PART - I

Should Growth Policy be Blind to Equity? Should Competition Law/Policy be Blind to Equity? The Debate

Synopsis

"Growth is extremely important because that is the basis upon which infrastructure is built, but we cannot forget equity. If we forget equity, social tensions will surface."

Introduction

This remark by Dr. C. Rangarajan, Chairman, Economic Advisory Council to the Prime Minister of India at the book launch of "Growth and Equity — Essays in honour of Pradeep Mehta"[1] at New Delhi on April 26, 2013 elicited a thoughtful and provocative debate, with submissions by distinguished thinkers in academia, practitioners of competition law, both in the public and private sectors, and in the NGO community.

The response is not surprising because the main worry in today's world is the increasingly skewed distribution of wealth in favour of the rich, while there is persistent impoverishment of the masses, leading to precisely the social tensions and eruptions of which Rangarajan warned.

The greatest challenge that policymakers face today is how to empower non-privileged participants to become part of a dynamic economic system, so that the majority of people could feel included in the benefits to be derived from well-functioning markets.

1. http://southasia.oneworld.net/resources/growth-cannot-be-chased-at-the-cost-of-equity-c-rangarajan-1#.UYJNC7UziSo

This debate was largely a competition (law and policy) debate, but there were considerations of other subjects, including growth and equity and inequity that exist both in national economies and at the level of the world economy. Submissions to the online forum provided empirical evidence of the consequences of exclusion of the masses from a fair share of the gains from growth, citing particularly the social upheavals of the Arab Spring, and warning of similar consequences elsewhere as governments continue to pursue exclusionary policies, as for instance, in China and in Tanzania.

We were also alerted to the fact that inequity spans both intra-national and international spaces, with the developing countries caught in a continuous cycle of unequal negotiating spaces in the world economy, and receiving an inequitable share of the global gains from trade and investment.

The core of the debate rested on the following basic questions:

1. Is it acceptable to have growth and an inequitable sharing of the derived benefits, so long as the poor are better off than they were before the pie was increased?
2. Should policies to stimulate growth be tailored by measures to achieve equity outcomes? How can barriers to markets be removed to prevent markets from being skewed towards the already privileged?
3. What is the role of a competition authority in the quest to achieve equity?
4. Whether, and to what extent, a principle of fairness and a value of equality of opportunity can and should be built into the competition law, or should simply be incorporated elsewhere?

Very strong and compelling arguments with diverse perspectives were put forward in response to these questions, and contributions were made on the symbiotic relationship between a well-functioning market and the role of government

in creating an enabling environment that would ensure equitable outcomes. It is precisely the gap between policies designed to advance the market economy and those required to create the enabling environment that would ensure equality of opportunity that is at the heart of this problematique.

The Problem

The worry that underpinned this debate is the global problem of increasing poverty and diminishing quality of life for the majority, while the top one percent of the world's population is controlling the 81 percent of the world's wealth. Tounakti Khalifa, Director of Price and Competition, Ministry of Tourism, Trade and Crafts, Tunisia (page no 37) pointed to the development of financial capitalism, vested in speculative investment, which has yielded super profits and rents, but created financial crises and economic contraction, with increasing job instability and growing unemployment.

Devinder Chopra, Member, Executive Committee, *Grahak Sahayak* Gurgaon (page no 36) spoke of the crying need for improving social services in India: health, education, sanitation, and other basic needs, the breakdown of the judicial system, corruption in the private sector and in government, with increasing numbers of parliamentarians facing charges.

Progress is stymied by cumbersome bureaucracy, sometimes coupled with corruption issues, by degradation of, until now, unpolluted environments, and by the persistence of unequal opportunities for social mobility in favour of the rich. The resulting high unemployment, particularly among the youth, and lack of access to vocational training further decrease the opportunities for gainful employment.

This lack of good governance is pervasive in the majority of developing countries, and, as one Indian public servant: Yaduvendra Mathur (page no 37) lamented in the discussion

at the book launch, he is plagued with self-doubt as to whether he is really serving the people or just benefiting from the high salary and perks of his job.

The Soft Underbelly of the Market Economy: Internal Sources of Exploitation

Interestingly, all the submissions that provided evidence of the impact of inequity on the poor and the resulting backlash came from developing countries (India, Thailand, Egypt, Armenia, Tunisia, China), and mostly from contributors who are staff of competition authorities, revealing their concern about focusing only on efficiency even where outcomes could increase marginalisation of the poor.

The experience in Egypt, provided by Mona Yassine, Vice Chairman, Association for the Protection of Competition, Egypt (page no 38) was compelling evidence that the pursuit of growth while losing sight of equity can have catastrophic consequences for social stability and democracy. Growth in Egypt at the time of the revolution was on average six to seven percent, but the benefits of growth were not trickling down to the poor, and the gap between the rich and the poor was widening, with 90 percent of the population living in poverty.

Similarly, Tounakti Khalifa (page no 37) pointed out that resentment swelled at the injustice and unfairness of the accumulation of wealth away from the poor and in favour of the rich, in the name of the so-called market economy, leading to revolt. He warned that Tunisia is paying a very high price for not having built a society based on principles of social justice, responsibility, transparency, efficiency, and competitive capacities.

Wang Xiaoye, Director, Economic Law Development Institute, Chinese Academy of Social Sciences (page no 39) alerted us to the fact that, with very quick growth in the

economy, trends in China are also skewing wealth towards vested groups in state owned monopoly sectors and industries, thereby widening the gap between the rich and the poor. She also commented that competition policy has not played an important role in China because market access for the non-public economy is still problematic today.

The Growth/Equity/Competition Policy Nexus

To the extent that growth means more inequity, should it be welcomed or avoided?

The debate was triggered by the reflective response by Jeffrey I. Zuckerman, a US lawyer (page no 41), to Dr. Rangarajan's statement, in which he claimed that growth without equity may be justified if there is a real ten percent increase in the incomes of 99 percent of the population, even though one percent of the population's income increases by 15 percent.

Kenneth Davidson, Senior Fellow, American Antitrust Institute, USA (page no 47) queried whether Zuckerman was using a simplistic caricature of Rawl's Theory of Justice to justify unequal distribution of benefits of growth.

Shanker Singham, Competition Law Consultant, USA (page no 44) sought to define more precisely what is meant by the term 'equity', pointing to the fact that there are two kinds of inequality (as it relates to competition policy) and anchored in the distribution between producer and consumer surplus. Growth that is achieved through monopolistic rent- seeking activities by rent-seeking elites is clearly harmful to the notion of consumer welfare enhancement. But if growth comes from maximisation of these two surpluses (and the resultant minimisation of dead weight loss), the critical point is that whatever is happening in respect to inequality, the poor are being lifted out of poverty at a maximal rate.

Vijay Vir Singh, Indian Council of Social Science Research, International Institute for Population Sciences, Mumbai & Head, Department of Economics, University of Rajasthan, India (page no 41) asserted that higher economic growth is needed to attain resources that can then be used in schemes for development to help people who are not part of the mainstream. He supported the view that growth and equity should be separate agendas, and asserted that it is the responsibility of the government how it utilises resources generated through growth to ensure equity. He also advised that the mindset of the poor needs to be changed, to take advantage of schemes developed for their betterment.

Objections to this view came fast and furiously, and from an overwhelming majority of respondents. Davidson (page no 47) argued that large inequalities of income cannot be justified by logic or economic theory, and that such inequality in the market economy may ultimately pose significant threats to the sustainability of market systems.

He referred to Adair Turner's *Economics after the Crisis*, in which the author argued that unequal incomes are both likely and desirable in market economies as a means of creating incentives for creative innovations that may be broadly shared globally or locally, but that income differences may also result from economic activities that merely distribute income in zero sum transactions. Such distribution of income to those who are already wealthy has no social justification.

Therefore, Davidson asserted, factual circumstance upon which unequal distribution is based needs to be examined to ensure equitable distribution, rather than applying the theory to all circumstances, (or as Francois Souty, Professor, University of La Rochelle, France warned, it should not be applied as mantra or sutra).

Should efficiency be the sole objective of competition law?

The discourse entered the arena of competition law and its role of achieving equity. There were alternative perspectives on the subject of the extent to which competition law and its enforcement should seek to incorporate equity. Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law USA (page no 42) argued that nations, especially developing nations, may not choose an aggregate efficiency standard. They may prefer inclusive growth, which may be more likely to produce a more cohesive and thus productive society. People want fairness.

She referenced the hypothetical case of a monopolist seed seller who is also a monopsonist buyer of the crop, using its power to transfer all of the risk of bad weather loss onto the farmers, who are mostly poor and represent a huge proportion of the source of livelihood in many low income countries. Policymakers in these nations may be sympathetic to a law that limits the power of the monopolist/monopsonist, even if the exploitation is efficient.

Peter Behrens, Professor of Law Emeritus, University of Hamburg, Germany (page no 48) pointed out that not all competition laws pursue aggregate efficiency. He stated that under EU competition rules, enforcers are normatively obliged to focus on consumer welfare rather than total welfare. Others asserted that notions of equity are embedded in some countries' competition law.

Derek Ireland, Director and Chief Economist, Chreod Ltd, Canada & Former Practitioner, Competition Bureau, Canada (page no 48) explained that Canada's competition law, in its mission statement, presumes that fairness/equity were complements, not substitutes, and both Canada and South Africa, among other countries, have fairness and equity considerations in the objectives statements. Francois Souty, Professor, University of La Rochelle, France (page no 49)

argued that the concept of equity is rooted in the French Roman Civil Code; there is reference to principles of non-discrimination which is applicable to competition law. He argued that there are definitely strong linkages between the concepts of competition and fairness in the French Law.

Souty further argued that these nuances in the scope and coverage of competition law with respect to equity may lead to different outcomes conducing to growth and equity. Therefore, economists and competition law practitioners need to address both equity and efficiency in competition policy and law enforcement. Current trends in pursuit of efficiency could lead to inequitable outcomes, as for instance, the trend in the EU to apply "equal treatment" to public and private ownership, which overturns the principles of administrative law that applied differential treatment to public enterprises over the last 150 odd years. In the process, universal subsidised service to many segments of the population that made costs bearable is now being removed, resulting in rising costs to consumers, all in the pursuit of efficiency. Indeed, Albert Foer, President, American Antitrust Institute, USA (page no 52) asserted that notions of equity are built into virtually every society's laws.

Eleanor Fox (page no 55) proposed that a question the group should address is whether and to what extent a principle of fairness and a value of equality of opportunity can and should be built into the competition law, or should they simply be incorporated elsewhere. She anticipated the arguments that such inclusion in competition law would compromise efficiency benefits for all, and that it would enhance discretionary space for corruptible officials. Her view is that competition should help all market players to participate in the market in a pro-competitive, pro-efficient way. It should not, unless very good reasons are shown, handicap efficiency.

Fox posited that there is a large area in which how to reach **efficiency is unknowable,** and argued that certain equity values such as the right of outsiders to contest markets in the face of dominant firm strategies can coincide with efficiency. She further argued that competition law is properly applied against certain market power and its exercise, and not just on the basis of some notion of efficiency; that application of competition law should, in general, lean towards the marginalised in society; and that rules of law protecting outsiders more than incumbents can be as clear and knowable as rules based on a standard that nothing is illegal if it is efficient.

Souty (page no 49), however, took issue with the theory of contestable markets and its application. He recalled that the contestable markets theory is an invention of very conservative scholars systematically promoting deregulation and market access (Baumol and Panzar-Willig), in support of the Chicago School's undermining of the classical structuralist industrial organisation approach to barriers to entry.

His concern is that the theory of contestable markets has become a vehicle to spur deregulation and privatisation programmes in developed and developing countries. And, where foreign investment cannot be attracted in developing countries, this has led to monopolistic private practices often associated with cronyism of a few ruling families (hence the Arab Spring), where market power is not simply seized by major TNCs seeking only profit maximisation (itself harmful, as in the case of Cable and Wireless' operations in the Caribbean).

Therefore, deregulation deriving from contestable markets theories did not improve fairness, nor equality of opportunities, nor social order. Fox (page no 55), in response, agreed with Souty that the theory of contestable markets can work in theory, but almost never does in fact.

Eschew an ahistorical approach

Some contributors had the view that competition law should or does protect small and middle sized businesses and even re-distribute wealth from the rich to the poor and not allow acts or transactions that increase gains for all if they confer a disproportionate share of the gains on the rich and established.

Souty (page no 56) and Aditya Bhattacharjea, Professor of Economics, Delhi School of Economics (page no 68) reminded us that two or three decades ago, it was recognised that competition law enforcement was not a matter of economic efficiency alone. Advanced countries enacted and implemented competition law at relatively late stages in their development, motivated by a variety of economic and non-economic reasons, including equity, curbing the economic and political power of big business, and preservation of small businesses, even at the cost of economic efficiency. This orientation provided vital political traction to competition laws and legitimised the market economy by appearing to control some of its unpalatable features.

Both Souty and Bhattacharjea, alerted us to the shifting values and objectives of competition law over historical time and pointed to values of equity and support of small businesses in the original antitrust laws.

According to Souty, the evolution of competition law over the last three or four decades has shifted to an almost exclusive focus on cartels and away from prosecution of abuse of dominance, in tandem with the "economic efficiency alone" conception of competition advanced by the Chicago School. Even the language has shifted away from words like, "abuses", and "monopolisation" to a milder "unilateral conduct", thus rendering the acts more benign.

Indeed, Souty argued, the very interventionist and political nature of current competition law development currently, runs counter to the fact that abuse of dominance was more important to developed countries when their economies were at the stage of evolution more in keeping with the conditions found in developing countries today. It demonstrates how much market fundamentalism has suffused international trade theory and national and international competition theory.

Souty called for a revival of the original Spirit of Antitrust, based on the philosophy of the Progressives, rather than follow that espoused by the Conservative Revolution in the 1980s, and supported by sponsorship of academics by wealthy elites. In his view, such revival would be a useful contribution to the restoration of public policies designed in favour of workers, consumers, and harmonious societies more concerned about long term and sustainable development, rather than short term financial profits and multiplication of a handful of billionaires while poverty increases in each of our countries.

According to Davidson, who supports Souty's call for a return to the Progressives, the origins of competition/antitrust law during the Progressive Era at the dawn of the 20th century were based on a fear of new Big Businesses that were dominating the economic landscape.

The progressives combined the American middle class "gentry" of the Roosevelt and Wilsonian wings of both the Republican and Democratic parties with small debt burdened farmers and emerging labour unions that were fighting dangerous underpaid working conditions. Those constituencies have been marginalised since the 1970s by Chicago economics and their artificial and narrow definition of efficiency.

In his view, those who passed the American Antitrust laws did not see an inevitable conflict between efficiency and equity, but if a choice was required, would have leaned towards equity.

Davidson cautions that this perspective should not be ignored or lost in the swamp of economic analysis that overcomplicates competition law.

Shadrack Nkelebe, Head, Advocacy Department, Fair Competition Commission, Tanzania (page no 52) stated emphatically that poverty alleviation is the core imperative in developing countries, and all policies should contribute to that end, while supporting a well-functioning market. He pointed to the unsustainability of current practice in Tanzania, because of growing discontent of the majority with government policies.

Pradeep S Mehta, Secretary General, CUTS International (page no 53) cautioned that competition authorities in the developing world will have to keep in mind the public interest litmus test, somewhat wrought into South African Law. He argued that disadvantaged communities stakes need to be taken into consideration in the application of the law, which may not necessarily be the best advice for all competition regimes.

In the case of Tanzania, according to Nkelebe, the objective of the competition law is to enhance the welfare of the people, and in the view of the respondent, this should transcend consumer welfare.

The Rebuttal

There were, however, views that strongly opposed bringing equity considerations under the ambit of competition authorities. Cezley Sampson, Consultant, Competition Policy and Law (page no 58) argued that competition policy and law should address economic efficiency in markets, and not equity and social justice, which in his view, is very subjective and depend too much on discretion and the culture and norms of a country. He further argued that using competition law and policy to address redistributive issues which involve invoking ethical consideration, provide opportunity for political

opportunism, elitism, corruption, as well as leading to dysfunctional markets.

Anthony Clayton, Professor, Institute for Sustainable Development, University of the West Indies (page no 58) agreed that using competition law to achieve redistributive goals would facilitate patronage and corruption and inflict a high associated economic cost.

While agreeing that competition law should be limited and not include instruments of social justice or fighting against poverty, Tounakti Khalifa (page no 59) argued that a competition policy has meaning/justification only if it contributes to the fulfilling of objectives that have been determined by the nation within the framework of its social and economic choices.

In his view, protecting competition and thereby ensuring better products and cheaper prices contributes to equity and social justice. It is therefore important to maintain a coherent environment for, and rigorous enforcement of, competition law, and the State must be guardian of public interest, providing well-functioning institutions, the social safety net, the guarantee of minimal rights, legal security (due process of law) all of which would shape an enabling environment for competition policy and law.

In support of the argument that competition authorities should not take into consideration equity issues, Hicham, Head, Advocacy Debt, Investigations Directorate, Competition Council, Morocco (page no 69) differentiated between allocative efficiency (static and dynamic) and redistributive efficiency based on equity. He argued that the institutional culture that drives competition authorities: the promotion of competition in markets, with sanctions as their tool, and the remit to intervene only when an anticompetitive practice is committed and detected (unless engaging in advocacy work or conducting merger investigations).

They are limited to fighting against anti-competitive practices and evaluating the potential effects of proposed mergers. But, equity-seeking entails a redistributive efficiency policy that aims to restore balance in the market, requiring interventionist policies which are outside the boundaries of the work of a competition authority.

By contrast, sectoral regulators have a responsibility to restore balance between historical operators and challengers on the one hand, and consumers on the other. Their tools to achieve equity include price fixing or asymmetric regulation favourable to new comers to the market. Competition authorities cannot engage in such equity measures because they could become vulnerable to "political capture".

This provoked a response from David Lewis (page no 66) that competition policies, including competition law enforcement, struggle to achieve legitimacy in developing countries (and even developed countries), and for this reason, it may not be a good idea to drive a deep separation between (efficiency enhancing) competition law and policy on the one hand, and (equity sensitive) redistributive policies, on the other.

Competition law enforcement has to be seen to be addressing the consequences for EQUITY of its enforcement and regulatory functions. He proffered that the public interest considerations built into the South African Competition Act, plus the fact that the competition authorities are responsible for their interpretation and enforcement, have worked well to underpin popular support for competition law enforcement.

Lewis argued for the need to recognise that markets and competition also can have a positive impact on democratisation, opportunity, and the incomes and wealth of the poor, and where competition law makes a clear contribution to one or the other of these objectives, it has to have a well-honed advocacy strategy that "claims" it. In support of these views, Lewis (page no 66) pointed to the advantages of the South

African approach: it forces the competition authority to be more transparent about whether, how, why, and the extent to which broader public interest objectives are influencing specific case investigations, analysis, decisions, and broader enforcement priorities and administration of the Act.

In response to Sampson and Clayton, Fox (page no 71) sought to clarify that a role for equity was being proposed based on rules of law, and not on subjective and idiosyncratic notions of equity.

Fox argued that even if achieving efficiency is confined to allocative and dynamic efficiency, it is not a self-defining term, and non-efficiency values get imported. Fox objected to the framing of the debate as efficiency (assumed to be pure and scientific) versus efficiency and equity, with equity assumed to impair efficiency and applications assumed to be unknowable and unpredictable. She identified three perspectives:

1) A general principle of *laissez faire* with minimal antitrust intervention (except perhaps a strong rule on cartels).
2) A principle that leans towards inclusiveness: contestability of markets by outsiders – thereby achieving some measure of equity consistent with efficiency; indeed, perhaps this is the way to achieve efficiency in some societies. No society that has systematically marginalised a critical mass of its citizens can ever achieve its potential for efficiency without including the masses of people in the economic pipeline.
3) Preserving small and medium-sized enterprises (SMEs). Applying the law to achieve this objective may handicap efficiency as the term is used in Western cultures. Others may not regard support of SMEs as in principle handicapping efficiency, although they must acknowledge that at some point there will be trade-offs (Eleanor Fox).

A final issue raised by Shanker Singham (page no 65) was the need for competition authorities to intervene to curb anticompetitive government distortions that generally favour the vested interest groups or domestic incumbents. Such government distortions result in wealth destruction by reducing consumer and producer surplus, shrinking the economic pie, and pushing millions into poverty. Competition authorities should not restrain themselves from action because the conduct is a public restraint.

David Lewis (page no 66) supported this view, asserting that there are many reasons for believing that state actions WILL support incumbent elites, and this is partly because of state capture by the elites, but also because of information asymmetries between weak states and the interests they are attempting to regulate.

Competition authorities may be best placed to tackle public restraints and elite dominance of competition policy. It was asserted that MARKET ENQUIRIES have the potential to become very important weapons in the armoury of competition enforcers – it grants them formal powers that extend beyond the traditional concerns of enforcement [a point that was missed by those who clearly limited the powers of intervention of competition authorities to disciplining anticompetitive conduct through sanctions, and engaging in advocacy and merger investigations].

Equity Enhancing Conditions: The Role of the State

Early in the debate, we were alerted by Morten Broberg, Professor, Faculty of Law, Copenhagen, Denmark (page no 42) to the fact that a strong democracy normally presupposes a large middle class. And, a large middle class presupposes a fair amount of equity. More clarity on how to achieve "a fair

amount of equity" was brought to our understanding by those who alerted us to the fact that policies pursuing growth objectives in a market economy would only achieve equity inclusive outcomes if they are introduced in an appropriate enabling environment. The lack of such a supportive environment for growth policies, in developing countries in particular, result in gross inequities.

Albert Foer, President, American Antitrust Institute, USA (page no 54) proponent of this view, pointed to the fact that a market system is unlikely to flourish without a state-based welfare net to ensure at least some minimal degree of economic equity.

The argument is that growth induces change in economies and yields both winners and losers, with growing anxiety and discontent among losers. The state can only sustain political support of institutions that sustain dynamism by reducing the downside of risk for its members through a promise that its members will be protected from worse outcomes.

He asserted that "It is not capitalism OR welfare, but markets AND welfare." Indeed, Tounakti Khalifa, (page no 59) speaking from the heartland of the Arab Spring, warned that competition alone cannot solve all our problems of today. Justice and equality of chances (i.e., fairness) must be at the centre of an economic policy of which competition policy is only a component. He asserted that ***social stability is priceless.***

Tounakti's warnings from the Arab Spring experience provoked a response from Peter Behrens that sought to clarify the links in institutional design of a society that seek growth with efficiency while at the same time limiting the degree of inequality so as to guarantee a fair share for everybody.

He argued that economic activities and redistributive systems must be kept separate (as did Sampson, Clayton and Singh, among others) and pointed to the disastrous results in East Germany of pursing an integrated policy of growth and

equity. However, he advanced proposals on how equity can be achieved through government intervention.

According to Behrens, Professor of Law Emeritus, University of Hamburg, Germany (page no 61) competition should govern the economic system, and this implies some fairness in equal opportunity to everyone to do business. However, this will not lead to just redistribution.

Governments should provide social benefit payment to those unable to work, or who suffer unemployment, until they find jobs. They are also responsible for providing adequate education and training of people in order to prepare them for jobs. So too, they must provide a proper healthcare system, a proper functioning administrative and judicial system, infrastructure, and other public goods which are accessible for everyone, irrespective of their wealth.

Most important is a well-functioning taxation system, which provides progressive taxation so that those who benefit most from the market will contribute most to government's budget.

The conclusion, then, is that most of today's problems can be explained by the failure of governments to provide for an equitable system of social redistribution. Behren asserted that "social justice" should complement "market competition" and not replace it. Competition law is designed to fight against rent seeking.

This argument for the institutional design of society to ensure equity is clearly valid, but spawned new questions. What we do when the political system is not taking your good advice, Russell Pitman asked.

Pitman argued that if we acknowledge that a huge majority of corporate assets are owned by the very wealthiest citizens, and if we assume, reasonably enough, a declining marginal utility of income, it becomes quite compelling to give a greater weight to consumer surplus than to producer surplus when forced to make a choice.

For instance, in the context of competition law enforcement, does it make sense to consider labour savings from a merger on pure welfare benefit in a poor country with a permanently large group of unemployed or underemployed?

Stewart pointed out that while the institutional framework proposed is theoretically valid, the means for providing such social safety net and wider enabling environment are not present in most developing countries. Moreover, the World Bank and International Monetary Fund (IMF) Structural Adjustment Programmes (SAPs) forced developing countries to reduce social programmes and benefits so that capital could be accumulated and directed towards repayment of external debts (extortionate and usurious in its escalation of interest rates and penalties).

Many contributors (Chopra, Clayton, Sampson, Yassine, Wang) pointed to the high level of corruption and political patronage to vested interests that exist in developing countries. Others alerted us to the fact that governments and private sector players are paying lip service to the important issue of putting economic, social, and environmental policies on the path of sustainable and inclusive development.

Wedderburn, Caribbean Director, Friedrich Ebert Stiftung, Jamaica (page no 46) warned that growth can only be sustainable if there is equal access to decent wages. And, finally, and profoundly, it was observed by Nadeem Ul Haque that we continue to debate the market versus government theme, but little attention was being paid to ***how this caring, knowledgeable government will be built.*** He also pointed out that the debate omitted to focus attention on newer issues of entrepreneurship and innovation in fluid markets in cities, and the issue of social capital and community development as part of the growth process.

Another omission, raised by Souty, was the silence in the competition debate and the competition world on the

interaction between competition policy and environmental issues that may require political choices counter to competition law principles, while at the same time promoting equity between peoples of developed and developing countries, as, for example, water provision and use issues, environmental protection issues, and pollution prohibition norms.

Indeed, mainstream economics now incorporate methods for internalising environmental costs and have developed this discipline and its application to economic analysis. Competition experts need to follow suit and address this issue.

Inequity in the World-Economy: Structure and Processes

Stewart, Associate Senior Fellow, University of the West Indies (page no 78) alerted us to the fact that exploitation through leakage of capital from the impoverished majority to the few rich, occurs not only at the national level, but is a feature of international economics.

Recent globalisation processes have accelerated the integration of peripheral economies into the world economy through specialisation in components of the product chain, usually at the lowest value added level and placing large sectors of these economies in a state of dependency and vulnerability, and through externally propelled growth based on cheap labour, poor standards and deprivation of human rights.

Despite all the hype in the general literature of developing countries "ascending the ladder" through an increase in manufacturing, in the majority of cases, it is merely a shift in the processes in the international division of labour, but with the continuing effect of limiting their role to the lowest value added components in the product chain.

The case of the factory workers in Bangladesh was cited by Stewart whereby consumers in the UK benefitted from

cheap clothing but the workers in Bangladesh paid a heavy price, including loss of life, because of poor safety standards and work conditions, and exploitative pay.

Stewart explained that this exploitation of developing countries is rooted at the structural level through their role in the international division of labour, their place in the hierarchy of control of international institutions, and the design of the rules of trade and investment, all of which favour the rich countries and their transnational corporations (TNCs). Stewart argued that inequity is bolstered through the imbibing of the dominating liberal ideology that informs theory and praxis.

Eleanor Fox (page no 79) added that insidious processes: "free trade rhetoric and restrained trade-when-it-suits the developed world" and unequal bargaining power preserve the power and control by rich countries.

However, Stewart pointed out that while these structures and processes at the world-economy level maintain the *status quo* of inequity in the world-economy, internal sources also support the system. Technocrats and academics imbibe the rhetoric of unselective open market economy development, and this is supported by the very education system of unquestioned neo-liberal economics taught to leaders and policy makers in the developing world.

And, the business elite insert themselves into the world economy where the greatest opportunity for capital accumulation resides, thus complying with the needs of international capital. Indeed, the elites of the South have more in common with the elites of the North, than they do with the marginalised masses of the South, as pointed out by Johan Galtung in his seminal work on structural imperialism. Hence, while the big TNCs profited by the cheap labour in Bangladesh and turned a blind eye to standards, it was a local proprietor who was responsible for the poor standards of building that

resulted in the collapse of the factory and the death and injury of many.

The consequences of this inequitable international division of labour in the context of foreign direct investment were brought to our attention through experiences in Thailand, Nigeria, and Zambia. Charles Chueng, Chairman, Competition Committee, Board of Trade, Thailand (page no 77) alerted us to the fact that hundreds of thousands of small retailers were displaced when "box retailers" the big TNCs, were allowed to enter Thailand.

Thulasoni Kaira, CEO & Secretary, Competition Authority, Botswana (page no 82) cited an uprising against Shell in Nigeria because of the negative impact on the community and the environment, as an example that economic growth (and the enterprise's long-term profitability) risks a serious derailment where it creates a distortion in equity.

He also referred to the small scale contract farmers in sugar, tobacco, and cotton industries in Zambia, who were being exploited by TNCs which flourished exponentially while the farmers continued to be in the poverty bracket for decades. In each of these, growth increased, but equity was reduced.

Another example provided by Kaira was the case of East Asian women (and children) who labour for prosperous and notable brands while they that labour on the ground never seem to move up the next social ladder. With these examples, he supported the statement that "growth cannot be chased at the cost of equity".

In response to the question posed on the role of competition authorities in dealing with entry of "big box retailers", Russell Pitman's view (page no 77) was that while entry is a matter of broader policy question, competition authorities have a critical role to play in monitoring market power *vis-a-vis* local and regional suppliers and potential abuse of dominance in local retail markets, either downstream or upstream.

The review of Dani Rodrik's *The Globalization Paradox* in the Washington Post, was referenced by Pitman, and merits an elaboration here, for he points precisely to the dogma of open markets and free trade that drive globalisation in the interest of members of the global elite, and favoured by the corporate community and academic economists. He points to the fact that countries that have most benefitted from free-market globalisation are not those that have embraced it wholeheartedly, but those that have adopted parts of it selectively.

He argues that globalisation, by its very nature, is disruptive, rearranging where and how work is done, and where and how profits are made, destabilising economies and creating large pools of winners and losers. He warned that any society, particularly democratic societies, will tolerate such disruption only if there is confidence that the process is fair and broadly beneficial. And, he proffered that globalisation will work for everyone only if all countries abide by the same set of rules, hammered out and enforced by some form of technocratic global government. He recommends, for developing countries, selective incorporation into the international division of labour dictated by globalisation.

The vexing question of how to agree to legally binding rules applied internationally to TNCs was raised by Fox and Stewart. Trudi Hartzenberg, Executive Director, Trade Law Centre for Southern Africa (TRALAC), South Africa (page no 83) pointed to the fact that the WTO is not where the development of this agenda is taking place, but was hopeful that a trend towards inclusion of a new generation of trade issues in regional trade agreements (RTAs) would augur well for developing countries. One example provided was the inclusion of standards in the Trans Pacific Partnership (TPP).

Souty referred to the upcoming Transatlantic Trade and Investment Partnership between the US and the EU, which

incorporates competition policy, and this augurs well for advances in international norms on competition policy, particularly in the light of the failure of the WTO Working Group on the Interaction between Trade and Competition Policy (WTO WGTCP) in 2004. The hope, therefore, was that rather than striving for a coherent global regime, governance of TNCs could be gradually included in RTAs, to the benefit of developing countries.

This proposition was countered by Stewart who pointed to the asymmetrical bargaining position of developing countries *vís-a-vís* industrialised countries and their TNCs, and suggested that such rules would only appear in RTAs where negotiations were shaped by equally balanced interests and negotiating strength. A perusal of current RTAs between developed and developing countries bears out this argument, with exceptions found only with north south RTAs involving the more advanced developing countries, such as South Korea or Brazil.

Others have very weak competition provisions in RTAs (e.g., CARIFORUM-EU EPA), and none, as is the case between the US/Central American/Dominican Republic RTA. While the governance rules embedded in the OECD Guidelines for Multilateral Enterprises were raised by Thulasoni Kaira as an example of the way forward, this also is a plurilateral agreement between equals, i.e. members of the OECD, and is not binding, making it a toothless tiger.

Stewart critiqued this unbalanced approach, whereby the powerful protect their own, but take little responsibility for the conduct of their TNCs outside of their national borders, and drew a parallel to domestic rules to deal with cross border anticompetitive conduct: the fact that legally, competition authorities' remit is to address conduct only if domestic consumers are affected, with no responsibility for the conduct of their TNCs where consumers in other jurisdictions are affected. The issues and debate on the effects of cross border

anticompetitive conduct and the constraints experienced by developing countries in trying to discipline anticompetitive conduct of TNCs is a topic deserving of a separate discussion, but demonstrates the lack of enforceable global rules of governance for TNCs.

It is important here to remind ourselves that even as paradigms change, so does law; it is not cast in stone. However, it is the forces that are most powerful that can influence change. This brings us back to the only attempt at building enforceable competition policy standards at a global level which was conducted at the WTO WGTCP between 1998 and 2004. It may be time to revisit this effort at developing enforceable international norms and standards on competition policy.

Summary of Key Points in the Debate

The following key pointers for influencing current practice and for shaping future work can be drawn from the main arguments put forward in this debate:

- The critical mass of discussants expressed the view that economic theory should not control all cases. A nuanced approach to interpretation and application of competition law should prevail, taking into account the specific circumstance.
- A possible alternative: members of the discussion group observed the inclination in many jurisdictions to apply an efficiency-only model to competition cases and often to apply what has become known as the Chicago School model which assumes that the market works well, that antitrust enforcement frequently protects inefficiencies, and that applying equity will protect inefficient firms and hurt society.

  Moreover, the assumptions of theory and convenience often migrate into assumptions about

reality. The critical mass of this group of discussants disagreed, and thought that the Chicago assumptions were more likely to protect dominant firms and vested interests, especially in developing countries where markets are deeply impaired and vested interests are pervasively favoured.

- The problem of inequity span both national and international economies, more so with increasing globalisation, and freer trade and freer movement can increase the gap between those who are rich or enabled and those who are poor and without the skills demanded in the global economy. While globalisation has pulled millions of people from below the poverty line, it has also put additional costs on some of the poorest, for example, as a result of greater demand for and higher price of food.
- Those that strongly opposed including other criteria for enforcement but efficiency argue that opening enforcement to equity considerations would not only shrink the pie and chill innovation, but create large pockets of discretion of enforcers and thereby lead to corruption, cronyism, and political capture by elites. Indeed, these practices are rampant in developing countries.

  Others countered that failure to recognise and nurture the dynamism of fenced out entrepreneurs can shrink the pie, and policy space for decision making can be structured to keep wayward enforcers honest.

  Should we not be seeking ways to fashion the "good governance" that is needed, along with the "good" government that would provide the social safety net and enabling environment for a market economy to function efficiently, but allow for equity?

- Finally, for a critical mass of debaters, there seemed to be an overwhelming perception that at the heart of policy should be human development outcomes. But policy derives from theory, and theory is (should be) forged from a society's vision of a better future for all of its citizens, given the conditions that prevail at a given juncture, and it should point to the path to achieving that end.

  One needs, therefore, to question theory and policy in the context of circumstance, and measure success or failure of policy by the extent to which there is an umbilical cord connecting societal reality and vision to theory, and to policy, and to praxis, and measured outcomes.