

# Dimensions of Competition Policy and Law in Emerging Economies



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# Abbreviations

## A

AMA Anti-monopoly Act  
ASEAN Association of Southeast Asian Nations

## C

CADE The Economic Defence Administration Council  
CAT Competition Appellate Tribunal  
CCI Competition Commission of India  
CFC Federal Competition Commission  
COMESA Common Market for Eastern and Southern Africa  
CPA Competition Principles Agreement  
CSOs Civil Society Organisations  
CUTS Consumer Unity & Trust Society

## D

DGAD Director General, Dumping and Allied Duties

## E

ECOWAS Economic Community of West African States

## G

GATS General Agreement on Trade in Services  
GATT General Agreement on Tariffs and Trade  
GDP Gross Domestic Product  
GNI Gross National Income

## I

IFC International Finance Corporation  
IGO Intergovernmental Organisations  
IPRs Intellectual Property Rights  
ITO International Trade Organisation  
JFTC Japanese Fair Trade Commission

## K

KFTC Korea Fair Trade Commission  
KPPU Business Competition Supervisory Commission

## M

M&As Mergers and Acquisitions  
MCOT Mass Communications Organisation of Thailand  
MITI Ministry of International Trade and Industry  
MNCs Multinational Corporations  
MRFTA Monopoly Regulation and Fair Trade Act  
MRTP Monopolies and Restrictive Trade Practices  
MRTPO Monopolies and Restrictive Trade Practices Ordinance

**N**  
NCP  
NTBs

National Competition Policy  
Non-tariff Barriers

**P**  
PNCE  
PPP  
PRC

The National Programme for Economic Competition  
Purchasing Power Parity  
People's Republic of China

**R**  
R&D  
RBP  
RTAs

Research and Development  
Restrictive Business Practice  
Regional Trade Agreements

**S**  
SADC  
SBDC  
SDE  
SEAE  
SIC  
SoEs  
SPS

Southern African Development Community  
Brazilian System for Protection of Competition  
Economic Law Office  
Economic Monitoring Secretariat  
Superintendent of Industry and Commerce  
State-owned Enterprises  
Sanitary and Phyto-sanitary

**T**  
TCA  
TRIMs  
TRIPs

Trade Competition Act  
Trade Related Investment Measures  
Trade Related Aspects of Intellectual Property Rights

**U**  
UBC  
UNCTAD  
USSR

United Broadcasting Corporation  
United Nations Conference on Trade and Development  
Union of Soviet Socialist Republic

**W**  
WAEMU  
WTO

West African Economic and Monetary Union  
World Trade Organisation

## Abstract

Emerging economies are characterised by fast transformation and rapid economic growth. Competition law and policy should help these economies enhance their growth prospects by promoting efficiency in resource allocation and production and enhance consumer welfare. However, the pursuit of competition policy in emerging economies is complicated by the need to achieve economies of scale through an industrial policy and the needs of the developing world to tackle the economic might of the developed world, through inter-country co-operation.

This paper shows that a happy compromise between competition and industrial policy and efforts to stimulate co-operation is not only desirable but possible. Some of the methods recommended here include selective and varying sectoral emphasis on competition policy as well as exemptions and exclusions in its application. The development experiences of present day developed countries such as Japan and Korea and emerging China are analysed to yield useful lessons in this regard.

The paper identifies inadequate awareness and lack of competition culture as stumbling blocks to the successful adoption of competition policy and law by emerging economies. It, therefore, urges gradualism in adoption of competition reforms and calls for efforts in competition advocacy and education which are in sync with the pace of reform. The paper also goes on to clarify implementation modalities, such as the shaping of the content of competition policy and law and the empowerment of competition authorities needed for effective implementation of the competition law.

**Key words: Emerging economies, competition policy and law, industrial policy, economic reforms.**

## Chapter 1

# Introduction

***...emerging economies have been defined as "those regions of the world that are experiencing rapid informationalisation under conditions of limited or partial industrialisation"***

The term 'emerging market' was originally coined by the International Finance Corporation (IFC) to describe a fairly narrow list of middle to higher income economies in the developing world with stock markets that were open to foreign participation. The term's meaning has since been expanded to include other developing countries.

Alternatively, emerging economies have been defined as "those regions of the world that are experiencing rapid informationalisation under conditions of limited or partial industrialisation". This framework allows us to explain how the non-industrialised nations of the world are achieving unprecedented economic growth using new energy, telecommunications and information technologies<sup>1</sup>.

In this paper, we use a classification of emerging economies that has been adopted by *The Economist*. The list of emerging economies, as recognised by this newspaper, is listed in Table 1 on page 2, which also provides us information on the per capita gross national income (GNI) at purchasing power parity (PPP) of various emerging economies as well as literacy levels and school life expectancy. Note that in 2007, the per capita income of the emerging economies varies from US\$2,740 in India to US\$14,400 in the Russian Federation.

***...emerging economies include those on the threshold of being classified as developed economies as well as others who still have a long way to go***

Most developed countries have a per capita income exceeding US\$20,000 and some even have incomes in excess of US\$30,000 per capita. Thus, emerging economies include those on the threshold of being classified as developed economies as well as others who still have a long way to go. What is common among these is their fast rate of transformation and rapid rates of economic growth. Table 1 shows that most of these economies exhibited per capita income growth of six percent and above, which is much higher than the 0-3 percent growth rate exhibited by most developed countries. The outliers are Poland and Mexico, with negative growth rates.

While developed countries are characterised by practically 100 percent literacy, in emerging economies, the literacy rate varies a lot, from a low of 55 percent for Pakistan to 100 percent for the Russian Federation. The average literacy rate of the emerging economies listed here is 90 percent. India and Pakistan stand out from the rest with literacy rates below 70 percent; the next lowest literacy rate is for South Africa with 88 percent. If we look at school life expectancy<sup>2</sup>, which can be defined for the layman as 'average years of schooling that a person expects to undergo', it varies from seven in case of Pakistan to 15 in case of Argentina, Uruguay and Poland; in a developed country like US this has a value of 16. The average for the emerging economies listed here is 12.67 years.

**Table 1: Development Characteristics of Emerging Economies**

| Country                   | Literacy Rate* | GNI PPP in 2007 (in US\$) | GNI Country Rank | School Life Expectancy (years) | Growth Rate (in percent) of GNI (2006 to 2007) |
|---------------------------|----------------|---------------------------|------------------|--------------------------------|--|
| <b>Argentina</b>          | 98             | 12,990                    | 72               | 15                             | 11.3   |
| <b>Brazil</b>             | 91             | 9,370                     | 94               | 14                             | 7.7  |
| <b>Chile</b>              | 97             | 12,590                    | 74               | 14                             | 11.4   |
| <b>China</b>              | 93             | 5,370                     | 119              | 11                             | 15.2   |
| <b>Colombia</b>           | 94             | 6,640                     | 109              | 12                             | 8.3  |
| <b>India</b>              | 66             | 2,740                     | 118              | 10                             | 11.3   |
| <b>Indonesia</b>          | 91             | 3,580                     | 152              | 11                             | 8.1  |
| <b>Malaysia</b>           | 92             | 13,570                    | 142              | 13                             | 11.5   |
| <b>Mexico</b>             | 92             | 12,580                    | 69               | 13                             | -44.6  |
| <b>Pakistan</b>           | 55             | 2,750                     | 75               | 7                              | 14.1   |
| <b>Peru</b>               | 90             | 7,240                     | 155              | 14                             | 11.5   |
| <b>Philippines</b>        | 93             | 3,730                     | 102              | 12                             | 8.7  |
| <b>Poland</b>             | 99             | 9,840                     | 139              | 15                             | -30.9  |
| <b>Russian Federation</b> | 100            | 14,400                    | 70               | 14                             | 13.1   |
| <b>South Africa</b>       | 88             | 9,560                     | 68               | 13                             | 7.4  |
| <b>Thailand</b>           | 94             | 7,880                     | 93               | 13                             | 5.9  |
| <b>Uruguay</b>            | 98             | –                         | 100              | 15                             | –  |
| <b>Venezuela</b>          | 93             | 11,920                    | 77               | 12                             | 8.6  |

\* as a percentage of population aged 15 and above.

Source: Sourced/constructed from World Bank data (World Development Indicators, 2009, online).

Thus, if we compare emerging economies to developed countries, these are characterised by faster growth and transformation, but lower levels of affluence, literacy and education. The lower levels of affluence dictate that these countries keep on growing fast in the future with adequate protection of consumer welfare. This implies that the economic system needs to sustain economic growth through fair competition, i.e. competition which is based only on firms vying with each other for expansion of their market shares through efficiency increases, rather than unfair or obstructive buying or selling practices.

However, because of lack of exposure to competition issues and enforcement coupled with low levels of education and literacy, awareness of competition issues and the presence of 'competition culture' among various groups of stakeholders might be weak. For these countries to continue growing fast and not get bogged down by anti-competitive practices, advocacy, which promotes such awareness and culture, is essential.

Most emerging economies set in motion initiatives for economic liberalisation either during the 1980s or 1990s. Prior to the initiatives,

***Emerging economies also found themselves having to decide whether they should promote competition just for the sake of having fair competition in the market or whether they should only promote competition, resulting in development***

significant government involvement alongside dominance of large state-owned enterprises (SoEs) characterised their approach and policies. The economic liberalisation process was characterised by a conscious shift from a ‘command-control’ regime to a ‘market economy’. Such a shift implied more economic freedom for consumers and producers, more consumer welfare and less state intervention. This transition called for structural changes and new policy regimes which consequently faced major challenges.

The liberalisation process, coupled with the globalisation drive, also entailed that companies in the emerging economies had to compete with those from countries that were much more developed compared to them.

As the liberalisation process progressed, there was a realisation and even a consensus among policy makers and economists that if left to its own devices, a market economy could give rise to some undesirable outcomes. Anti-competitive practices are a case in point. It was realised that without any regulation, large firms, including multinational corporations (MNCs), may capture the market at the expense of smaller producers through anti-competitive practices.

One desirable solution that emerged was the fostering of ‘fair competition’ in the market, through competition policy instruments. Emerging economies also found themselves having to decide whether they should promote competition just for the sake of having fair competition in the market or whether they should only promote competition, resulting in development. That would imply that competition would be discouraged in the event that it did not promote economic development within national boundaries – for instance, competition with foreign companies.

The accepted mechanism for fostering competition in the market is through various flanking policies and the enactment and enforcement of a competition law. Competition law seeks to promote fair competition by ensuring that (a) the market is not captured by a few large sellers/players (regulation of mergers and acquisitions); (b) firms in a dominant position do not abuse their dominance, to the detriment of the other smaller firms; and (c) market players do not enter into collusive arrangements that stifle competition in the market.

***...competition law enforcement had to be adjusted to address such variations, resulting in competition regimes that are different from those in developed countries***

However, developing economies have a lot of sectoral variations, compared to their developed counterparts; some sectors are more modern like western developed economies, while some are moderately developed. There are also several socio-economic and political factors that are given prominence in these economies and policies have to be aligned to be in conformity with them. Thus, competition law enforcement had to be adjusted to address such variations, resulting in competition regimes that are different from those in developed countries.

Competition policy is defined as “those government measures that directly affect the behaviour of enterprises and the structure of industry<sup>3</sup>”. Competition policy involves a set of policies that enhance competition in local and national markets and further consumer interest. The latter is served as competition law enforcement is often

instrumental in providing the right to choice – one of the eight rights contained in the United Nations Guidelines for Consumer Protection<sup>4</sup> – adopted by the UN General Assembly in 1985 and amended in 1999.

Competition policy encompasses a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. It includes a competition law which is designed to prevent anti-competitive business practices. An effective competition regime promotes fair competition to facilitate a business environment characterised by static and dynamic efficiency in resource allocation and checks on abuse of market power. The idea is to not only ensure that firms compete, but do so fairly, without trying to capture the market through mergers, abuse of dominance or collusion.

***An effective competition regime promotes fair competition to facilitate a business environment characterised by static and dynamic efficiency in resource allocation and checks on abuse of market power***

This paper analyses certain issues in competition policy and law in emerging economies. The rest of this paper is structured as follows. Section 2 discusses the three main competition paradigms and how existing competition paradigms have shaped competition enforcement in some emerging economies, by shifting emphasis of competition laws from structural to behavioural issues.

Section 3 briefly discusses the evolution of competition laws in emerging economies, while Section 4 discusses the experiences of Japan, South Korea and China in regard to industrial policy and its implications for competition policy, to serve as a useful guide for emerging economies.

Section 5 looks at factors which have complicated the development of effective competition regimes in emerging economies, such as the need to have an industrial policy which generates economies of scale for private firms.

Next, we look at various ways and means of shaping the implementation and content of competition laws, taking into account transition issues (Section 6). In the next Section, we look at how governance issues in developing economies influence the competition regime in these countries, while Section 8 discusses competition issues under WTO, particularly the debate under multilateral negotiations, such as the Havana debate and Singapore Issues. Section 9 concludes.

## Chapter 2

# Competition Law

## Enforcement's Response to Shifts in Competition Paradigms

***The structuralist approach to competition is characterised by interventionist approaches such as per se prohibitions, divestitures in concentrated markets and large discretionary powers for competition authorities***

There are three main alternative competition paradigms that can be identified: *structuralist*, *contestability* and *Chicago*. According to the structuralist school, market structure, namely the degree of concentration, is the main determinant of market performance. Monopoly is considered bad, because it is likely to distort prices and efficient resource allocation. Thus, the structuralist approach to competition is characterised by interventionist approaches such as *per se* prohibitions, divestitures in concentrated markets and large discretionary powers for competition authorities. US antitrust policy during 1950-1970 and EC competition policy during 1960-1990 are good examples.

Proponents of the contestability school, initiated by Baumol in the early 1980s, by contrast, focus on free entry to markets, rather than on market shares. According to them, as long as markets remain contestable (easy entry and easy exit), the potential entry/competitive pressures of new competitors is/are likely to ensure efficiency and prevent monopolists from raising prices above competitive levels or compromising quality. However, it is acknowledged that it is only Chicago School that believes in the relevance of contestability theory for firm behaviour. This theory has, by and large, not stood the test of empirical scrutiny.

Chicago school economists reject the structuralist approach and view monopolies as a sign of superior efficiency, provided the monopoly is not due to governmental barriers to market entry. It is their view that monopoly profits are temporary and will operate as an incentive for competitors to become more efficient<sup>5</sup>. The US antitrust policy between 1970 and 1990 can fit into the category.

***Due to better implementation of the antitrust law in the US, it is widely believed that it was the first country in the world to have a competition law***

The period after 1990, particularly the late 1990s, normally referred to as 'post-Chicago', was characterised by the increasing popularity of game theory and behavioural economics, in which the simplistic modelling of human behaviour gave way to more complex depictions, with greater emphasis on empirical relevance of economic theories.

The mentioned schools of thought have fashioned the competition regimes of various countries over the years. Canada was the first country in the world to adopt a competition law in 1889. The second country to adopt a competition law was the US in 1890 (Sherman Act, 1890). Due to better implementation of the antitrust law in the US, it is widely believed that it was the first country in the world to have a competition law. What compelled the US and Canada to have

competition laws is the demand by agrarian interests to fight the collusive behaviour of merchants engaged in trading and distribution of farm goods and livestock. Collusive alliances were also called trusts and, hence, the Sherman Act is called an antitrust statute. Over time, the US has moved from a structure-oriented approach to a conduct-oriented approach<sup>6</sup>, realising that implementation of competition law needed to focus on behaviour of enterprises, rather than their structure.

***Competition laws are not static.***

***These have constantly been evolving and responding to the needs and thinking of the times***

Competition laws are not static. These have constantly been evolving and responding to the needs and thinking of the times. Most early competition laws were designed for countries in a less globalised world. During the 1950's, the thinking on the subject emphasised the primacy of market structure. Subsequently, with the so-called New Industrial Economics, the emphasis rightly shifted from structure to the conduct of firms and, more recently, to concern with their strategic behaviour. The shift of focus from market structure *per se* to firm behaviour and conduct is now well-established in the implementation of competition law worldwide.

It is, however, important to note that even during the 1960s, antitrust drew inferences about anti-competitive conduct not just from market shares but also actual evidence of market behaviour. Moreover, even presently (in the foreseeable future), the use of market shares is (likely to be) widely prevalent in inferring the legality of conduct and merger analysis.

In most countries, if not all, the competition authority would find it easier to analyse the structure of enterprises than their behaviour, as the effort involves analyses of available and securable firm-level data and information. Importance, however, needs to be given to how the behaviour of enterprises affects competition and consumer interest. Study and analysis of behaviour does not lend itself to any arithmetical formulae and, consequently, is more difficult.

Analysis of conduct and behaviour by the competition authority is a big challenge for all developing countries, as it is more complex than structural analysis. It may be added here that the former requires more resources than the latter. As in the case of US, many developing countries, including emerging economies, have been graduating to emphasis on behaviour, rather than structure, of enterprises in implementing their competition laws.

***India, where a new competition law (Competition Act, 2002), which emphasises a behavioural approach, has been enacted in place of the previously structuralist anti-monopoly Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, is a case in point***

India, where a new competition law (Competition Act, 2002), which emphasises a behavioural approach, has been enacted in place of the previously structuralist anti-monopoly Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, is a case in point. Over the past decades, the latter did not promote growth or competition in the market place. SoEs or parastatals were encouraged and generally kept out of the ambit of competition law.

Pakistan is another example. Prior to the current Competition Ordinance, 2007, Pakistan had the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance<sup>7</sup> (MRTPO) 1970, aimed at regulating undue concentration of economic power and monopoly power. The Competition Ordinance, 2007, is a modern law, with focus

on conduct, rather than structure, through control of abuse of market dominance and certain types of anti-competitive agreements.

Likewise, after the collapse of the Iron Curtain, the socialist economies of the erstwhile Soviet Union adopted the market economy paradigm, despite ideological differences with the concept. While earlier, prices and commodity supplies were under the strict management and surveillance of the State, later the adoption of the market economy paradigm resulted in the drafting and adoption of competition legislation. The competition laws emphasised consumer protection, regulation of monopolies, including natural monopolies, and regulation of misleading advertisements and deceptive marketing.

A question germane to this paper relates to the kind of competition regime that is suited to the needs of emerging economies. While a consensus is developing on the suitability of behavioural competition law to modern needs, the jury is still out, not only on the ideal content of competition laws but also on the issue of developing institutional, systemic and penal structures to ensure its enforcement in emerging economies.

## Chapter 3

# Evolution of Competition Regimes in Emerging Economies

***Only three emerging economies, Mexico, Indonesia and Peru, took a quick approach to competition law, being the only emerging economies with a history of one law which was not repealed***

The various political and economic issues surrounding enforcement of competition regimes in emerging economies can be best understood by tracing the history of competition laws in emerging economies. Annexure 1 summarises in brief how competition laws have evolved in the 17 emerging economies, already given in Table 1. As shown in the Annexure, only two of them, the Philippines and Malaysia, do not have a competition law. The years of first adoption of competition laws range from 1923 (Argentina) to 2000 (Uruguay). Only three emerging economies, Mexico, Indonesia and Peru, took a quick approach to competition law, being the only emerging economies with a history of one law which was not repealed.

In all the other emerging economies with competition laws, a gradual approach was preferred, where the current competition law is a result of at least one previous law which was enacted with deliberate exemptions, to ensure that the law would be compatible with the existing economic policies.

India and Pakistan, for example, enacted structure-based, as opposed to conduct-based, laws in 1969 and 1970, respectively, which were best suited to the pursuit of socialist policies, only to opt for new behavioural laws after fully embracing liberalisation and market-oriented reforms.

The same trend can be witnessed in Brazil, where the competition law was enacted at a very early stage, but with a very broad focus only partly dealing with anti-competitive practices, but mainly on crimes against the general economy. The law had to be changed to be fully focused on anti-competitive practices only after market-oriented reforms had been fully embraced.

The road to competition law was relatively longer in countries such as Argentina and South Africa, where competition laws were adopted quite early, but the laws proved inadequate for tackling competition issues and resulted in many repeals for new laws.

***Russia adopted a big bang approach to reforming its economy, through deregulation and privatisation, which only resulted in several private monopolies***

Russia is a unique example — although it only embraced competition reforms very late in the early 1990s, it has had several competition laws, more than almost any other emerging economy which had adopted competition reforms earlier. Russia adopted a big bang approach to reforming its economy, through deregulation and privatisation, which only resulted in several private monopolies. Thus, the need to have an appropriate law was an evolving exercise.

A common trend in all emerging economies, however, is that the period before the adoption of competition laws was characterised by heavy

government intervention, which was reduced to minimal levels after the adoption of competition laws. Some of the competition laws were not fully implemented after adoption – a result of lack of political will due to other conflicting priorities and lack of consumer awareness. This is true of countries such as Argentina, Colombia, South Africa, Thailand and Uruguay.

The conclusion from the evolution of competition laws in emerging economies is that competition law objectives often conflict with other developmental or political economy-driven objectives. This leads to half-hearted pursuit of competition law objectives.

## Chapter 4

# Legacies of the Past

*The experiences of Japan, South Korea and China, with regard to industrial policy and its implications for competition law enforcement, might serve as a useful guide for emerging economies*

The debate on the need for some control of restrictive business practices (RBPs) has a long history and this includes the debate leading to the aborted Havana Charter, in which developing countries were among the members calling for measures on protecting competition to be included on provisions governing international trade. This was largely due to the realisation that trade liberalisation was likely to result in big MNCs, largely from the developed world, having the ability to distort competition in the developing country markets to their advantage.

However, despite its rejection, the Charter provided a legacy for future debates, as competition issues under international trade continued to crop up under World Trade Organisation (WTO) negotiations. This led to debate under the United Nations Conference on Trade and Development (UNCTAD) fora, resulting in the creation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The Set), which was adopted by the UN General Assembly at its 35<sup>th</sup> meeting on December 05, 1980. However, the approach of the developing world was to get a policy to promote global competition, while the rich countries were more interested in setting standards for a competition law for members to adopt, which many apprehended as being a market access device.

The experiences of Japan, South Korea and China, with regard to industrial policy and its implications for competition law enforcement, might serve as a useful guide for emerging economies. In the past, these followed policies that were not market-oriented and though these embarked on reforms, many aspects remained unchanged inadvertently.

### 4.1 Japan

*Japan followed the policy of giving primacy to the achievement of national development goals over competition principles. A competition law was enacted very early in Japan; its Anti-monopoly Act (AMA) was enacted in 1947*

Japan recorded a high economic growth between 1950-1970. It inherited the legacy of US antitrust laws imposed by the US occupation authorities in the post-Second World War period. But, the legacy was short-lived.

Japan followed the policy of giving primacy to the achievement of national development goals over competition principles. A competition law was enacted very early in Japan; its Anti-monopoly Act (AMA) was enacted in 1947, which, however, could not be effectively implemented, as it was given lower priority, compared to industrial policies. This was largely due to the fact that the law was enacted at a time when the Japanese business culture was not in harmony with competition culture.

*...the protectionist policy, manifested in high rates of investments and strengthening of incentives to upgrade technology, enabled Japan to compete successfully in the global market*

Evenett<sup>8</sup> observes that this was reflected at that time by the dominance of Japan's Ministry of International Trade and Industry (MITI) over Japan's competition authority, namely, Japanese Fair Trade Commission (JFTC). MITI forced mergers in a variety of industries and encouraged formation of cartels. Cartels existed mainly in the form of the legally recognised horizontal *Keiretsu*, normally centred on one bank and trading company. The term *Keiretsu* refers to a set of companies with interlocking business relationships and shareholdings. Thus, the *Keiretsu* were also vertical and conglomerate entities. The objective of MITI in encouraging collusion was to make Japan competitive in the international market.

Porter et al<sup>9</sup>, studying the Japanese model, have listed lax antitrust enforcement, aggressive promotion of exports and selective protection of domestic producers as some of its important components. According to Amsden and Singh<sup>10</sup>, the protectionist policy, manifested in high rates of investments and strengthening of incentives to upgrade technology, enabled Japan to compete successfully in the global market:

“... in contrast to the conventional paradigm in economic development... which proposes that competition leads to economic growth, the Japanese experience suggests reverse causality; that it was growth which stimulated competition, at least in the sense of reducing industrial concentration, rather than the other way round”.

However, it may not necessarily be correct to contend that limiting competition or rivalry promoted Japan's economic development, as there are views to the contrary. Evenett, in 'An Issues Paper',<sup>11</sup> quotes Japan's contribution in the year 2001 to the WTO's Working Group on the Interaction between Trade and Competition Policy, reproduced herein below:

“...much of Japan's economic dynamism has in fact been rooted in the robust market mechanisms created through competition among firms. Industrial and competition policy co-ordinated mutually and developed an environment that allowed companies to engage in free and fair competition. The introduction of competition policy early in Japan's economic reconstruction, as well as the subsequent evolution of this in response to economic development, was a great factor in Japan's rapid economic growth in the past. Even today, it is those sectors where competition has been intensive – the automobile industry, for example – which tend to have the greatest international competitiveness”.

*After Japan entered into a period of low growth after 1970, competition policy norms started to be strengthened, in order to make the better use of market mechanisms, through amendments to the competition law*

It is important to point out here that statements at the WTO may be politically motivated and, therefore, not a completely accurate depiction of reality. Given the eminence of both critics, it would be fair to say that there is an element of truth in what each says – protectionist industrial policy was probably used initially to leverage short run gains, but, in the long run, considerations relating to sustainability led to appropriate official steps to inject more competition into the economy.

*Some improvements in the Japanese competition regime post-1995 could probably be attributed to the establishment of the WTO, of which Japan was a founding member*

This ‘compromise view’ is also supported by empirical facts: competition law enforcement was only ignored during periods of high economic growth between 1955-1970. But, after Japan entered into a period of low growth after 1970, competition policy norms started to be strengthened, in order to make the better use of market mechanisms,<sup>12</sup> through amendments to the competition law. This saw an amendment to the AMA in 1977, giving JFTC some significant powers and made competition enforcement more powerful<sup>13</sup>. The most important amendment came about as late as April 2005, through an amendment, which can be regarded as the “modernisation of enforcement procedures of the AMA”<sup>14</sup>.

Some improvements in the Japanese competition regime post-1995 could probably be attributed to the establishment of the WTO, of which Japan was a founding member. In June 1996, the AMA was amended and the JFTC was restructured, with its enforcement capacity being strengthened<sup>15</sup>. Enforcement of trade-related competition issues, through the application of the 1989 ‘Guidelines for the Regulation of Unfair Trade Practices with Respect to Patent and Know-How Licensing’, was also strengthened. Cases enforced include the 1997 cease and desist order against trade associations refusing to license “primary” patents to firms seeking to enter markets (monopolisation); and 1998 cease and desist order against bundling of two software programmes (unfair trade practice)<sup>16</sup>.

In 1999, the 1989 Guidelines were amended by JFTC’s 1999 Guidelines for Patent and Know-How Licensing Agreements under the Anti-monopoly Act. These included violations that may be the basis for revocation of a patent or licence; liability for monopolisation based on the unilateral refusal to licence by a patent owner that is a monopolist in a relevant market; making the enforcement of AMA consistent with the compulsory licensing agreement under the Patent Act and the Article 31 provisions of the TRIPs<sup>17</sup>.

The December 2000 case, where JFTC announced a clearance, allowing a single joint venture company to manage and grant licences of the standardised technology for the next generation telecommunications system for mobile phoness known as the “3G Patent PlatHome”<sup>18</sup>; and the Microsoft case of abuse of intellectual property rights (IPRs) induced dominance, whose hearing commenced in 2004<sup>19</sup>. show the extent to which the JFTC was now vigorously enforcing competition law.

*In the case of Japan, despite the primacy of the industrial policy over competition law enforcement, it may be seen that competition principles were not totally sacrificed in many sectors and became stronger over time*

Thus, in the case of Japan, despite the primacy of the industrial policy over competition law enforcement, it may be seen that competition principles were not totally sacrificed in many sectors and became stronger over time. Its strategy was thus based on a compromise between industrial and competition policy objectives, with relative emphasis varying across sectors.

#### **4.2 Korea**

With a view to enabling the domestic industries in Korea to effectively compete in the global market, its government used instruments such as trade protection, selective credit subsidies, export subsidies and public ownership of banking sector, which were largely inspired by the Japanese approach. While the government adopted this strategy

of providing subsidies and offering trade protection, it set stringent performance standards for firms wishing to avail of the largesse. Poor performance by firms was visited with penalties. Likewise, when firms fulfilled export targets and government objectives, government rewarded them with subsidised credits<sup>20</sup>. In effect, this was an artificial simulation of competition in a controlled setup.

***The 1997 financial crises in Korea and some Asian economies are attributed to the absence of a competitive domestic economic environment at that time***

This policy spurred the growth of big business. At the same time, the Korean government ensured that big businesses did not collude by following the policy of awarding subsidies only if performance was good<sup>21</sup>. However, this policy resulted in market concentration and dominance by a few large houses. The large firms abused their dominant power at home to frustrate entry by rivals. They indulged in raising prices and in resisting the move of the government to enact and enforce a competition law. This was despite the existence of a competition law, the Monopoly Regulation and Fair Trade Act (MRFTA) enacted on 31 December 1980, with a competition agency, the Korea Fair Trade Commission (KFTC), in charge of its enforcement. Thus, other policies were given prominence, compared to the competition law, which was generally loose.

It needs to be noted that Korea's policy encouraged large conglomerates (called *Chaebols*), while restricting competition in the domestic arena. The 1997 financial crises in Korea and some Asian economies are attributed to the absence of a competitive domestic economic environment at that time. As a result of the lessons learnt during this crisis, the Korean government has been seeking to establish a pro-competitive market structure and to incorporate competition principles in its economic policies. The contribution of Korea in 2001 to the WTO's Working Group on the Interaction between Trade and Competition Policy acknowledged that export-oriented economic growth could not be brought about through protection of domestic industries. The said contribution noted that:

“Greater competition will ensure that unrestrained interaction of competitive forces will yield the best allocation of economic resources, thereby helping, promising small and medium enterprises to grow on market-driven foundations and form a healthy industrial platform”.

***For emerging economies, in general, this experience of Korea should be relevant. In other words, the primacy of industrial policy over competition law enforcement is not likely to be sustainable in the long run***

Significant changes were made to the competition law in 2002, as emphasis shifted to efforts to promote competition and improve market structures and discourage behaviour hindering competition. The MRFTA was amended to allow changes to its conglomerate policy: behavioural regulation instead of structural regulation for monitoring conglomerates according to asset size.

For emerging economies, in general, this experience of Korea should be relevant. In other words, the primacy of industrial policy over competition law enforcement is not likely to be sustainable in the long run. This is not to say that industrial policy has no place in economic development. It has logic and place, but it is its primacy over competition policy that needs to be calibrated. Even primacy in the short run may secure success only at a heavy cost.

#### 4.3 China

Chinese policy makers in the past had been of the view that industrial policies promoting rivalry in domestic markets could undermine the export prowess of promising firms. Nolan<sup>22</sup>, an expert on Chinese policies noted that they created the so-called 'national champions' in select strategic areas such as electricity generation, coal mining, automobiles, iron and steel and the like. Sheltering them behind high trade barriers, the policies supported the growth of national champions. They were extended a slew of facilities such as profit retention, financial autonomy, right to take investment decisions, right to engage in international trade, etc. Banks were advised by the government to support such enterprises.

*...China adopted a policy of moderating competition in certain sectors, particularly when the viability of SoEs underwent erosion with problems relating to unemployment, labour unrest and social welfare surfacing, with promotion of vigorous, but fair, competition in others*

China originally had a centrally planned economic system, but subsequently transited towards a socialist market economy. This transition took place without a full-fledged competition law. But, China's economic policies did inject competition into the market and inter-firm rivalry. Jiang<sup>23</sup> has noted that from the late 1970s to the mid-1980s, the country's industrial policies promoted competition; from mid-1980s these policies limited competition and since the mid-1990s, the policies promoted and limited competition in concert.

During the late 1970s, when China undertook economic reconstruction, it noted the drawbacks of central planning and realised that competition among enterprises would increase output, improve efficiency and promote innovation. The government encouraged new enterprises, competition among enterprises and relaxed price controls, but this placed the SoEs in difficulties.

SoEs were, and are, generally large employers and also providers of social and other welfare services. The pressures faced by SoEs because of competition led the government to backtrack and adopt measures that restricted competition. This policy was practiced for about 10 years from the mid-1980s to mid-1990s. This period saw enactment of a competition law, the Countering Unfair Competition Law of People's Republic of China (PRC), promulgated on September 02, 1993. Thus, measures restricting competition continued to be pursued for other policy objectives, with the law being subordinated to other policies.

*...on August 01, 2008, a new law, the Anti-Monopoly Law, came into force in China. The law was established... and prohibited anti-competitive agreements and abuse of dominant market positions, while requiring notification of mergers and acquisitions above (M&As) a certain threshold*

This restrictive policy worked only for a short period, as the domestic demand was constantly increasing. From the mid-1990s onwards, the government again started promoting competition as domestic consumers were unhappy at the poor quality and unreasonable prices of goods and services of the SoEs and monopoly industries. New investors pressurised the government to address these problems. China's accession to the WTO made the country open its service markets. As a result, SoEs re-oriented themselves to facing foreign competition<sup>24</sup>.

Since the mid-1990s, China adopted a policy of moderating competition in certain sectors, particularly when the viability of SoEs underwent erosion with problems relating to unemployment, labour unrest and social welfare surfacing, with promotion of vigorous, but fair, competition in others. Where goods were in short supply, the industrial policy of the government supported the firms producing them and where

goods were available in plenty, the policy restricted overproduction by firms.

Note that proponents of market capitalism often forget that adjustments to excess supply and demand are often not instantaneous – the underlying process of creative destruction marked by the entry of firms in the case of excess demand and that of their exit in the case of excess supply takes time to unfold. Thus, the industrial policy was seemingly used in China to shorten the adjustment time ordinarily characterising market processes. By and large, the Chinese industrial policies favoured inter-firm rivalry and competition in the market.

***Although competition laws were not enforced during the periods of high growth, the countries used other means to encourage competition in the economy. ...enforcement of competition laws during this period might not necessarily have reversed development***

This was officially confirmed on August 01, 2008, when a new law, the *Anti-Monopoly Law*, came into force in China. The law was established along the same lines as that in developed countries such as Australia, Europe and the US and prohibited anti-competitive agreements and abuse of dominant market positions, while requiring notification of mergers and acquisitions above (M&As) a certain threshold.

#### **4.4 Lessons**

The experiences of Japan, South Korea and China have been aptly summed up by Evenett<sup>25</sup>:

“In sum, this recent literature adds further credibility to the view that the active and appropriate enforcement of competition law in ... East Asian economies would have reinforced rather than compromised their national development strategy”.

In other words, the absence of competition laws in the three economies does not imply absence of competition: competition was a generator of growth in emerging markets over the past 40 years, even though it was not regulated. Japan, for example, had, and has, fierce competition among its auto companies and its electronics companies – the greatest source of its eventual competitive advantage over the US and the EU.

Although competition laws were not enforced during the periods of high growth, the countries used other means to encourage competition in the economy. It can be argued, therefore, that enforcement of competition laws during this period might not necessarily have reversed development.

***Emerging economies would do well to use the experiences of these economies to glean lessons on the importance of competition and the need for drafting a competition law or reshaping existing competition laws***

Emerging economies would do well to use the experiences of these economies to glean lessons on the importance of competition and the need for drafting a competition law (if they have none) or reshaping existing competition laws, keeping in mind that mimicking competition in the absence of regulation is unsustainable.

Having said that competition laws are imperative for economic progress and equity, it deserves mention that there are experts who feel that as long as developing countries lack certain conditions, adoption of a competition regime may not be warranted. For instance, Laffont<sup>26</sup> argues that ‘it is not always the case that competition should be encouraged in developing countries’. His reasoning runs as follows:

“Competition is an unambiguously good thing in the first-best world of economists. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, no natural monopolies, complete markets, fully national economic agents, a benevolent court system to enforce contracts and a benevolent government providing lump sum transfers to achieve any desirable redistribution”.

In his view, many developing countries (which include emerging economies) lack most of the conditions; they may legitimately turn to industrial policies as a second-best solution. But, it has been argued above that industrial policy, if allowed to have primacy over competition law enforcement, may not secure sustainable economic progress and desired outcomes, especially given the need to protect consumers and smaller firms against resultant dominant institutions' practices.

## Chapter 5

# Other Policy Objectives

### 5.1 Exemptions and Exclusions

Executive policies/decisions of the government in most emerging economies are often not compatible with the promotion of competition, as these are often tethered to what is known as 'public interest'. 'Public interest' implies general social welfare. According to Justice Felix Frankfurter of the US Supreme Court, "the idea of public interest is a vague, impalpable but all controlling consideration<sup>27</sup>". It is thus distinguishable from self interest or individual, sectional, class or group interest.

In a number of countries, mainly developing, there appears to be a shift away from universal use of competition laws to promotion of broad public interest objectives through public interest-based authorisation procedures and exemptions in competition laws (see Box 1). Public interest objectives include, for example, the promotion of employment,

#### Box 1: Exemption Serves Public Interest

Merger assessment in South Africa mandates a public interest test. The South African Competition Law, Competition Act, 1998, requires the Competition Commission to consider competition concerns, efficiencies that could arise and public interest issues in assessment of mergers. Thus, in the competition law of that country, public interest has been explicitly articulated. For instance, section 12 (3) of the Competition Act posits four components for the public interest test and requires the Competition Commission to consider the impact of a merger transaction on them. The four components are:

- The requirements of a particular industrial sector or region;
- Employment;
- The ability of small and medium-sized businesses and firms owned or controlled by historically disadvantaged individuals to become competitive; and
- The ability of South African firms to compete internationally.

Public interest, in terms of the interests of small and medium-sized pharmaceutical enterprises, was tested by the South African Competition Commission in the ring pharmacies case. A ring pharmacy is an Association consisting of more than 30 individually-owned small and medium-sized enterprises (SMEs). In order to effectively compete with pharmacy chains, ring pharmacies organised joint marketing arrangements for member enterprises. The Association applied for an exemption for this arrangement as it constituted some kind of a merger for marketing purposes.

The South African Commission granted the exemption sought on the principal justification of promoting competition to the pharmacy chains by the SMEs constituting ring pharmacies. The Commission's decision recognised the public interest element in the ring pharmacies arrangement and also recognised the importance of protecting historically disadvantaged SMEs. In this case, the public interest dimension took the form of protection and empowerment of SMEs, which interestingly also promoted competition.

*Source: Hartzenberg, Trudi – 'Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa's Competition Policy' – Trade Law Centre for Southern Africa, 2004.*

***The moot question... is whether competition laws should be used as tools by policy makers to further public interest objectives such as regional development, industrial policy, etc.***

regional development, national champions, national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation, assistance to historically disadvantaged persons, security interests etc<sup>28</sup>.

The moot question in this regard is whether competition laws should be used as tools by policy makers to further public interest objectives such as regional development, industrial policy, etc. Using the competition tool for securing such public interest objectives is fraught with certain risks. First, narrower interests might be promoted in the garb of public interest. Thus, *de jure*, public interest objectives may *de facto* serve private interest. For instance, policy makers may decide on a policy restricting competition to achieve a broader policy objective. But, in result, the policy may afford monopoly profits to a select few enterprises.

To illustrate how competition policy is consciously subverted in the name of public interest, we look at the Indian case. In an unpublished paper,<sup>29</sup> Swaminathan S. Aiyar made a pointed reference to the plethora of laws and rules in India that explicitly protect certain players, reduce competition and give discretion in decision-making to politicians and bureaucrats in the name of public interest.

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 listed some of the restrictive policies which impede competition: reservation of industries for the public sector (Coal, Railways, Postal Services, Insurance, Petroleum, etc.), canalisation of exports and imports through the public sector (petroleum and some agricultural products), the jute packaging order (compelling fertiliser and cement producers to use jute, rather than plastic sacks, resulting in leakage of material), reservation of items for the small-scale sector and reservation of items for the handloom sector. He argued that public interest is invoked to protect jobs, leading to sub-optimal efficiency and discouraging new investment.

In a similar vein, Fingleton<sup>30</sup> describes in an interesting article how business developed strategies to protect their interests in shaping the application of the competition law in Ireland. The competition law of that country was not generally pro-business, as it did not subordinate consumer interest to business interest. The business sector employed strategies that resulted in dilution of the application of competition law to business entities selectively.

***In shaping the content and implementation of competition laws, there is a big responsibility thrust on the governments of emerging economies... every country needs to fine tune its policies to ensure that protection for domestic enterprises is coupled with a time limit for such protection***

Thus, in shaping the content and implementation of competition laws, there is a big responsibility thrust on the governments of emerging economies. Broadly, every country needs to fine tune its policies to ensure that protection for domestic enterprises is coupled with a time limit for such protection. The time limit needs to be minimal, so as to afford domestic enterprises a chance to educate themselves on competition and gear themselves to facing competition when the time limit expires.

***In many emerging economies, therefore, multiple objectives are allowed to rein in competition law enforcement. These may result in conflicts and harm to competition and consumers***

In many emerging economies, therefore, multiple objectives are allowed to rein in competition law enforcement. These may result in conflicts and harm to competition and consumers. For instance, promoting small businesses and maintaining employment could conflict with attaining economic efficiency. Note that concerns such as community breakdown, fairness, equity and pluralism cannot be quantified easily and their invocation in governmental policies in an ad-hoc manner can undermine competition.

The task, therefore, is to pursue an *appropriate* competition policy and law without being greatly constrained by or in conflict with other public policy objectives. Micro-industrial governmental policies that may support or adversely impinge on the application of competition regime include:

- Industrial Policy;
- Government Procurement Policy;
- Reservation Policy for the Small Scale Industrial Sector;
- Financial and Fiscal Policy;
- Trade Policy (tariffs, quotas, subsidies, anti-dumping and safeguard action, domestic content regulations and export restraints – essentially WTO-related);
- Privatisation and Regulatory Reforms;
- Labour Policy; and
- Consumer Policy.

In addition, there could be other sector-specific policies in environment, health care and financial markets that may restrict, rather than promote, competition. The Australian example, where it developed a framework of national competition policy (NCP), is worth looking into by emerging countries. The NCP recognises that competition is a means to an end and that end is community benefit. The benchmark of community benefit in the NCP is outlined in that country's competition principles agreement (CPA).

The CPA mandates that all relevant factors should be considered when deciding whether restrictions on competition are warranted. CPA lays down an array of community interest matters, where restrictions on competition may be justified<sup>31</sup>. These include ecologically sustainable development, occupational health and safety, industrial relations, access and equity, economic and regional development, including employment and investment growth, social welfare and equity considerations, including community service obligations, consumer interest, the competitiveness of Australian business and the efficient allocation of resources.

***The task is to pursue an appropriate competition policy and law without being greatly constrained by or in conflict with other public policy objectives.***

For instance, the merits of a statutory marketing arrangement in a country would need to be reviewed in terms of factors such as the welfare of consumers, the impact of barriers to competition on farmers' incomes, the value of exports, environmental impact, socio-economic implications for regional communities, employment effects, economies of scale in transport and marketing and the like.

The CPA model is fairly well-conceived and worthy of consideration and adaptation in emerging economies for bringing in harmony between consumer and public interests. The trade-offs among the interests of the different groups would have to be assessed and made explicit in

adjudicating between consumer interest and public interest. A vigorous cost-benefit analysis may not be always possible, but there is the need to bring in as much objectivity as possible in the adjudicative effort. At a minimum, the interested parties should be given an opportunity to participate in the process for adjudication and also an opportunity to provide data and information for consideration.

***Industrial policy in emerging economies may have multiple objectives such as developing backward areas, increasing employment, enhancing technological capacity, effecting better income distribution, etc***

## **5.2 Marrying Industrial Policy and Competition Law**

A working definition of Industrial Policy provided by the World Bank<sup>32</sup> is that it constitutes “government efforts to alter industrial structure to promote productivity-based growth”. Industrial policy in emerging economies may have multiple objectives such as developing backward areas, increasing employment, enhancing technological capacity, effecting better income distribution, etc. Many of these seek to promote domestic industries in order to limit dependence on imports. Ownership of assets is sought to be kept in the hands of nationals, rather than foreigners.

Industrial policy might be geared to an approach adopted by many nations called economic nationalism. Note that competition policy and dynamic efficiency could be in conflict in some circumstances. If there is unfettered competition, the intensity of rivalry among firms could result in lower margin of profits and thus lower surpluses for investment in R&D, innovative practices, etc. Thus, it is argued that there could be a trade-off between competition policy and dynamic efficiency.

***It is argued that there could be a trade-off between competition policy and dynamic efficiency***

In the global economy, with its array of powerful MNCs, firm size matters. Not only firms but governments seek appropriate firm size through actions related to competition. Economies of scale brought about by increase in size certainly reduce the cost of production and consequently enhance the competitiveness of a firm. Efficiency gains, while welcome, could run into conflict with objectives of ‘fair competition’, particularly if increase in size is brought about by a merger. Lau<sup>33</sup> has argued that:

“...the government has to take into account the existence of increasing returns to scale which render the usual market allocation inefficient. For example, if the size of the market will support it, it is better to have one minimum-efficient-scale plant than to build two sub-minimum-efficient-scale plants. This is where the government can and should intervene to prevent potentially inefficient and possibly ruinous competition”.

Estonia<sup>34</sup> echoed a similar argument in its submission to a panel on “Competition Policy in Small Economies” at the third Organisation for Economic Cooperation and Development (OECD) Global Forum on Competition held in 2003.

***Not only firms but governments seek appropriate firm size through actions related to competition***

Building on this view, state action drives industrial policy in such a manner that it creates or fosters ‘national champions’. Examples of State action would include forced M&As, in which the State (for instance, Japan, as noted earlier) directs two or more firms to combine to constitute a single entity and policies designed to encourage M&As. Policies that encourage combinations may place benign or no

constraints on them or may overlook the real or potential adverse consequences of a combination on competition.

Box 2 captures the arguments of one of the opponents of policies borne on economic nationalism (Neelie Kroes, European Commission's Member in charge of competition policy). She styles the policy of protectionism as outdated and harmful to competition.

#### **Box 2: Kroes Slams Protectionism and National Champions**

Kroes,<sup>35</sup> speaking at the Villa d'Este Forum on 'Intelligence 2006 on the World, Europe and Italy' in Cernobbio, Italy, said that, 'We cannot allow ourselves to be side-tracked by the outdated 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 firms to enter them, would give the national champion the market power to raise prices and would be detrimental to consumer interest.

In addition to creating national champions, economic nationalism dictates that many countries, including developed countries, adopt protectionist measures (see Box 3).

#### **Box 3: Mittal Takes over Arcelor**

The takeover<sup>36</sup> recently by Mittal Steel (world's number one steel company owned by an Indian in UK) of Arcelor (world's number two steel company with headquarters in Luxembourg) was an event that tested the policy of economic nationalism on the competition issue. Arcelor Mittal, the entity following the takeover, has become the world's number one steel manufacturer, with 330,000 employees in 60 countries. But, on the run-up to the event being consummated, there was speculation about whether the takeover would be blocked by considerations of economic nationalism by Luxembourg and other European countries, where Arcelor had a presence. Those countries did attempt to block the takeover, but, ultimately, the event was allowed to pass, though one has to still wait for an official notification in this matter.

However, it is argued, quite convincingly, that globalisation may or may not be a threat to developing countries, but like any new environment, it requires policy makers therein to adapt to new realities. 'Defensive action' – protectionism – may cut them off from the very global market place they need to engage in to ensure economic growth, higher employment and the sustainability of their social models. To reach a high level of competitiveness, they need to focus not only on national competition but also on global competition. Policies are needed to promote and encourage the ability of domestic enterprises to effectively compete in the global market.

It is also important to point out that the pursuit of industrial policy objectives, at the expense of competition law enforcement, may be

fraught with drawbacks in terms of development. In many emerging economies, such an initiative is more likely than not to play into the hands of cronyism and privilege, where government action becomes more political and less law bound, due to absence of transparency.

### **5.3 Competition vs. Cooperation: A Comparison of Attributes**

*Competition has been identified by some researchers as an aggressive tool to achieve market power, while cooperation is considered a management tool for defensive positions against the effects of competition*

As noted earlier, emerging economies all over the world are quite diverse in terms of their economic and social development. Thus, competition regimes do not have the same relevance or meaning for all these countries. A major proponent of an alternative – the cooperation approach – is Venezuelan President, Hugo Chavez, who has rejected the Washington Consensus in favour of this approach to tackle US economic might<sup>37</sup>.

More generally, many emerging economies have been invoking the ‘competition approach’ or ‘cooperation approach’, depending on the relative relevance of these approaches for their interests. There are different views regarding whether the competition approach is better than the cooperation approach for business. Competition has been identified by some researchers as an aggressive tool to achieve market power, while cooperation is considered a management tool for defensive positions against the effects of competition<sup>38</sup>.

Buffington<sup>39</sup> argues that cooperation is better than competition for business as unabated competition may be costing billions of dollars in sales and overall decreases in human achievement. He points out that competition brings out the “beast” in us, while research demonstrates that co-operation surely brings out the “best” in us. This view was also supported by Kohn<sup>40</sup>, who suggested that when regulation brings more competition to the market place, its advantages prove illusory, selective or short-lived. Kohn advocates for cooperation, rather than competition.

The benefits of competition have already been articulated in this paper and this generally is the argument for competition against cooperation. Rajagopal uses the argument in Dubey and Patel (2004)<sup>41</sup> relating to the Indian experience to question the argument against competition as anti-development. Heavy competition in almost all product categories eroded high profit margins of premium priced products consumed by the upper strata of the Indian society, created price wars and limited market growth for the strata. However, this motivated companies to cater to the lower classes and the rural segments which they had previously ignored, resulting in more benefits<sup>42</sup>.

*A competition law becomes necessary as a way of regulating ‘tactical and strategic’ moves by firms to outperform rivals. This is more so because the cooperation approach is difficult to regulate or enforce*

The approach to competition law enforcement in emerging economies might, therefore, not be surprising, given these alternative views to competition. The following statement can be used to conclude the competition vs cooperation debate:

“Competition may be characterised as striving to win the race not to destroy other competitors... The local market competition is targeted towards the customers and the competitors strive to win the customer temporarily or permanently. However, the competition may turn more tactical and strategic in order to outperform the rival firms”<sup>43</sup>.

***A competition law is like a cop, who can curb, if not eliminate, such practices. As over 100 countries have chosen to enact a competition law, this could be seen as demonstrating the utility and need for a competition regime for countries without one***

Thus, a competition law becomes necessary as a way of regulating 'tactical and strategic' moves by firms to outperform rivals. This is more so because the cooperation approach is difficult to regulate or enforce.

A question can be raised as to whether a competition law is needed at all for emerging economies. The opponents of competition law advance the argument that general domination of an economy by the informal sector necessarily implies that market forces would ensure competition. As it would be difficult to police the activities of the market players, runs their argument, there is no need for a competition regime. They further argue that a competition regime may extinguish small and weak firms and spell doom for domestic firms. Others contend that the process of establishment of competition should be gradual. They suggest that industrial policies should be harmonised with competition law enforcement in order to strengthen competitiveness.

Notwithstanding the apprehensions of possible injury to domestic industry (particularly the SMEs), it can be claimed that a competition law in developing countries is a desirable objective and instrument for promoting consumer welfare. Sans a competition law, the erring market players would get away with anti-competitive practices, with adverse consequences for the consumers.

A competition law is like a cop, who can curb, if not eliminate, such practices. As over 100 countries have chosen to enact a competition law, this could be seen as demonstrating the utility and need for a competition regime for countries without one. The tightening of competition laws in Japan, Korea and China, discussed earlier, after some periods of lax administration can also be used as a point of emphasis on the critical role of competition law.

***...need to achieve sync between the adoption and implementation of competition laws and the dissemination of competition culture through education of domestic producers and suppliers about the benefits of competition, especially in the form of enhanced efficiency***

However, there is a need to bring about a competition regime gradually, than in one stroke<sup>44</sup>. There is a need to achieve sync between the adoption and implementation of competition laws and the dissemination of competition culture through education of domestic producers and suppliers about the benefits of competition, especially in the form of enhanced efficiency. A competition law can only be fully implemented if it is appreciated by key stakeholders. Furthermore, the process of strengthening a competition law should leave enough space for its flexible application in accordance with the specific characteristics and needs of individual countries.

Even after recognising the importance of introducing modifications in the pursuit of competition law and policy in an 'emerging economy' setting, the overall importance of following such a policy cannot be discounted. Note that there is empirical evidence of the benefits of competition policies *vis-à-vis* economic development, greater international trade and consumer welfare<sup>45</sup>.

The evidence, albeit referring to experiences of developed countries, indicates substantial benefits through "greater production, allocative and dynamic efficiency, welfare and growth". It should also be noted that competition ensures product quality, cheaper prices and, therefore, greater consumer welfare.

Although differences in the nature of markets in developed and emerging economies could possibly lead to differences in the outcomes of competition law enforcement, it is better to place faith in the beneficial effects of such enforcement as revealed by its long history in developed economies, than to draw lessons from its brief history in emerging economies in which concrete examples are hard to find.

In a note<sup>46</sup> presented to the Standing Committee on Finance, *Lok Sabha* (Lower House of India's Parliament) Secretariat, the benefits gained in different economies from economic reforms and competition policy, were highlighted [the Standing Committee on Finance of the Parliament was examining the Competition (Amendment) Bill, 2006]. Some of the highlights were:

- Australia – The estimated gains from reforms (including competitive markets) were around 5.5 percent of gross domestic product (GDP). The average household income was higher by A\$7000 (US\$5774), as a result of competition policy. Competition policy also resulted in lower prices for rail transport and energy.
- US – The real prices of natural gas, long distance telecommunications, airlines, trucking and rail industries dropped by 25-50 percent within 10 years of regulation. The annual consumer benefits were estimated to be approximately US\$5bn in the long distance telecom industry, US\$19.4bn in airlines, US\$19.6bn in the trucking industry and US\$9.10bn in the rail road industry. Consumers also benefited from improvements in the quality of services.
- New Zealand – Pro-competition policy developments added around 2.5 percent to their employment rate over the two decades, 1978-1998.
- UK – Enforcement of competition law led to lower real prices and better consumer choice in airlines, long distance telephony, replica football kits, etc. As in New Zealand, the employment rate went up substantially due to pro-competition policy.

***...bigger problem still in emerging economies which may make it difficult to realise similar benefits is poor governance – widespread corruption, poor management of public finances and inadequate judicial and oversight institutions***

However, the bigger problem still in emerging economies which may make it difficult to realise similar benefits is poor governance – widespread corruption, poor management of public finances and inadequate judicial and oversight institutions. Thus, competition law enforcement may become another tool for capture by vested interests and itself become a barrier to entry.

## Chapter 6

# Transition Issues

### 6.1 Content Shaping and Implementation Shaping of Competition Policy

*...domestic competition policy was needed to make competition more fair and effective and also prepare domestic firms for competition elsewhere*

Many emerging economies are still in transitional phases, which usher in some heterogeneity in their competition laws, not only in content but also in implementation too. State monopolies continue to exist in many economies, with associated fears that privatisation initiatives may result in domestic companies being taken over by globally dominant foreign firms, as well as of monopoly being transferred into private hands, hence resulting in more dire anti-competitive consequences. State-owned monopolies are, therefore, sometimes immune to competition law to allow the government to pursue its other social obligations using the institutions. Thus, content and implementation of competition laws should, therefore, reflect these transition issues.

The deregulation movement and the opening up of new sectors to private initiatives (such as in telecommunications, electricity, airlines, etc.) created a need for new forms of market governance to avoid widespread abuse of market power. Enforcement of competition law, together with sector regulations, was used to fill the void left by State intervention. Greater openness of economies and foreign investment liberalisation generated competition among firms from different countries. It was felt that domestic competition policy was needed to make competition more fair and effective and also prepare domestic firms for competition elsewhere.

Support from the State in the form of subsidies, incentives and subventions in a country with a high density of small and medium-scale producers and suppliers are illustrations of implementation shaping. Such support might help these producers to grow in size and to become competitive in the domestic and global market. Moreover, such competition-distorting measures would be outside the purview of competition law.

*Competition law would not be implemented vis-à-vis state-sponsored measures in some circumstances. Protection of small-scale industries is a policy followed by many developing/emerging countries and, in particular, India*

In other words, competition law would not be implemented *vis-à-vis* state-sponsored measures in some circumstances. Protection of small-scale industries is a policy followed by many developing/emerging countries and, in particular, India. The small-scale industrial policy relating to India is discussed in Box 4.

The essential facility principle also hampers privatisation reforms, as some resources are considered too critical to be put in private hands. It might be difficult to compel private players to share essential facilities with competitors once the sectors are opened up. This is particularly true with respect to the electricity, telecom, water and railway sectors, where some natural monopoly characteristics in the distribution

#### Box 4: Small-Scale Industrial Policy in India

For several decades, India has encouraged and protected its small-scale industrial sector by reserving certain goods and products for manufacture by this sector. The handloom sector is similarly protected. The country has both efficient and inefficient small-scale units; some are well managed and others are not. Competition theory would dictate that the inefficient, ill-managed firms should exit the market, but this would aggravate unemployment, especially in the vulnerable sectors. The small-scale sector is a significant generator of employment, though at considerable cost to the exchequer. The reservation system has led to poor quality output. The small-scale sector is also characterised by poor skill formation, low capital availability and poor quality machinery.

Reservations in favour of the small-scale industry protect these from competition, but are not necessarily in the interests of the sector, as these also promote poor productivity. Moreover, execution of the policies was faulty and instead of creating a continuum, leading to large organised industry, reservations helped only a few small-scale industries. However, the policy of preferential treatment for small-scale industries continues. Nevertheless, reservation policies have undergone some changes since 1991, with the de-reservation of certain items. Yet, the total number of reserved items remains large, at about 450. Moreover, following the removal of quantitative restrictions on imports, the reservation does not make sense any more. This situation is inefficient and welfare-reducing, due to the higher prices that consumers have to pay for inefficiently produced products. What would be in the interests of the sector is a separate set of policies specifically designed to help new entrepreneurs to enter and small firms to grow.

mechanisms require a careful approach before allowing resources to move to private hands. These sectors are, therefore, largely characterised by state monopolies, with the application of competition law either absent or restricted.

Making merger regulation not a part of competition law in regions straddled with a large number of small producers and suppliers is an illustration of content shaping. Likewise, a small open economy may not need merger control regulation at all, given that the size of firms may be too small to pose a threat in the presence of competition introduced by imports. Some mergers in that context could be beneficial to consumers if these are benign and offer economies of scale. The structure of the market may be able to accommodate concentrations or may require concentrations for efficiency reasons.

Analysing mergers is a very complex procedure and it may be a waste of resources to have merger control regulation in these circumstances, when other anti-competitive practices are rampant.

***Making merger regulation not a part of competition law in regions straddled with a large number of small producers and suppliers is an illustration of content shaping***

### Box 5: Merger, Regulation, Employment and Competition

The Competition Act, 1998, of South Africa enjoins the Competition Commission to review public interest issues when notified of M&A activity. Such issues include impact on employment, black empowerment and international competitiveness.

The acquisition of Automotive Trim Division (ATD), a division of National Converter Industries Ltd, by Feltex Autotrim (FA) came up before the Commission. Both ATD and FA were manufacturing and supplying moulded carpets and headliners to the motor industry. If the acquisition were to go through, the market share concentration for the acquiring party would be significantly higher. ATD was a failing firm facing liquidation. In the East London area, where it was situated, ATD, on liquidation, would have put 450 of its employees on retrenchment guillotine. East London was already suffering from chronic unemployment and ATD's exit would have exacerbated it.

The Commission approved the acquisition despite competition concerns relating to concentration. Because the acquisition was allowed, only 23 retrenchments were estimated to take place. In the bargain, because of the Commission's decision, some 427 jobs were saved.

*Source: South Africa Competition Commission - Media Release No.10, July 02, 2002.*

A case of implementation shaping is in Box 5. In that case, failing firm arguments and employment effects influenced a decision that went against the competition perspective.

## Chapter 7

# Governance Issues

### 7.1 Political Interference

The effective implementation of competition law by competition agencies and the pursuit of competition policy are often short-changed by political interference. The main objective of politicians is the winning of elections which ensures that they remain in power. However, elections are a commercial exercise, with outcomes not only driven by the support enjoyed from well-organised power groups but the funds they generate for politicians. Such funds are then utilised to garner more support. It is, therefore, in the interest of politicians to keep big corporates – who constitute a very influential power group – happy.

Corporations, on the other hand, consider competition law enforcement to be a major hurdle to the pursuit of their expansionist objectives, which often rely on market capture, through anti-competitive practices. A *quid-pro-quo* between politicians and the corporate sector is common all over the world – the latter extending their commercial and electoral support in return for government efforts to delay the effective implementation or enactment of competition law.

Emerging economies are especially prone to becoming victims of the collusion between corporates and incumbent politicians. Unlike in developed countries, the existence of a large and vibrant civil society in emerging economies does not normally result in influence that neutralises the attempts of the politician-corporate nexus to hijack the agenda regarding competition law and policy. Moreover, the smaller the economy, the more powerful might be the nexus – familiarity between corporates and politicians is not only more probable in such economies but is quite possible that many politicians have corporate interests and vice-versa<sup>47</sup>.

Larger economies have other problems – there is a significant chance that anti-competitive practices arising out of nexuses formed between local/regional politicians and businessmen go undetected by a centralised competition agency. While the politician – large corporate nexus can become a stumbling block for effective pro-competitive action it is possible for the collective will of the population, especially the intelligentsia to counter the effect of such a nexus. Development of awareness about competition issues, through strong civil society movements, might be a feasible measure.

Evidence of the potency of the mentioned nexus exists. In India, the enactment of the new Competition Act took a long time and was enabled only through the ceaseless efforts of civil society organisations (CSOs) such as CUTS. Even after being enacted the act was not enforced for long because of: a) court intervention on the appointment of head and members of the competition authority; and b) lack of commitment on the part of the government to constitute the agency properly.

*In India, the enactment of the new Competition Act took a long time and was enabled only through the ceaseless efforts of civil society organisations (CSOs) such as CUTS*

In many developing countries, governmental control over the competition authority is manifested through its power to appoint and remove members of the competition authority and, in some cases, supersede the authority itself. Independence of the authority is seriously undermined by governmental control and inadequate budgetary support.

In China, a protracted power struggle among the various organs of the Central Government responsible for competition policy formulation to determine which body would control the competition authority was reported, contributing to delays in the implementation of the law.<sup>48</sup> Similarly, in Nigeria, turf issues among three different government agencies have not allowed the formulation of the competition law even today.

***Thailand has witnessed pressure from business which has resulted in business representatives finding seats on the Competition Authority and, therefore, its poor functioning***

Vested interests and businesses also thwart the enactment and effective implementation of competition law. They fear that the law could stand in the way of their endeavour to make profits. Egypt experienced pressures which led to its competition law drafts being stranded at different points of time and undergoing a series of amendments to suit the interests of pressure groups.

Thailand has witnessed pressure from business which has resulted in business representatives finding seats on the Competition Authority and, therefore, its poor functioning. Implementation of competition law in such emerging economies has, therefore, suffered quite a deal, to the detriment of consumers<sup>49</sup>.

## **7.2 Good Corporate Governance**

A culture of good corporate governance will help build effective competition into the market. If competition was to be restricted, firms would generally lack the incentives to use financial and operational resources efficiently. With considerable market power, these would tend to earn excess profits and also wield political influence to tilt public policy in their favour. If there is an appropriate competition policy and an effective competition law, it would compel the firms to be on their toes, focus on efficiency, avoid practices resulting in price distortions and promote better corporate governance.

In most developing countries, the goal of improving corporate governance can be significantly advanced by strengthening the competitive process. The first step in this direction would be to enlarge the scope of deregulation and trade and investment liberalisation in line with development needs.

The second step would be to buttress the aforesaid step with more domestic market competition. This can be achieved by the adoption of a sound competition law and the establishment of an effective competition authority. Equally important is to ensure adequate competition in markets dominated by corporate interests. For instance, securities and market regulations would be necessary to promote public disclosure and accountability of corporate insiders.

A third step would be to make the competition authority free from political influence and induce it to exercise its authority in an accountable and transparent manner.

***...public and the consumers are aware of the benefits of a competition-driven market, there is not much that competition law can do or competition authorities can achieve***

According to Khemani and Leechor<sup>50</sup>, competitive markets require supporting infrastructure including:

1. A mechanism for ensuring that public policy generally does not unnecessarily inhibit competition;
2. A reliable judiciary and legal system which permits private enforcement; and
3. Independent media to check the misconduct of firms and public officials.

One more could be added to this, namely, the need for efficient and effective CSOs to campaign for further competition and protect consumer interest. Many emerging economies do not have strong consumer organisations and CSOs to either influence government policy and/or bring forward complaints to the competition authority, where they have been constituted. This is an offshoot of weak consumer education and lack of competition culture. Unless the public and the consumers are aware of the benefits of a competition-driven market, there is not much that competition law can do or competition authorities can achieve.

## Chapter 8

# Specific Issues

### 8.1 Interface between Trade Policy and Competition Policy

Despite the desirability of harmony between public interest and competition principles, these could be in conflict. Trade and similar policies which are predicated on public interest and competition policies which are predicated on consumer interest sometimes manifest this conflict.

Trade laws, which regulate trade and competition laws, which regulate competition, have a certain common core objective, namely, to maximise economic welfare by improving the environment for more efficient resource allocation. They are regarded to have complementary effects as well as contradictory effects with each other<sup>51</sup>.

As mentioned earlier, competition policy is concerned with both government interventions that have implications for 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 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 defined<sup>52</sup> as “the complete framework of laws, regulations, international agreements and negotiating stances adopted by governments to achieve legally binding market access for domestic firms”.

A trade policy addresses two broad and interrelated issues. First, a liberal trade policy seeks to create trading 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 reduction of traditional border restrictions such as tariff and import licensing but also the reduction of non-tariff barriers (NTBs), including sanitary and phyto-sanitary (SPS) 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.

*Competition policy is concerned with both government interventions that have implications for 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*

*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 seeks to achieve economic efficiency by liberalising markets through the removal of barriers to trade at the border. Free trade and competitive behaviour are thus necessary conditions for efficiency***

Thus, competition policy and liberal trade policy seek to achieve the same objective of economic efficiency. In a manner of speaking, competition policy seeks to achieve economic efficiency by liberalising domestic markets through laws that protect and promote competition. A liberal trade policy seeks to achieve economic efficiency by liberalising markets through the removal of barriers to trade at the border. Free trade and competitive behaviour are thus necessary conditions for efficiency.

But yet, trade and competition policies could be in conflict with each other. For example, anti-dumping and safeguard measures by way of protection of domestic industries could be another competition-distorting policy.

## **8.2 Competition Issues under WTO**

Issues arising from the relationship between competition policy and international trade have been subject to debate for decades and can be traced to discussions on creating the International Trade Organisation (ITO). On March 24, 1948, 53 countries signed the Havana Charter prepared by the UN Conference on Trade and Employment to govern international trade. The Charter has a whole chapter on RBPs; Chapter V, covering articles 46 to 54.

Among other things, the Havana Charter provided for members to take measures, in co-operation with the proposed ITO, to prevent business practices from affecting international trade, through restraints on competition, limitations on access to markets or the fostering of monopolistic control. Articles 48 and 50 outlined the investigation procedure that would guide ITO in investigating complaints on RBPs. The Havana Charter failed to take effect, despite its endorsement by 53 countries, including the US, because the Congress of the US rejected it.

Competition issues also gained prominence through the United Nations platform. A UN Conference on Restrictive Business Practices on April 08-22, 1980, resulted in the approval of the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (UN Set). The UN Set was eventually adopted by the UN General Assembly at its 35<sup>th</sup> meeting on December 05, 1980.

The adoption of the UN Set has resulted in milestone achievements, through the auspices of the UNCTAD, by providing frameworks for the control of restrictive business practices that can be adopted at national and regional levels, as well as the strengthening of laws and policies to ensure that restrictive business practices do not impede or negate the realisation of benefits from liberalisation and globalisation.

The setting up of an Intergovernmental Group of Experts (IGE) on RBPs to provide a forum and modalities for multilateral consultations and discussion and exchange of views on competition issues among international stakeholders has seen the UN Set achieve milestones in helping countries to take appropriate action at the national or regional levels towards competition regime administration. The IGE meetings remain a critical forum for multilateral discussion among international stakeholders on matters related to competition.

Under the WTO, however, competition issues under international trade could not stay out of the limelight for ever. They resurfaced again as part of the Agreement on Trade-related Investment Measures (TRIMs) adopted by all parties to the General Agreement on Tariffs and Trade (GATT), under the rubric of the new WTO. Article 9 of the TRIMs agreement provided a built-in agenda to consider the adoption of an investment policy and a competition policy. Consequently, the issue was agreed to be studied along with Transparency in Government Procurement and Trade Facilitation under four working groups set up as a consequence of the declaration adopted at the WTO 1996 Ministerial conference in Singapore. Thus, the four issues were christened as Singapore Issues.

One working group was to study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in WTO framework. This working group was to work in co-operation with the other working group established at the same Conference on the relationship between trade and investment. These two groups were required to work with the UNCTAD and other intergovernmental organisations (IGOs), as considered necessary.

***The rejection of the negotiation on competition issues under the Singapore Issues by developing countries is a reflection of the fear of competition from the relatively more advanced developed country firms***

This was reiterated in the Doha Ministerial Meeting in 2001 when it was agreed that there is a case to launch negotiations on these two areas along with two other Singapore issues: transparency in government procurement and trade facilitation, if there is an explicit consensus. However, there was stiff opposition to negotiate them by the developing world at the ministerial meeting in Cancun in 2003, which meeting was abruptly ended without any conclusion.

Following this, at a meeting in Geneva to restart the Doha Round negotiations in July, 2004, it was agreed that these three issues would be dropped from the negotiating agenda, but trade facilitation alone would be proceeded on. Some remarkable progress has been made on the issue of 'trade facilitation' which is still being negotiated. There is scope for discussion of other issues, including competition, once the Doha Round has been concluded.

The practicable alternative at the moment would be for countries to enter into bilateral agreements with their trading partners on some agreed modes of dealing with competition issues arising out of trade, whether it is the investigation of any antitrust conduct beyond the territory of one of them or the effects of that conduct in the territory of another.

***The rejection of the negotiation on competition issues under the Singapore Issues by developing countries is a reflection of the fear of competition from the relatively more advanced developed country firms.***

Competition issues also cropped up in multilateral discussion under WTO through the negotiation of the trade-related aspects of intellectual property rights (TRIPs) agreement. The TRIPs Agreement came into effect from January 01, 1995, and seeks to achieve reductions of distortions and impediments to international trade, while promoting adequate protective measures for IPRs. The Agreement also contains

a number of provisions relating to the use of IPRs with relevance to competition rules. It allows fair use and the possibility of compulsory licensing or the granting of dependent patents, i.e., the granting of a right by public authorities against the will of a patent owner, in order to facilitate use of a patent to the extent necessary to develop a new product.

Article 31 of TRIPs provides for granting of compulsory licences under a variety of situations, such as the interest of public health, national emergencies, nil or inadequate exploitation of the patent in the country, anti-competitive practices by the patentees or their assignees and overall national interests. Article 40(2) of TRIPs makes a direct reference to the need to enact competition law so as to discipline abuse of monopoly power by IP holders:

“Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member”.

IPR-related transactions between gigantic firms with anti-competitive dimensions are on the rise, causing huge damage to consumers, especially in developing countries. Emerging economies, therefore, have to ensure that they have proper mechanisms in place to handle the challenge and an effective competition law could be an alternative. It is worthwhile to ask whether a proper balance of interests exists in preserving IPRs and a competitive economic environment.

The General Agreement on Trade in Services (GATS) also provides for competition provisions. GATS is an integrated framework for addressing issues related to cross-border trade, investment and movement of service providers and is a focal point for government efforts to review and develop policy instruments that affect how services are provided. However, with the exception of financial and telecommunications services, GATS has brought about only limited meaningful competition in most sectors, as the commitments themselves to a large degree reflect the autonomous liberalisation initiatives undertaken by individual WTO members.

***The General Agreement on Trade in Services (GATS) also provides for competition provisions. GATS is an integrated framework for addressing issues related to cross-border trade, investment and movement of service providers and is a focal point for government efforts to review and develop policy instruments that affect how services are provided***

### **8.3 Anti-Dumping Policy**

Trade policy includes tariffs, quotas, subsidies, anti-dumping actions, domestic content regulations and export restraints. Until the 1970s, the focus of trade policy in India was on regulating the utilisation of foreign exchange, through the use of quota restrictions. This implied licensing for all categories of imports. The broad instruments of trade policy were across-the-board import substitution and the protection of domestic industry.

Licensing of imports was the corner stone of trade policy in India. According to Bhagwati and Srinivasan<sup>53</sup> ‘[i]f it could be shown that there was domestic production of the imports demanded, then the imports were not permitted (regardless of cost and quality considerations)’.

During the last decade, the anti-dumping instrument has been used liberally by India (as also many other countries, including the US and China) to protect its domestic industries from material injury. Box 6 describes the anti-dumping action relating to silk as constituting a protectionist policy favouring domestic producers.

#### **Box 6: Imported Silk in India Faces the Wall of Protectionism**

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 PRC. 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. The DGAD found evidence of dumping and levied hefty anti-dumping charges on various Chinese firms. The popular varieties of silk covered by this levy are crepe, georgette, chiffon and habutai.

China generally has low wages, long hours, poor labour laws, little IPR protection and apparently state support to sell goods cheaply abroad. When these confront a more legally regulated economy such as India, industry can be wiped out and millions can be pushed into unemployment. Whether taking advantage of low production costs can be equated to dumping is debatable, but the damage to the Indian firms is the core justification.

The government is already imposing an anti-dumping levy on raw silk. And now, in addition, silk fabrics are being subjected to the levy. The duties are between 40 and 50 percent. Protectionism thus takes the form of anti-dumping duty on raw silk and also silk fabrics. This measure protects domestic producers against competition from abroad<sup>54</sup>.

Even though in India, over the past decade, the government has been consciously giving up policies of protectionism and allowing markets to automatically protect the interests of consumers, however, anti-dumping measures and action have been, and are being, invoked to protect domestic industries impacted with material injury through ‘import dumping’. Anti-dumping measures do have a justification when dumping takes place, with the attendant predatory pricing (in many cases) risks. However, if these are used mainly to protect the domestic industries from import competition, one cannot but decry dilution and negation of competition principles.

## Chapter 9

# Conclusion

***...a regional competition law and authority might help deal with tackling cross-border anti-competitive practices, it needs to be complemented by national competition laws and national competition policies to be more effective***

Emerging economies are characterised by fast transformation and rapid economic growth. Competition policy and law should help these economies enhance their growth prospects as it can help in promoting efficiency in resource allocation and production. However, the pursuit of competition policy in emerging economies is complicated by the need to achieve economies of scale, through an industrial policy, and the requirement for the developing world to tackle the economic might of the developed world, through inter-country-co-operation. Moreover, there are some countries and region-specific issues that make it difficult to apply a uniform competition regime across countries from different regions, making it important for countries to design competition regimes best suited to their social, economic and political variables.

Regional bodies across the world have also started to develop regional competition bodies and examples in Africa include the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU). There is a discussion of this nature in ASEAN too, but it is not so smooth because some of its strong members, such as Malaysia and Philippines, do not have a competition regimes.

Regional competition authorities may be better placed to address region-specific competition concerns and emerging economies stand to benefit by ensuring that their national objectives are taken into account. However, an NCP works better than any regional dispensation in isolation for balancing the objectives of achieving competition in the markets and other national objectives. Thus, while a regional competition law and authority might help deal with tackling cross-border anti-competitive practices, it needs to be complemented by national competition laws and national competition policies to be more effective.

***In its study report covering seven countries in Asia and Africa in 2002, CUTS came out with a categorical conclusion that “[O]n an average, the countries under the 7Up1 project (including South Africa and India) have a poor competition culture”... The implementation of the law varied from country to country, depending upon the economic situation***

The success of an NCP in emerging countries requires one important pre-requisite, which is the development of competition culture in government, business and the general public. The level of awareness of the potential benefit from the competition instrument is generally inadequate in most developing countries.

In its study report covering seven countries in Asia and Africa in 2002, CUTS<sup>55</sup> came out with a categorical conclusion that “[O]n an average, the countries under the 7Up1 project (including South Africa and India) have a poor competition culture”, i.e. poor not only in terms of the letter of law but also in its implementation. The implementation of the law varied from country to country, depending upon the economic situation.

*Of the seven countries covered by the study of CUTS, the best funded competition regime is that of South Africa. But, even in that country, the budgetary allocation for the Competition Authority was just 0.033 percent of the annual government budget in the year 2000*

On awareness, the study found that it was quite insignificant and whatever existed was mostly found among businesses and bureaucrats. The media, academia and civil society were reported to be not conversant with competition matters. The situation in most emerging economies will at best be marginally better, given similarity in institutions and deficiencies in human capital.

The establishment of a competition culture would then see competition law enforcement regarded as a priority item in governance in most developing countries. Consequently, the budgetary allocation for the activity of competition enforcement, which is poor, if not dismal, would be addressed.

Of the seven countries covered by the study of CUTS<sup>56</sup>, the best funded competition regime is that of South Africa. But, even in that country, the budgetary allocation for the Competition Authority was just 0.033 percent of the annual government budget in the year 2000. India's budget was a measly 0.0009 percent of the total government budget. Interestingly, 49 percent of the budget of the South African Competition Commission was obtained from filing fees paid by enterprises seeking mergers!

This paper reveals some ways that have been used in effecting a compromise between competition law enforcement and conflicting industrial policy objectives in the case of emerging economies: selective and varying sectoral emphasis on competition law enforcement and exemptions and exclusions in its application, rather than a total subjugation of the competition law. For example, if the government has a genuine need to promote SMEs and competition law enforcement is seen at variance with such an objective, then SMEs are better exempted from the application of competition laws.

Similarly, if equity and redistribution of wealth is to be pursued, then competition laws can be structured such that certain marginalised groups and stakeholders can be favourably treated. The same argument can be extended to the pursuit of other industrial objectives where the simultaneous enforcement of competition law could produce conflicts.

The development experiences of present day developed countries such as Japan and Korea and emerging China analysed here yield useful lessons in this regard. Both Japan and Korea pursued a protectionist regime in which competition laws were not enforced, but this could not be sustained in the long run and they amended their laws and gave the competition authorities more teeth, as a way of moving from the past protectionist regime. China adopted a law subsequently, despite a long history of pursuing policies that were seemingly incompatible with the competition norms, which also speaks about the need to graduate from a protected economy to a competitive one.

*...in the absence of adequate education and lack of competition culture in emerging economies, gradualism in competition reforms, in sync with the pace of economic reforms, is called for*

The paper, therefore, argues that in the absence of adequate education and lack of competition culture in emerging economies, gradualism in competition reforms, in sync with the pace of economic reforms, is called for. This also calls for careful implementation modalities such as the shaping of the content of competition law and the empowerment of competition authorities.

## Annexure 1

| Competition Regime  | Remarks   |
|---|---|
| <b>1. Argentina</b>   |   |
| <ul style="list-style-type: none"> <li>• The first Act was passed in 1923 (Bill 11.210)</li> <li>• New legislation (Decree-Law 22.262) passed in 1980</li> <li>• Several legislative proposals on competition were introduced and discussed in the Parliament during 1990s</li> <li>• Finally, in September 1999, a new Competition Act (Bill 25.156) was passed</li> </ul> | <ul style="list-style-type: none"> <li>• Though amendments were introduced to make it more effective, the Act has seldom been enforced</li> <li>• The law did not include a list of prohibitions of restrictive practices. M&amp;As regulations were also missing</li> <li>• However, not enough political will was gathered to pass a new Competition Act contributing</li> <li>• Regulation for its implementation could, however, only be adopted a year after the expiration of the deadline established by the National Assembly for this purpose</li> </ul> |
| <b>2. Brazil</b>  |   |
| <ul style="list-style-type: none"> <li>• Law No. 1.521 passed on December 26, 1951</li> <li>• Law No. 4.237, of September 10, 1962, established the <i>Conselho Administrativo de Defesa Econômica (CADE)</i></li> <li>• The modern era of competition policy in Brazil began in 1994 with Law No. 8.884 of 1994</li> </ul>   | <ul style="list-style-type: none"> <li>• Although containing antitrust provisions, its aim was to change provisions of the current law on crimes against the general economy</li> <li>• CADE was established as a federal authority which reports to the Ministry of Justice</li> <li>• The law established the Brazilian System for Protection of Competition (SBDC), which comprises of CADE; Economic Law Office (SDE); and Economic Monitoring Secretariat (SEAE)</li> </ul>  |
| <b>3. Chile</b>   |   |
| <ul style="list-style-type: none"> <li>• The Anti-monopoly law was first enacted in 1959</li> <li>• In 1963, a position of the National Economic Prosecutor was created by Law No. 15.142</li> </ul>  | <ul style="list-style-type: none"> <li>• This occurred following an international mission that had recommended abandoning price controls</li> <li>• It was created to prosecute and investigate anticompetitive conducts, acting on public interest</li> </ul>  |

*Contd...*

| <b>Competition Regime</b>  | <b>Remarks</b>   |
|--|--|
| <ul style="list-style-type: none"> <li>The 1959 law was reformulated as the '<i>Law for the Defence of Free Competition</i>' and adopted in December 1973</li> <li>Law No. 19.911 was officially published on November 14, 2003, and came into effect on May 13, 2004</li> </ul>   | <ul style="list-style-type: none"> <li>This was due to several drawbacks in the 1959 competition law</li> <li>With globalisation, new technologies and concentration of market competition issues became more complex. This modern law created a Competition Tribunal, which replaced the Preventive and Antitrust Commissions</li> </ul>  |
| <b>4. Colombia</b>   |  |
| <ul style="list-style-type: none"> <li>The first competition legislation was Article 1 of Law No. 155 of 1959</li> <li>The law was amended by Article 1 of Decree no. 3.307 of 1963</li> <li>In 1992, Decree No. 2.153 was issued by which the pro-competition legislation was updated</li> </ul>  | <ul style="list-style-type: none"> <li>Though the Law dates back to 1959, the fundamental application of competition policy had not been initiated fully by 1992</li> <li>Through Decree No. 2. 153, the Superintendent of Industry and Commerce (SIC) was restructured, subordinate to the Commerce, Industry and Tourism Department</li> </ul>   |
| <b>5. India</b>  |  |
| <ul style="list-style-type: none"> <li>The first competition law was the Monopolies and Restrictive Trade Practices Act (MRTP Act), 1969</li> <li>The Act was amended in 1984 to bring unfair trade practices within its ambit</li> <li>The MRTP Act was amended again in 1991 to remove provisions for prior approvals for mergers</li> <li>The Parliament passed the new law in December 2002, named the Competition Act, 2002, establishing the Competition Commission of India</li> <li>The Act was amended by the Competition (Amendment) Act, 2007, amending 41 out of 66 clauses</li> </ul> | <ul style="list-style-type: none"> <li>A regulatory authority called the MRTP Commission was established to enforce the law. It was, however, a licensing law, rather than a competition law. Secondly, it had no penalty powers, but could only order cease and desist</li> <li>The provision of regulating mergers was dropped in 1991 as part of the overall reforms agenda</li> <li>The MRTP Act was enacted at a time when India had the policy of 'command and control' paradigm for the administration of the economic activities of the country and was no longer appropriate under liberalisation. For the first five years, the Competition Commission of India (CCI) engaged in advocacy</li> <li>The amendment followed two writ petitions challenging the constitution of the established to enforce the law. The MRTPC is now set to shut down after the establishment of the CCI, which wields similar powers. However, the cases pending before the MRTPC will now be transferred to the newly set up Competition Appellate Tribunal (CAT).</li> </ul> |

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| Competition Regime   | Remarks   |
|--|---|
| <b>6. Indonesia</b>  |   |
| <ul style="list-style-type: none"> <li>The Law on Prohibition of Monopolistic Practices and Unfair Business (the AMA – Anti-monopoly Act), Law No. 5/1999 was the first and only competition law</li> <li>The Supervisory Body for Business Competition (KPPU) was established by the Parliament, on June 07, 2000, as a watchdog to monitor whether business practices are in line with Law No. 5/1999</li> </ul> | <ul style="list-style-type: none"> <li>Heavy government intervention, with the markets being unable to function properly characterised the period before the law</li> </ul>   |
| <b>7. Malaysia</b>   |   |
| <ul style="list-style-type: none"> <li>Malaysia does not have a competition law as yet</li> </ul>  | <ul style="list-style-type: none"> <li>However, some sector-specific regulations are in place, which have some impact on competition. Currently a draft law is being debated within the government, without any public participation</li> </ul>   |
| <b>8. Mexico</b>   |   |
| <ul style="list-style-type: none"> <li>The Mexican competition law, the Federal Law of Economic Competition was approved in December 1992 and came into force in June 1993. It establishes a Federal Competition Commission (CFC) to enforce the law</li> <li>A competition policy, the National Programme for Economic Competition (PNCE), was issued by the CFC for the period 2001-2006</li> </ul>              | <ul style="list-style-type: none"> <li>The law could only be enacted in 1992, despite the fact that the Constitution of 1857 established the prohibition of monopolies. The law is being vigorously enforced</li> <li>It also takes into account harmonisation with other programmes of the Ministry of Economics, such as Foreign Trade and Promotion of Investment 2001-2006</li> </ul> |
| <b>9. Pakistan</b>   |   |
| <ul style="list-style-type: none"> <li>The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO) in February 1970 was the first competition law</li> <li>The law was discarded for the current Competition Ordinance, 2007, which is a modern law</li> </ul>   | <ul style="list-style-type: none"> <li>Having been established in the 1970s, like India, this was also suitable for command and control regimes, rather than modern times</li> <li>Unlike the old one, focus is on conduct, rather than structure</li> </ul>  |
| <b>10. Peru</b>  |   |
| <ul style="list-style-type: none"> <li>Legislative Decree 701, enacted in 1991 as part of the 1990's reforms is the competition law for Peru, mirrored EU competition law</li> <li>In 1992, the Peruvian competition agency, INDECOPI, was created, opening its doors in 1993</li> </ul>   | <ul style="list-style-type: none"> <li>INDECOPI was given responsibility over the Competition Law, the Law against Unfair Competition, the Consumer Protection Law and the Law for the Elimination of Bureaucratic Barriers. It was also given competence over Bankruptcy, Standardisation, Accreditation and Intellectual Property</li> </ul>  |

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| Competition Regime   | Remarks   |
|--|---|
| <ul style="list-style-type: none"> <li>In 1997, the Anti-monopoly and Anti-oligopoly Law for the Electricity Industry (Law 26876) was passed for implementing merger control in the electricity industry</li> </ul>  | <ul style="list-style-type: none"> <li>INDECOP was empowered to enforce this electricity merger control law</li> </ul>  |
| <b>11. Philippines</b>   |   |
| <ul style="list-style-type: none"> <li>There is currently no comprehensive competition law for the Philippines</li> </ul>  | <ul style="list-style-type: none"> <li>However, some legislations such as Article 186 of the Revised Penal Code R.A. 3815 (1930) and the Republic Act, 3247 (An Act to Prohibit Monopolies and Combinations in Restraint of Trade) (1961) can be regarded as piecemeal approaches to competition law</li> </ul>   |
| <b>12. Poland</b>  |   |
| <ul style="list-style-type: none"> <li>In 1987, the Act on Counteracting Monopolistic Practices in National Economy was enacted</li> <li>The Act on Counteracting Monopolistic Practices (The Anti-monopoly Act) was enacted in February 1990</li> <li>In December 2000, the Act on Competition and Consumer Protection was enacted</li> <li>In July 2002, the Act on Competition and Consumer Protection was amended</li> </ul>   | <ul style="list-style-type: none"> <li>This was the first attempt to introduce some regulations in the centrally planned economy</li> <li>Although largely based on the EU model, it also included solutions designed specifically for Poland, as a transition economy</li> <li>In view of Poland's incoming accession to the European Union and necessity to harmonise national regulations with the European law, the need for a new competition law was felt</li> <li>This was within the framework of adaptation of Polish regulations to the EU law</li> </ul> |
| <b>13. Russia<sup>57</sup></b>   |   |
| <ul style="list-style-type: none"> <li>In 1990, the first Russian competition authority was created – the State Committee for Anti-monopoly Policy and the Support of New Economic Structures</li> <li>The Law "On Competition and the Restriction of Monopolistic Activity on Goods Markets" was passed in 1991</li> <li>A Law "On the Limitation of Monopolistic Activity in the Union of Soviet Socialist Republic (USSR)" was adopted on July 10, 1991</li> <li>The competition authority led an effort that resulted in the passage of the law "On Natural Monopolies" in 1995</li> </ul> | <ul style="list-style-type: none"> <li>This marked a turning point from the hitherto centrally planned oriented economic norms</li> <li>The laws contained relatively mild sanctions for most violations, preferring cease and desist orders</li> <li>The 1995 legislation introduced the concept of natural monopoly and contained a narrow definition of natural monopoly</li> </ul>  |

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| <b>Competition Regime</b>   | <b>Remarks</b>  |
|---|---|
| <ul style="list-style-type: none"> <li>Decree No. 191 “On the State Programme of De-monopolisation of the Economy and Development of Competition on the Markets of the Russian Federation” was passed in March 1994</li> <li>In June 1999, the Federal Law of the Russian Federation No. 117-FZ “On the Protection of Competition on the Market for Financial Services,” was passed</li> <li>The new Russian Federal Law on the Protection of Competition (Competition Law) entered into force in October 2006, replacing the two separate laws on financial and commodity markets (1991 and 1999, respectively)</li> </ul>                                 | <ul style="list-style-type: none"> <li>The competition authority was assigned to elaborate broad “de-monopolisation plans,” directed toward the elimination of structural barriers to competition, the creation of infrastructure and the facilitation of entry in highly concentrated markets</li> <li>The 1999 law was, in part, as a response to financial manipulations and anticompetitive behaviour by banks and financial institutions that was revealed during the crisis</li> <li>The 2006 law ensured more efficient control of competition by the Russian competition authorities</li> </ul> |
| <b>14. South Africa</b>   |   |
| <ul style="list-style-type: none"> <li>The first attempt at competition law was in 1949, when the Undue Restraint of Trade Act No.59 was adopted</li> <li>This was repealed by the Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955) administered by the Board of Trade and Industries</li> <li>Again, this was repealed by the Maintenance and Promotion of Competition Act 1979 (Act No. 96 of 1979) which was administered by the Competition Board</li> <li>The Competition Act, 1998 (Act No. 89 of 1998) (“the Competition Act” or “the Act”) was passed by Parliament in September 1998 and is the current legislation</li> </ul> | <ul style="list-style-type: none"> <li>However, the 1955 Act was widely regarded as a feeble piece of legislation<sup>58</sup></li> <li>However, the two decades of the existence of the 1979 Act were characterised by an increasing concentration of economic power and widespread abuse, hence it was a failure<sup>59</sup></li> <li>Being vigorously enforced, this current law has proven to be quite effective</li> </ul>  |
| <b>15. Thailand</b>   |   |
| <ul style="list-style-type: none"> <li>The Price Control and Anti-monopoly Act B. E. 2522 AD of 1979 was the first competition law</li> <li>The Price Control and Anti-monopoly Act was later replaced by two laws: Trade Competition Act (TCA) B.E. 2542 AD 1999 and the Goods and Services Price Control Act B.E. 2542 AD 1999</li> </ul>   | <ul style="list-style-type: none"> <li>This was in response to the public outcry of the widespread collusive behaviour of businessmen</li> <li>This was after the realisation that the promotion of a market-based economy would need a strong competition culture in the markets and that 1979 Act was outdated and did not suit the economic scenario of the time. Alas, there is no proper enforcement for lack of political will</li> </ul>   |

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| Competition Regime  | Remarks   |
|---|---|
| <b>16. Uruguay</b>  |   |
| <ul style="list-style-type: none"> <li>• In June of 2000, the first competition law, Law 17.243 was passed</li> <li>• Act 17.296 of February 16, 2001 completed the previous Act and established the penalties to be applied by the Administration to the companies in default</li> <li>• The laws were repealed by Law Number 18,159, "Law of Promotion and Defence of Competition", on July 10, 2007</li> </ul> | <ul style="list-style-type: none"> <li>• It contained three articles (13 to 15) which set forth, for the first time, the basic general rules of the Uruguayan antitrust law<sup>60</sup></li> <li>• This is the current law, which repealed the previous laws as they were not enforced effectively<sup>61</sup></li> </ul>   |
| <b>17. Venezuela</b>  |   |
| <ul style="list-style-type: none"> <li>• The Law to Promote and Protect the Exercise of Free Competition, G.O Nº 34.880 was the first competition law enacted in 1992</li> <li>• Some regulations were also put in place and these include Rule Nº 1 to Promote and Protect the Exercise of Free Competition (1993) and Rule Nº 2 to Promote and Protect the Exercise of Free Competition (1996)</li> </ul>       | <ul style="list-style-type: none"> <li>• This was in addition to several provisions in the constitution relating to competition</li> <li>• The Superintendent for the Promotion and Protection of the Free Competition (<i>Pro-Competencia</i>) is the organisation that administers the competition law. It has functional autonomy, but administratively, it is under the Production and Commerce Ministry</li> </ul> |

## Endnotes

- 1 <http://www.emergingeconomyreport.com/>
- 2 School life expectancy is defined as the total number of years of schooling which a child of a certain age can expect to receive in the future, assuming that the probability of his or her being enrolled in school at any particular age is equal to the current enrolment ratio for that age.
- 3 Khemani, R.S. and Mark A. Dutz, 'The Instruments of Competition Policy and Their Relevance for Economic Policy', PSD Occasional Paper No. 26, World Bank, Washington DC, 1996.
- 4 UNCTAD (2001), United Nations Guidelines for Consumer Protection, United Nations, New York and Geneva.
- 5 Scherer F.M. and David Ross – 'Industrial Market Structure and Economic Performance' – 3<sup>rd</sup> ed. Houghton Mifflin Company, Boston, 1990.
- 6 For a history on competition policy in several countries over the centuries, see Ewing - 'Competition Rules for the 21<sup>st</sup> Century: Principles from America's Experience', Kluwer Law International, The Hague, 2003. Also see Mehta and Evenett: 'Promoting Competition around the World: A Diversity of Rationales and Approaches' in 'Competition Regimes in the World – A Civil Society Report', CUTS International, 2006. and also reproduced as a Briefing Paper: <http://cuts-ccier.org/pdf/ECPL-6-2006.pdf>.
- 7 In Pakistan, often, Ordinances are never passed by the Parliament as laws, but yet remain functional. This style has become the norm for many such laws. This system has been inherited from the military governments that it has been under for many years, even though the same has been intermittent.
- 8 Evenett, Simon – 'Competition, Competition Law and Development in the Asia-pacific Region' – An Issues Paper (revised version), Oxford University, UK, 2004.
- 9 Porter, M. et al – 'Can Japan Compete?' Basic Books, 2000.
- 10 Amsden, A.H. and Singh, A. – 'The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea', European Economic Review, 38, p 941 to 951, 1994.
- 11 Supra note 9.
- 12 Akinori Uesugi (2005), Secretary General, JFTC at <http://www.jftc.go.jp/e-page/policyupdates/speeches/050420uesugi.pdf>
- 13 *Ibid.*
- 14 *Ibid.*
- 15 Taylor, V (2000), 'Re-regulating Japanese Transaction: The Competition Law Dimension', in 'Implication of Recent Japanese Legal Reforms', Pacific Economic Papers No.302.
- 16 Cases from H. Stephen Harris, Jr. (PowerPoint Presentation) 'IP and Competition Law Developments in Japan' available at <http://www.ftc.gov/opp/intellect/020523harris.pdf>
- 17 *Ibid.*
- 18 Watanabe E, (2002) 'Regulation on setting technology standards under the antimonopoly law of Japan', Washington University Global Studies Law Review [Vol. 1:263 2002]
- 19 Kamiyama H (2008), 'Recent Developments on the Anti-monopoly Act and JFTC's Guidelines in Japan'.
- 20 Rodrik D – 'Trade and Industrial Policy Reform' in T N Srinivasan et al (editors), 'Handbook of Developing Economics', Vol III, 1995
- 21 Supra note 9
- 22 Nolan, P – 'China and the Global Economy', Palgrave, 2001.
- 23 Jiang – 'Promoting Competition and Maintaining Monopoly: Dual Functions of Chinese Industrial Policies during Economic Transition', Washington University, Global Studies Law Review, 2002.
- 24 *Ibid.*
- 25 Supra note 9.
- 26 Laffont, J. – 'Competition, Information and Development', Paper for the Annual World Bank Conference on Development Economics, Washington DC, April, 1998.
- 27 Quoted in Ramaiya, A. – 'Guide to the Companies Act' – Wadhwa and Company, Agra, India, 1992.
- 28 OECD – 'The Objectives of Competition Law and Policy' – Note by the Secretariat, OECD, Paris, 2003.
- 29 See paper presented by Swaminathan S Aiyar to the Expert Group appointed by the Ministry of Commerce, Government of India, to study the Interface between Competition and Trade Policies, Indian Institute of Foreign Trade, New Delhi, 1998,
- 30 Fingleton John, 'Political Economy Insights from Competition Policy in Ireland' – Fordham Corporate Law Institute, 2001.

31 'Considering the Public Interest under the National Competition Policy', National Competition Council, Melbourne, November 1996, 'National Competition Policy: Some Impacts on Society and the Economy', National Competition Council, Melbourne, January 1999, and Annual Report 1999-2000, National Competition Council, Melbourne, August, 2000.

32 World Bank – 'The East Asian Miracle: Economic Growth and Public Policy', Oxford University Press, 1993.

33 Lau, L.J. – 'The Role of Government in Economic Development: Some Observations from the Experience of China, Hong Kong [China], and [Chinese Taipei]', in Aoki, M, Kim, H and Okuno-Fujiwara, M., editors, 'The Role of Government in East Asian Economic Development', Clarendon Press, 1996, p. 41-73.

34 OECD – 'Competition Policy in Small Economies' – Estonia's submission to 'OECD's Global Economic Forum on Competition', document no. CCNM/GF/COMP/WD (2003) 5, 2003.

35 Kroes, Neelie – 'Cross-border Mergers and Energy Markets' – Speech by 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', Cernobbio, Italy, September 02, 2006. Please see: [http://www.globalcompetitionreview.com/news/news\\_item.cfm?item\\_id=4247](http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=4247)

36 see: <http://www.arcelor.com>.

37 [http://www.inthesetimes.com/article/2962/the\\_caracas\\_consensus/](http://www.inthesetimes.com/article/2962/the_caracas_consensus/)

38 See Rajagopal (2006), 'Competition Vs Cooperation: Analysing Strategy Dilemma in Business Growth under Changing Social Paradigms', ITESM Working Paper 05/2006.

39 Perry W. Buffington (1986), 'Competition vs. Co-operation', at website <http://www.charleswarner.us/articles/competit.htm>

40 Kohn Alfie (1986), 'No Contest: The Case against Competition', as discussed in Rajagopal (2006).

41 Dubey J. and Patel R. (2004), 'Small Wonders of the Indian Market', Journal of Consumer Behaviour, 4(2).

42 See note 39.

43 See note 39.

44 See 'Supplementary Note' of S. Chakravarthy in the 'Report of the High Level Committee on Competition Policy and Law', Department of Company Affairs, Government of India, New Delhi, 2000.

45 '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' – UNCTAD Report, Geneva, September 18, 1997.

46 Note presented by the Competition Commission of India to the Standing Committee on Finance, Lok Sabha Secretariat, vide Lok Sabha Secretariat No. 36/2/2006/FC, dated July 10, New Delhi, 2006.

47 For instance, the adoption of a competition law in Egypt was opposed strongly by a leading ruling party parliamentarian who was also the owner of steel mills, see Chapter on Egypt in the 'Competition Regimes in the World – A Civil Society Report', CUTS International & INCSOC, 2006.

48 Max Everest-Phillips (2009), 'Tackling the Tyranny of Vested Interests', in 'Politics Triumphs Economics', Academic Foundation and CUTS International, Jaipur.

49 'Competition Regimes in the World – A Civil Society Report', CUTS Centre for Competition, Investment & Economic Regulation, Jaipur, India, p. ix, 2006.

50 'Competition Boosts Corporate Governance' – Shyam Khemani and Chad Leechor, Global Competition Review, February-March 2000.

51 Iwata, K. – 'Competition Policy and Unfair Trade Measures' – Trade and Tariffs, January 1997 and Messerlin P.A. – 'Competition Policy and Anti-Dumping Reform: An Exercise in Transition' – 'The World Trading System: Challenges Ahead' – (ed) J.Scott, Institute for International Economics, 1996.

52 See 'Dictionary of Trade Policy Terms' – Walter Goode – Centre for International Economic Studies, University of Adelaide.

53 Bhagwati, Jagdish N., and Srinivasan, T.N. – 'Foreign Trade Regimes and Economic Development: India', Special Conference Series on Foreign Trade Regimes and Economic Development, New York: National Bureau of Economic Research, 1975.

54 Verma, Sunny and Subramanian, Ganapathy – 'Anti-dumping Duty on Chinese Silk', Economic Times, Hyderabad, November 20, 2006.

55 CUTS – 'Pulling up our Socks' Jaipur, India, 2003.

56 *Ibid.*

57 Based on OECD (2004), 'Russia – Peer Review of Competition Law and Policy' and 'Russian Competition Law: Overview and Recent Developments', European Antitrust Review 2009.

58 Nandi Mokoena (2009), Chapter on Evolution of competition policy and law in South Africa, "Why Countries Adopt a Second Competition Law?", CUTS International (forthcoming).

59 *Ibid.*

60 Gerardo Caffera, 'Antitrust Law in Uruguay. A brief overview' at [http://www.ag-internet.com/push\\_news\\_one\\_two/antitrust.pdf](http://www.ag-internet.com/push_news_one_two/antitrust.pdf)

61 D. Daniel Sokol (2007) 'Uruguayan Law of Promotion and Defence of Competition Enacted' at [http://lawprofessors.typepad.com/antitrustprof\\_blog/2007/10/uruguayan-law-0.html](http://lawprofessors.typepad.com/antitrustprof_blog/2007/10/uruguayan-law-0.html)

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