	++	+	+++	++
Exclusive dealing	+++		++		++	++	
Price Discrimination			++		+++	+++	+++
Predatory pricing	++		+		+	++	
Unreasonably High price							
Refusal to deal					+	+	
Unfair Trade Practices	++	+++			++		+++

Source: Compiled from 7Up3 Country Reports of CUTS (For more details, see at www.cuts-international.org/7up3.htm)

Note: (+++) Significant
(++) Moderate
(+) Existing but insignificant

13. ILLUSTRATIONS OF ANTI-COMPETITIVE PRACTICES

Cartels are one of the most pernicious offences in most competition laws. They devastate the consumers in terms of price over charge. Some examples of cartelisation are given below starting with a Tobacco cartel in Malawi (Box 7).

[9] The study was conducted by CUTS, a leading NGO in Jaipur, India.

A. CARTELS

TOBACCO BUYERS' CARTEL IN MALAWI

BOX 7

The anti-competitive structure of the tobacco market compounded by the level of transparency created by the auction system as it is currently operated enables the big buyers to minutely monitor all new entrants and sanction them as and when they see an opportunity to do so. Big buyers have allegedly formed a cartel. They were found to indulge in auction rigging. According to a report on Tobacco Sales in Malawi compiled by Clive Stanbrook, a renowned British lawyer,

"One of the reasons that the contract sales for flue cured tobacco were at better prices than on the auction floor … may have been because they were carried out in less transparent circumstances".

Besides this transparency being a factor affecting the market, two big players in the tobacco market Dimon and Standard Commercial merged their worldwide operations and indulged in cartelisation practices thus resulting in many small and medium buyers leaving the auction floor. Thus the existing two main buyers were able to exclude other buyers from the market both by their strong market shares and making market access almost impossible for new entrants.

A Tobacco Control Commission (TCC) has been established as a watchdog under the Control of Tobacco Auction Floors Act. Its duties are, *inter alia*, to promote and expand the sale of tobacco and most importantly to control and regulate the sale of tobacco on the auction floors in Malawi.

Stanbrook recommended that the TCC and the Minister needed to exercise their powers to bring about changes that would be beneficial to the growers. "These would be aimed at …. establishing clear competition based conditions, breach of which would endanger the buyer's licence," said Stanbrook. In other words, TCC should act with a view to prevent auction rigging by the big players in collusion. The report further recommended that Government should initiate a criminal investigation into the buyers' cartel.

(The Chronicle Newspaper, 18.08.05)

Under the outgoing Indian competition law, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, for brief), a soda ash export cartel of the US was challenged and the charge of cartelization was tested by domestic producers. Box 8 next page provides a summary of the case.

The now famous (or infamous) case of Vitamins cartel, Lysine cartel and Graphite Electrodes cartel merit mention here as illustrative of the manifest adverse effect on consumers particularly in the developing countries. They are described below in Boxes 9, 10 and 11 respectively in the pages following this.

SODA ASH EXPORT CARTEL

BOX 8

While cartels are generally prohibited in many competition statutes, export cartels are generally exempted. Competition laws implicitly or explicitly exempt export cartels on the consideration of "beggar thy neighbour". Holistically, such a consideration may not be ethically justified, but yet most, if not all, countries are bothered about their domestic markets rather than the global. There are however proponents of export cartels, which reasonably relate to the lawful realisation of cost-reducing or output-enhancing efficiencies (OECD, 2003). Some countries regard export cartels as competition-restricting in character, but still exempt them from their competition laws and some regard them as having competition-enhancing efficiencies. Many countries see virtue in their own cartels and evil in others. Evenett et al (2001) and OECD (2003a) between them have listed 15 countries whose competition laws explicitly or implicitly exclude export cartels.

In September, 1996, American Natural Soda Ash Corporation (ANSAC), an export trading company comprising 6 American producers of soda ash and registered under the Webb-Pomerene Act in the US attempted to ship a consignment of soda ash to India. The Alkali Manufacturers Association of India (AMAI), whose members included the major Indian producers of soda ash, filed a complaint against ANSAC before the MRTP Commission alleging, *inter alia,* cartelization. The Commission imposed an interim injunction on ANSAC restraining it from exporting **soda ash to India as a cartel.** Quoting from the ANSAC membership agreement, the Commission held that ANSAC was *prima facie* a cartel, which was carrying out part of its trade practices in India, giving the Commission extra-territorial jurisdiction under section 14 of the MRTP Act, even though the cartel itself was formed outside India. The Commission however clarified that the **American firms could export to India individually** (MRTP Commission, 1997).

INTERNATIONAL VITAMINS CARTEL

BOX 9

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. Also a small amount of vitamins is supplied to consumers directly. Food companies blend raw vitamins into bread, rice and juice. The animal food industry buys bulk vitamins to produce healthier and faster growing livestock. An example would be huge chicken farms.

Producers of vitamins formed a cartel dividing up the world market for different types of vitamins during the 90s. The conspiracy appears to have begun in 1989, when executives at Roche AG and BASF began holding talks about price fixing. They decided to carve up the vitamin market and to rope in other major vitamin majors like Rhone-Poulenc of France and Takeda Chemical Industries of Japan. Many other vitamin producers joined the cartel. The cartel operated for over 10 years in a fairly stable manner. There were frequent high level executive meetings and 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 $ 500 million and the total fines collected exceeded US $ 1 billion in the US alone.

The overcharges paid by 90 countries importing vitamins were estimated. The overcharges according to the analysis were more in the jurisdictions with weak cartel enforcement regimes. For instance, the Latin American countries that did not enforce effectively their cartel legislations witnessed their vitamin import bills escalate by more than 50%, whereas the escalation was less than 40% in respect of Latin American countries that enforced such legislation. Damage-wise, India incurred overcharges of more than US $ 25 million. 10 European countries suffered an overcharge of about US$ 660 million. All the 90 importing countries put together suffered overcharges by US $ 2700 million during the 90s (Clarke and Evenett, 2003).

The financial impact of the vitamin cartel, or for the matter of other cartels, is much more than the dollar value, if the purchasing power parity ratio is reckoned. In the case of India, for instance, the purchasing power parity ratio is 8.7. The damage of US $ 25 million translates into a whopping US $ 220 million. 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.

LYSINE CARTEL

BOX 10

Between 1992 and 1995, a Lysine cartel operated comprising 5 producers belonging to Japan, Korea and US. The 5 producers controlled more than 97 % of the global capacity during that period. Lysine is an amino acid that stimulates growth and results in leaner muscle development in hogs, poultry and fish. Lysine is mixed with corns and thus is an input for the feed products. The Lysine cartel engaged in price fixing, allocation of sales quotas and monitoring of volume agreements. The cartel was at its peak in effectiveness in 1994, when the price of Lysine reached about US $ 1.20 per pound. This price was approximately US $ 0.50 above the competitive price level. In the first 3 months of the conspiracy, prices went up about 70% in a market with roughly US$ 500 million in annual sales worldwide (Joel I. Klein, 1999).

Connor (2001) has estimated the overcharge to US customers during the conspiracy period at US $ 141 million. He made a projection of the global overcharge by Lysine cartel at US $ 200-250 million. The price increase resulted in decline in purchases and consequently in decline in production dependent on Lysine. Connor concluded that the Lysine industry produced atleast 20 % less in 1994 than it would have, had there been perfect competition. After the cartel broke in 1995, notable changes in global production shares were observed. One of the Korean cartel members increased its production share from 15 to 18 %.

The cartel had the effect of benefiting the cartel members because of the higher sale prices but at the cost of developing countries' competitors. Only after the cartel broke up, new entrants have taken to production of Lysine.

GRAPHITE ELECTRODES CARTEL

BOX 11

Graphite Electrodes have a highly concentrated world market. More than two-thirds of the market is in the hands of two firms, one German and the other American. Japan, India and China produce and supply the remainder. These electrodes are essentially used in the production of steel in electric arc furnaces. Seven producers formed a cartel sometime in 1992 and agreed to increase and maintain prices beyond the competitive level, allocate volume amongst themselves, divide the global market amongst themselves, reduce exports to members' home markets, restrict capacity, restrict access to technology to non- members, monitor and enforce agreement etc.

This cartelisation resulted in price increases from approximately US $ 2000 per MT to US $ 3200 – 3500 in different markets. An estimate by OECD (2000) placed the sales affectation at US $ 5-7 billion worldwide. The developing countries bore the brunt of the price increase, as they had to import Graphite Electrodes for steel production. A corollary was that the developing countries had to defray higher import prices of steel- based intermediate products (Levenstein and Suslow, 2001).

The Korean Fair Trade Commission convicted in March 2002, 6 Graphite Electrode manufacturers in the US, Germany and Japan. According to the Commission, the Korean steel manufacturers imported Graphite Electrodes from the 6 cartelised companies from 1992-1998, during which period, the import price had recorded an increase of almost 50 % resulting in damage to the Korean companies at about US $ 139 million. Automobile and shipbuilding industries in Korea, which consume a lot of steel, were thus hurt by this cartel (KFTC, 2002). It would appear that after the break-up of the cartel, several joint ventures emerged producing Graphite Electrodes.

B. LIMITING PRODUCTION AND RESTRICTING TECHNICAL KNOW-HOW

Enterprises may combine to limit supply of goods to the market and to impose conditions restricting dissemination of technology and thus prejudice competition. Box 12 below bears testimony to such prejudice.

LIMITING PRODUCTION AND RESTRICTING TECHNICAL KNOW-HOW

Box 12

Sarabhai M Chemicals Private Limited entered into a technological know-how agreement with its overseas collaborator, E. Merck A.G., providing for the provision of know-how by the latter to the former. The know-how was to enable Sarabhai to manufacture pharmaceutical chemicals, vitamins, insecticides etc in India. The agreement stipulated that Merck by itself or its licensees (like Sarabhai) should not directly or indirectly manufacture certain items (about 520 out of 600 items) in India and that Merck would be free to import into India such items and sell the same. Sarabhai's request for technological know-how for the manufacture of certain pharmaceuticals and Vitamins was turned down by Merck. The MRTP Commission[10] held that the agreement had an adverse effect on competition because of the denial of access to the technological know–how and was also a barrier to entry to other intending manufacturers

C. BID-RIGGING

Bid rigging is often resorted to in public procurement tenders. The possibility of bid rigging will be particularly relevant to public sector purchasers, given their legal obligations to award contracts by competitive tender. The rigging parties perceive Government to be blind to collusive practices and consequently indulge in bid rigging while responding to tenders. This imposes heavy costs on public treasury and therefore on taxpayers. This also undermines confidence in the Government. Consumers are visited with high prices and with prejudice to their interests. Box 13 below describes a medical oxygen supply cartel.

MEDICAL OXYGEN SUPPLY CARTEL

BOX 13

Four foreign companies, namely, Air Liquide (France), Praxair (US), AGA (Germany) and Indura (Chile) were the suppliers of medical oxygen to both public and private hospitals in Argentina. These companies formed a cartel and entered into an agreement to indulge in bid rigging and to distribute and divide customers among themselves. The Competition Authority in Argentina conducted 4 raids, in which it found certain documents showing exchange of information about the customers, bids, prices etc. As a result of bid rigging and collusion, **hospitals and consumers were forced to pay high prices**. And the cartel members enjoyed illegally high profits. The Competition Authority succeeded in getting the four companies prosecuted and levied with fines amounting to US $24 million. The successful prosecution of the bid rigging and price fixing cartel was welcomed by the consumers in Argentina[11].

[10] MRTP Commission's Order 6 July 1978 in Sarabhai Chemicals Private Limited, RTPE No. 45/75 – (1979) 49 Comp. Cases 145.

[11] Recent Important Cases, report by UNCTAD Secretariat, September 2005.

D. Resale Price Maintenance

Resale price maintenance is a practice witnessed in most countries. It militates against the interests of consumers and constitutes an anti-competitive practice. Box 14 below is an illustration.

Motor manufacturers indulging in resale price maintenance

Box 14

The South African Competition Commission initiated a formal investigation into the high prices of vehicles. The Competition Commission started with a formal investigation into alleged setting a minimum resale price, collusion and price coordination. Speaking to the Economist from South Africa, Ms Zondwa Ntuli, Manager of Compliance Division of the Commission observed that the main focus of the investigation, however, was "the setting of a minimum resale price by manufacturers which might be the standard practice in the industry."

As a result of that announcement, car enthusiasts started crying for the blood of vehicle manufacturers in South Africa. They felt that they had been cheated and betrayed.

According to Ms. Ntuli the investigation was expected to reveal whether anti-competitive pricing existed in the industry and if that might be contributing to high prices for consumers. Information gathered by the Commission, according to the media release suggested that "it was almost a standard practice amongst manufacturers and importers of new motor vehicles to maintain minimum prices." In other words, the manufacturer imposes a minimum resale price on a dealer and by so doing limits a dealer's ability to offer discount. "We will not hesitate to recommend that the highest fine be imposed on the perpetrators, which can be up to 10% of the firms' annual turnover," said Ms. Ntuli.

The Commission effectively conveyed the message that vehicle manufacturing companies should understand that anti-competitive behaviour like resale price maintenance would not be tolerated and that necessary provision of the Competition Act would be invoked to deal with such practices.

The Namibia Economist, May 14, 2004 (http://www.economist.com.na/2004/14may/05-07-19.htm)

Because of space constraint, case laws relating to other offences listed earlier have not been given in this paper.

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 consumer interest as the absence of competition law.

REFERENCES

Aiyar, S. Swaminathan (1998) — Paper presented to the Expert Group – Indian Institute of Foreign Trade, New Delhi, 1998

Amsden, A.H (2001) — "The Rise of the Rest: Challenges to the West from Late-Industrializing Economies", Oxford University Press, London, 2001.

APEC (1999): — 'Competition Law for Developing Economies' - Asia-Pacific Economic Cooperation Trade and Investment Committee, Singapore, 1999.

Clark, J.M. (1940) — 'Towards a Concept of Workable Competition'– American Economic Review, June 1940.

Clarke J.L., and Evenett. S.J., (2003) — "The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel. Forthcoming in the Antitrust Bulletin", 2003.

Commission of the European Communities (1996): — "The Impact and Effectiveness of the Single Market" - COM(96), 520 Final, Brussels, 30 Oct., 1996.

Conner, J.M., (2001) — "Global Price Fixing: Our Customers are the Enemy" Kluwer Academic Publishing, Boston M A 2001.

CUTS, (2006) — "Competition Regimes in the World – A Civil Society Report", CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, 2006.

Deunden, Nikomborirak (2005) — "Cable Television Monopoly Case Study: An Investigation by the Thai Trade Competition Commission", Thailand Development Research Institute, Bangkok, 2005.

Expert Group (1999): — 'Report of the Expert Group on Interaction between Trade and Competition Policy', Ministry of Commerce, Government of India, Jan.1999.

Evenett, S.J., Levenstein.M.C. and Suslow V.Y., 2001 — "International Cartel Enforcement: Lessons from the 1990s" – World Economy, 24: 1221-45, 2001.

Evenett, Simon (2004) "Competition, Competition Law and Development in the Asia-pacific Region'-An Issues Paper (revised version), Oxford University, U.K., 2004.

Goldman S. Calvin (1996): 'Competition Law and Trade Issues: Practical Implications' – Speaking notes at a meeting of the Japan Society, December 12, 1996.

Ireland, (2003) "Competition Policy in Small Open Economies" - Presentation of the Republic of Ireland to the Third OECD Global Forum on Competition, 2003.

Iwata, K. (1997) "Competition Policy and Unfair Trade Measures" – Trade and Tariffs, Jan.1997

Jenny, Fredric (1997): 'The Interface Between Competition Policy and Trade, Investment and Economic Development' – Paper presented at the Conference on Competition Policy in a Global Economy' – New Delhi, 17-19 March 1997.

Joel I. Klein, 1999 "The War Against International Cartels: Lessons From The Battle Front", Presentation at Fordham Corporate Law Institute, New York,1999.

KFTC, 2002 Korean Fair Trade Commission, press releases Seoul 22 March, 2002.

Khemani R.S. and Mark A. Dutz (1996): 'The Instruments of Competition Policy and their Relevance for Economic Policy' PSD Occasional Paper No. 26, World Bank, Washington DC, 1996.

Khemani, Shyam (1997): 'Role of Competition Law- Policy in the Development Process' – Paper presented at the Conference on 'Competition Policy in a Global Economy' – New Delhi, 17-19 March, 1997.

Kroes, Neelie (2006) "Cross – border Mergers and Energy Markets" – Speech by Ms Neelie Kroes, Member of the European Commission in charge of Competition Policy at Villa d'Este Forum on "Intelligence 2006 on the World, Europe and Italy", Cernobbia, Italy, 2 September 2006. Please see: http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=4247

Levenstein, M.C &

Suslow V.Y, 2001 — "Private International Cartels and Their Effect on Developing Countries," Background paper for the World Bank's World Development Report, Washington DC 2001.

Messerlin P.A. (1996) — 'Competition Policy and Anti-Dumping Reform: An Exercise in Transition' – 'The World Trading System: Challenges Ahead' - (ed) J. Scott, Institute for International Economics, 1996.

MRTP Commission, 1997 — Alkali Manufacturers Association of India vs. American Natural Soda Ash Corporation (ANSAC) and others – 1997 (5) CTJ, 288. MRTPC, 1997.

Nayyar, Deepak (1997): — 'Globalisation: What Does it Mean for Development?' - Paper No.42, Rajiv Gandhi Institute for Contemporary Studies, New Delhi, 1997.

OECD, 2003 — "Hard Core Cartels: Recent Progress and Challenges Ahead", OECD, Paris, 2003.

OECD, 2003a — "Coverage Of Competition Law: Illustrative Examples of Exclusions"- Document CCNM/GF/COMP/TR(2003)17, Paris, 2003.

Porter, Michael (1990): — 'The Competitive Advantage of Nations' – New York, Free Press, 1990.

Schumpeter, J.A (1942): — 'Capitalism, Socialism and Democracy', London, 1942.

Sachs, J and Warner, A. (1995) — "Economic Reform and the Process of Global Integration" – Brookings Papers on Economic Activity, No. 1, 1995

UNCTAD (1997): — 'Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development in order to attain Greater Efficiency in International Trade and Development' – Report, 18 Sep., 1997.

Verma, Sunny and Subramanian, Ganapathy (2006) — "Anti-dumping Duty on Chinese Silk", Economic Times, Hyderabad, 20 Nov 2006.

WU, Rong-I and CHU, Yun-Peng (1994): — 'International Cooperation on Competition Policy: Issues, Existing Models and Prospects for the Future' - Paper presented for the second conference on Pacific Basin Business, Economics and Finance, May, 1994.