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COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES

CHAPTER I

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I.2. PREREQUISITE FOR DEVELOPMENT-ORIENTED COMPETITION POLICY IMPLEMENTATION: A CASE STUDY OF NEPAL

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1. Introduction

Competition policy was not a priority for most least-developed countries (LDCs) in the era of widespread state intervention in economic activity, which was underpinned by the concept of import substitution industrialization (ISI). However, subsequent developments, both internal and external to these economies, demonstrated the need for specific pro-competitive initiatives. Internally, the adoption of liberalization policies, the rise in privatizations, and the fact that most privatized entities in the utilities sector are natural monopolies underscore the importance of a solid competition regime to elicit the most favourable efficiency and welfare effects of liberalization and privatization. Externally, the massive international merger wave and the existence of international cartels (WTO, 2001) and their potentially negative impact on market contestability posit a case for competition policy to equip developing countries with the tools to deal with the increased market power of multinational companies and their anti-competitive practices (Adhikari and Knight-John, 2003).

Most LDCs have, explicitly or implicitly, adopted some kind of competition policy measures during the past decade. The majority of them have virtually done away with a licensing regime, accelerated the process of privatization, deregulated or delisted many industries from the earlier "reservation" system, and opened themselves up to international trade and foreign investment (Adhikari and Regmi, 2001; Musonda, Mbowe and Sampson, 2001).

Theoretically speaking, these measures have the potential to significantly contribute towards increasing market contestability in the domestic markets of the LDCs. However, implementation of these policies has not been as effective as was originally thought. The prevalence of a host of anti-competitive practices has hindered the process of creating a competitive environment in the marketplace. A lack of political will, coupled with apathy within the concerned agencies to implement these policies, is considered one of the reasons for policy failure in the LDCs.

In order to ensure that pro-competition policies meet their desired objectives, they should be anchored on the development dimension. Since economic development is the major priority for most LDCs, it is essential for them to prepare development-oriented competition policy and legislation in tune with their development requirements.

Although LDCs are designing competition policy and enacting competition law due to a growing realization of their merits, most LDCs are worried about the possibility of their competition regime encroaching upon the pursuit of their development objectives. They are looking for mechanisms to ensure that they could design their competition regime in a development-friendly manner. For instance, Nepal, an LDC, which has made a commitment at the time of its accession to the World Trade Organization (WTO) to prepare a competition law (WTO, 2003) needs to design a development-oriented competition policy and law. However, policy makers, who have limited exposure to these issues, are unable to reach a consensus on how to design and implement a development-oriented competition policy framework. This calls for a thorough analysis of the development implications of the competition policy and law to be prepared in Nepal.

The overall objective of this chapter is to prepare a policy document to identify the *prerequisites for the successful implementation of competition policy in developing countries and the mechanisms through which this may operate*, taking Nepal as a case study. In the process, the chapter also looks at various facets of competition policy and law including their application in various jurisdictions. Section 2 discusses development objectives of the LDCs, particularly Nepal, in the post-liberalization era. Section 3 investigates the constraints faced by developing countries and LDCs to implement competition policy and law. Section 4 briefly sketches the nature of anti-competitive practices in Nepal and their impact on various sectors of the economy and segments of the society. Section 5 discusses the issues of the development dimension of competition policy as adopted in other countries – their merits and demerits as well as their successes and failures. Section 6 discusses the *prerequisites for the successful implementation of competition policy* in Nepal. The final Section concludes and provides some policy prescriptions to His Majesty's Government of Nepal (HMGN), so as to help them design and enact their competition law.

2. Development objectives of LDCs in the post-liberalization era

LDCs have, for decades, been striving to find the right development strategy to enable them to promote sustainable development by reducing poverty and malnutrition, engendering development-oriented institutions, and promoting social justice. Over the past two decades, an increasing number of LDCs have placed their hopes on a development strategy based on increased participation in the world economy, through exports and inward foreign investment (UNCTAD and Commonwealth Secretariat, 2001: 1) to achieve the goal of sustainable development.

To this end, they have vigorously promoted an outward-looking economic development strategy. Indeed, as per the UNCTAD LDC Report (2000), trade liberalization in the LDCs has actually proceeded further than in other developing countries. In 1999, 60 per cent of the 43 LDCs for which data are available had average tariff barriers below 20 per cent and non-tariff barriers that covered less than 25 per cent of production and trade. Similarly, UNCTAD data on foreign investment regimes in the late 1990s show that out of a sample of 45 LDCs, only nine maintained strict controls on the remittance of dividends and profits and capital repatriation (Cuddy, 2001: 3). However, it is worrisome to note that the LDCs, despite serious efforts to achieve their development objectives are not able to realize their potentials (Adhikari, 2004).

The efforts to integrate these economies with the outside world have also been supplemented by a wave of economic reform measures at home. Most LDCs have started their domestic economic reform measures – including privatization, deregulation and financial sector liberalization – due to the conditionalities of the Bretton Woods Institutions. These measures were not necessarily a product of thoughtful consideration aimed at instilling competition in the economy, but rather were a part of a donor-driven exercise. Nonetheless, these measures, in theory, are important from the perspective of enhancing competition in the marketplace. However, it is an irony that they have not been able to achieve even the purpose they were intended to serve, let alone promote competition. We now turn to look at the problems faced by the LDCs and the efforts made by them to achieve their development objectives.

2.1. Employment generation

Lack of productive employment opportunities and consequent exacerbation of poverty is the single major problem for most LDCs. Since the majority of the populations in these countries depend on agriculture for their livelihood, they are not only hit by international price fluctuation of the primary commodities, but are also affected by the lack of market access opportunities in the North. Their process of diversification into secondary and tertiary sectors has been glacially slow.

Therefore, creation of a viable industrial and service base for absorbing the ever-growing youth population that enters the employment market every year is one of the major objectives of most LDC governments. In the case of Nepal, this objective is reflected, for example, in the Tenth Five-Year Plan (2002–2007) of HMGN, which is also the Poverty Reduction Strategy Paper (PRSP) adopted by the government through a wider consultation with relevant stakeholders at various levels (National Planning Commission, 2002).

2.2. Promoting investment

In order to accelerate the pace of economic growth and provide employment opportunities to their growing populations, most LDCs are rigorously promoting investment. Against the backdrop of the reduction in official development assistance (ODA) and change in donors' priorities as well as focus, the LDCs are providing extra incentives to foreign investors to invest in their respective countries.

For example, in Nepal, under the "one-window" policy, foreign investors are provided with a one-stop clearance procedure for their proposal. Except for the limited number of sectors, excluded mainly on cultural and national security grounds, all economic activities are open to foreign investment. Approval is almost automatic, provided the relevant environmental criteria are fulfilled. However, most LDCs are lagging behind in terms of attracting foreign direct investment (FDI).

A study conducted by CUTS (2003a: 3–4) on the investment regimes of three LDCs – Bangladesh, Tanzania and Zambia – revealed that only Tanzania has improved its foreign investment performance, while Bangladesh and Zambia are lagging far behind. Similarly, as per the World Investment Report, 16 under-performers (with low FDI potential and low FDI performance) during 1999–2001 are LDCs (UNCTAD, 2003: 10).

2.3. Enhancing competitive ability

In the era of global competition, it is not sufficient for LDC companies to be locally competitive. They need to be globally competitive, for which they should possess some competitive advantage such as economies of scale, cutting-edge technology, marketing strengths, efficient production and distribution systems, and/or cheap labour (Adhikari and Ghimire, 2001: 7). The LDCs do not generally have a comparative advantage in any one of these areas except for the availability of cheap labour.

However, because of the low productivity of such labour, resulting mainly from lack of education and skills and poor health, even this comparative advantage of the LDCs has not been fully exploited. Therefore, one of the major development objectives of LDCs in the post-reform era is to identify and harness the potential areas of their comparative advantage, and at the same time enhance their competitiveness in the global market.

2.4. Removing supply-side constraints

In the LDCs, lack of linkage between production facilities, service and infrastructure facilities limits their potential to specialize in crucial productive sectors and reap the benefits of productivity gain. While poorly developed human resources have led to a paucity of managerial, entrepreneurial and technical skills, the ability to conduct adaptive research is severely constrained by a lack of incentive and entrepreneurial zeal.

Similarly, poorly developed infrastructure (e.g. transport, power and storage facilities), support services (e.g. telecommunications, financial services and other technical support service institutions), and a general lack of trade facilitation measures limit their ability to supply even otherwise competitively produced goods to the international market. Therefore, removing the supply-side constraints to be able to export by taking advantage of market access opportunities is another objective being pursued by most LDCs (Adhikari, 2004).

2.5. Diversification of export profile

The LDCs have not been able to diversify their domestic production structures, not only with regard to manufactured goods, but even with respect to their primary commodities. This renders them especially vulnerable to international market volatility. Of the 4,162 products exported by LDCs to 30 major trading partners in 2000, 127 accounted for 90 per cent of their total export trade. On average, the top three commodities exported by each LDC usually account for over 70 per cent of its total exports (WTO, 2001). The export concentration ratios (defined as the share of the principal export product in the total export value) have remained high and largely unchanged since 1980 for all LDCs. Several countries greatly depend on particular primary commodity exports, especially in sub-Saharan Africa.[1]

What makes the situation even worse for many LDCs is that, while exports of a single product may constitute a large share of their export basket, they count for relatively little in terms of the international supply, so that they are unable to influence world prices in a way that is beneficial to them (Chandrasekhar and Ghosh, 2000: 4). Therefore, diversification of the export profile with a view to reducing their vulnerability to global demand shock is another objective being pursued by most LDCs.

3. Impediments to effective implementation of competition policy in LDCs

It is generally accepted that competition policy and law is required for all the countries irrespective of the level of their economic development, partly because perfect competition is merely an economist’s dream, and unattainable in a real life situation. The theoretical underpinning of their needs stems from the inherent nature of market failure, which is caused mainly by information asymmetries, natural monopolies, natural growth of firms and mergers and acquisitions (CUTS, 2002: ix). The problem is further compounded by the desire of firms to attain a certain degree of market power. These problems have led the prevailing wisdom to advocate the design and establishment of institutions that ensure that clandestine market power is not achieved and that those with market power do not abuse it (CUTS, 2002). However, it is not always easy for the governments of the developing countries and LDCs to effectively implement competition policy and law due to several inherent problems. While some of them are unique to LDCs, some others are found in a variety of shades in other countries too.

3.1. Conflict with other policy objectives

LDC governments tend to be inimical to the idea of implementation of competition policy and law because they, rightly or wrongly, believe that these actions unnecessarily constrain the ability of the governments to exercise their sovereign rights to achieve other genuine policy objectives. For example, given the fact that one of the major development objectives of the LDCs is to generate employment opportunities, they would be hesitant to expose their small and medium enterprises (SMEs) to foreign competition because of the latter’s potential to provide employment opportunities.

Even in a developed country such as Japan, competition policy discipline was subordinate to the industrial policy. Its powerful Ministry of International Trade and Industry (MITI) never flinched from ignoring the basic tenets of antitrust regulations if they interfered with the export-oriented industrial policy for which it became famous (Moisés, 1998).

While one of the objectives of competition policy and law is to reduce economic concentration by regulating mergers and the creation of market power, firms in LDCs cannot attain a minimum efficient scale and be able to compete with the foreign firms if this objective is vigorously pursued by the State. Lachmann (1999: 12) is of the view that all the successful market economies began industrialization shielded by trade protection – the only exception being Hong Kong. Therefore, LDC governments should also be allowed to use interventionist policy in order to help their enterprises attain economies of scale so as to be able to compete with foreign enterprises. He argues that the "the initial costs of protection [not competition] will be outweighed by the long-run benefits of increasing competitiveness and participation in international trade" (Lachmann, 1999).

Realization that the government needs to pursue active industrial policy in the initial stage of industrialization led HMGN to bind tariffs at levels higher than those being applied, at the time of Nepal's accession to the WTO (WTO, 2003).[2] This may be, in part, a reflection of the failure of the strategy adopted by the government in the recent past to spur economic growth through unilateral liberalization of trade, investment and finance.

At times, rather than refraining from enacting the competition law with the fear that it might restrict the policy options of the government, some countries have attempted to strike a balance between conflicting objectives of the government at the time of drawing up the competition law itself. The South African Competition Act of 1998 provides a classic example of an attempt by a government to accommodate its conflicting objectives.[3]

3.2. Resistance from vested interests

"Competition is always in danger. Since it is uncomfortable or even threatening, business tries to avoid it. To use a metaphor: competition is not a weed that grows even if left alone; rather it is a cultural plant that needs constant government attention" (Lachmann, 1999: 19). Implementation of competition policy and law in countries where competition culture is lacking (which is the case with most LDCs) entails, among others, convincing the business enterprises to move beyond myopia. It is about asking them to weigh the long-term costs and benefits of competition policy and law implementation.

There is an inherent tendency among business people to see their (anti-competitive) actions as virtuous and viewing others actions as evil. Take the example of a domestic firm, which commands a dominant position in the market in the present context. It does not abuse its market power but is opposed to bringing its sector within the ambit of competition law. It does not know that since there is no entry barrier, a multinational corporation (MNC), with financial muscle as well as better knowledge, skills and expertise to run a similar enterprise, could enter the market and introduce predatory pricing. In such a situation, the firm would be the first one to realize that bringing its sector within the ambit of competition law would have saved it from unfair competition.

For example, in the case of Nepal, it was found that manufacturers, who demand protection and oppose competition in their sector, complain about a cartel in the financial (mainly banking) sector, which by limiting their access to credit impedes their ability to become competitive. They do not realize that in the absence of the strict application of competition rules they could also be faced with the situation where the suppliers of raw materials form a cartel and raise the price of their inputs making it impossible for the former to source their raw materials at a market-determined price. Should such a situation occur, they could become staunch supporters of competition policy and law.

Interestingly, some businesspersons engaged in anti-competitive practices publicly defend their behaviour. Transport entrepreneurs, who are engaged in syndication (as discussed in detail below), defend their action as being welfare enhancing overall. According to them, a syndicate system is an orderly mechanism that assures the consumers of uniform price, and quality of service (as per their benchmark), and saves the consumers from the hassle of being annoyed by the call boys at the bus stations. In the absence of a syndicate system, as the argument goes, there could be unhealthy competition because the government does not have a system in place to determine the optimum number of buses that could ply a given route, which then results in misallocation of resources.

3.3. Lack of good governance

One of the reasons for the failure of the most LDC governments to implement policy measures aimed at spurring economic growth is the lack of good governance. In most LDCs, a public choice theory seems to apply perfectly with the government willing to provide concentrated benefits to a small group of the favoured and well-organized population (e.g. a business lobby), to the detriment of widely dispersed and unorganized groups (e.g. consumers).

A politics–business nexus, fuelled by the attitude of the people in power to make decisions based on their personal preference and connection, rather than on merits, has further exacerbated this problem. In the smaller LDC economies, where people tend to know each other fairly well and there is a strong cultural tradition to favour the relatives, friends and cadres, it is almost impossible to root out corruption and mal-governance. In Nepal, for example, mal-governance is one of the reasons for the failure of the government to contain anti-competitive practices, even if some of them are outlawed by the Consumer Protection Act 1997.

Adhikari (2002a: 17) documents yet another example of corruption contributing to anti-competitive conduct.[4] The manufacturers of polythene pipes, who are engaged in bid rigging, mentioned that the part of the rent they earned through bid rigging is, more often that not, shared with the officials of the public sector, who invite the bid. They even say that the compulsion for rent sharing has led them to adopt bid-rigging practices. This has led to the creation of vested interests even on the consumers' side, who want to zealously maintain the *status quo.* These officials would always defend the riggers and would not be inclined to support the competition investigation, even when it is initiated by the competition authority.

3.4. Tension with sector-specific regulators

Despite massive changes in technology, several segments of the infrastructure in the LDCs are natural monopolies, because of the limited size of markets and the lack of entrepreneurial zeal to make risky investments in sectors with high gestation periods. Moreover, competition authorities do not have the required competence to deal with such complex issues as redistributive policy (through cross-subsidization) and universal service obligations (Tirole, 1999). Therefore, sector-specific regulators will continue to play a major role in ensuring that natural monopolies do not abuse their position in the market, and make optimal arrangements for the supply of public goods, for which they were created.

One of the responsibilities of the sector-specific regulators is to maintain price-cap regulation in the sectors under their jurisdiction – an activity that impinges on competition. While simultaneous jurisdiction is not uncommon even in developed countries, this is a source of tension in most LDCs because of a lack of clear-cut demarcation of authorities and responsibilities. Some of the tensions in LDCs as documented by Basant (2001) are presented below.

In Zambia, a clear overlap exists between the tasks of the Zambian Competition Commission (ZCC) and the Securities Exchange Commission (SEC). In a case where the ZCC required the shares of the acquired entity to be floated on the stock exchange in order to prevent the concentration of stock in the hands of the acquirer, the SEC allowed the acquirer to offer the share to the minority shareholders. Although this resulted in the acquirer having total control over the company with negative implications for competition, the ZCC could not prevent this as the SEC's decision prevailed.

The case of Tanzania is interesting as the sector-specific regulation was initially under the purview of the competition authority. Subsequently, some other sector-specific regulatory authorities were created. The conflicts between the competition authority and the Tanzania Communication Commission (TCC) became obvious when the former filed a complaint against the latter for permitting the dominance of two cell phone companies (Mobile and Tritel) in the country. The TCC had to provide detailed explanations for its conduct and subsequently registered other cell phone providers, e.g. Vodafone.

3.5. Resource and capacity constraints

The issues of resource and capacity constraints are perhaps some of the most significant problems facing competition authorities in the LDCs. Whilst the dismal resource base is linked to the fiscal crunch that confronts most LDCs and the need to balance and prioritize competing demands on the government budget, it is also a reflection of an absence of political backing for competition policy and law. Exclusive dependence on state funds has a disastrous impact on the capacity of the competition authority in terms of quality and quantity of staff, opportunities for training and human resource development, and support facilities and infrastructure, while also undermining its independence to a large extent (Adhikari and Knight-John, 2003).

The resources available to remunerate staff are a crucial determinant of the skills and expertise that the authority can attract. The salaries paid to employees of the competition authorities are lower than the levels in the private sector in most LDCs (CUTS, 2002).[5] As documented by De Zoysa and Wickramaratne (2001) even in a developing country such as Sri Lanka, staff of the Fair Trading Commission (FTC) were paid salaries that were lower than those in the rest of the public sector.

Competition agencies require a considerable degree of skill and competence to address complex issues ranging from how to determine dominance or at what level to set threshold limits or to how to evaluate competition cases using a “rule of reason” approach. However, in the developing countries and LDCs, competition agencies struggle with these issues and are unable to handle their caseload because of a lack of qualified staff. In Sri Lanka, for instance, the erstwhile FTC (now Consumer Affairs Authority) only investigated two mergers and 23 restrictive trade practices in the 1996–2000 period, while India’s Monopolies and Restrictive Trade Practices Commission (MRTPC) had to struggle with an enormous backlog of cases with only seven professional staff members (CUTS, 2003b: 43).

3.6. Lack of political will and independence

A common feature in most developing economies is the absence of political ownership and support for competition policy. This also translates to political interference in the activities of a competition agency, undermining its independence as a professional “watchdog” of competition. CUTS (2003b) lists some of the criteria that define independence: legal independence, where the competition agency is not a part of any government department and where members cannot be removed without proper justification, financial independence, and, *de facto* independence where it would have the cooperation of other government agencies in enforcing its decisions.

Legal or on-paper independence does not necessarily provide for *de facto* autonomy, as is evidenced in the case of Pakistan where the government interfered in several cases, most notably that of the cement cartel. The Indian tale of the soda ash and cement cases that set a strong lobby group comprising a few big industrial houses against an association of small builders and ordinary consumers also indicates the threat to independence from strong business lobbies (Adhikari and Knight-John, 2003). The reasons for the lack of political support relate mainly to the mal-governance issue highlighted in Section 3.3 above.

3.7. Absence of competition culture

A significant problem confronting most LDCs is the absence of a national constituency to support competition policy work. While a bottom-up approach – pressures from groups such as consumer and other civil society organizations (CSOs) that operate outside the government – is particularly relevant in countries that lack the political commitment to competition policy, this appears to be lacking in most of the LDCs.

Business enterprises, devoid of the sense of competition, are least prepared to listen to the idea of competition advocacy. Worse still, in the case of Nepal, they were found not even willing to provide their suggestions to the government and CSOs in helping them improve the content of the draft competition legislation, in which they will have a significant stake, once passed.[6]

Inculcating competition culture among the government officials is yet another challenge. A former Secretary at the Finance Ministry of Nepal, after having attended a Competition Policy Conference organized by the World Bank and the International Bar Association, among others, in New Delhi in March 1997, commented that he felt that the introduction of competition law would inhibit the foreign direct investors from investing in Nepal, as they would perceive it as yet another regulation!

As these examples point out, a conscious effort to promote competition through the implementation of competition policy and law may not be sufficient to infuse competition in the marketplace. Even if a state-of-the-art as well as home-grown competition law is enacted, it could encounter serious implementation problems if constituencies it is meant to serve are not convinced of its benefits.

4. Anti-competitive practices in Nepal and their impact on economic development

It is evident from the foregoing analysis that market failure is common in LDCs for various reasons. Nepal is no exception. There are various historical, cultural and social reasons, besides economic ones, contributing to the prevalence of anti-competitive practices in Nepal. While some anti-competitive practices were prevalent even prior to the initiation of economic reform measures in Nepal, others have recently surfaced.

4.1. Transformation of public monopoly into private monopoly

Most of the LDCs have initiated a privatization process as a part of the structural adjustment programme (SAP). Analysis of the privatization policy, for example in Nepal, reveals that despite serious efforts, they have not been able to make the privatization process as broad based as possible. If the privatization process is not conducted properly, that is without transparency, accountability, due process before the law and without contestability, it is quite possible that the process would simply remove state monopolies and create private-sector monopolies (Musonda, Mbowe and Sampson, 2001).

In the case of Nepal, most of the public-sector enterprises, which were monopolies in the hands of the government, have either been transformed into private monopolies or are in the process of becoming so. Very few public enterprises have enhanced their competitive ability after privatization. Due to the absence of clear-cut guidelines, the lack of regulation, competition culture and a legal framework, and the virtual absence of post-privatization monitoring and an evaluation mechanism, the privatized enterprises have failed to infuse competition in the economy. Rather, they are weakening the competitive base of the economy (Adhikari and Adhikari, 2001).

4.2. Cartel

In LDCs, market-sharing and price-fixing cartels are prevalent in various degrees. For example, in Nepal, it is very normal for the business associations, which were established with the objective of protecting their professional interests, to have converted themselves purely into cartelizing bodies. Examples include the Nepal Bankers Association (NBA),[7] the Foreign Exchange Dealers Association of Nepal (FEDAN), the Colour Photographers Association of Nepal, the Nepal Association of Travel Agents (NATA), the Airlines Operators Association of Nepal (AOAN),[8] the Brick Manufacturers Association of Nepal, etc. So much so that even barbers in Nepal have formed their association, the Nepal Barbers Association, and its members are instructed to charge a given price for their services (Paudel, 2001: 14). The norm among these associations is such that those who undercut the price face strict sanctions from their associations, and at times even exclusion.

In the context of Nepal, there cannot be a more classic example than that of the sugar industry when one has to see how far cartel can go. In August–September 1999, leading sugar industrialists approached the government to increase the tariff on the import of sugar to 40 per cent so as to prevent Brazilian sugar from entering Nepal. Their justification was that since Nepal already had sufficient domestic capacity to produce sugar, importation was redundant and that a higher tariff was necessary to protect the "infant" sugar industry. When the government raised the tariff, domestic industries, a cartel as they were, stopped supplying sugar to the market and pressurized the government to increase the retail price of the sugar. The government, instead of clamping down on the cartel by utilizing the provision of the Consumer Protection Act 1997, yielded to the pressure. Interestingly, the cartel timed the move to the beginning of the festive seasons (when demand for sugar shoots up exceptionally), and succeeded in forcing the government to bow down (Adhikari, 2002b). Consumers are forced to pay a higher price for the local sugar because of the cartel. Even now, the sugar tariff remains at 40 per cent and its retail price is 29 rupees per kg, whereas the landed price of imported sugar would be 20 rupees per kg, if the tariff barrier were to be removed. This policy of the government has deprived the consumers of the opportunity to consume sugar at a much lower price.

4.3. Syndicate system

The major portion of the surface transportation system of Nepal is based on a syndicate system. This syndicate system is a collusive agreement among the transport entrepreneurs, who form an association, which determines the route and the frequency of plying buses or trucks for each member of the association. This system disallows any outsider to enter the road-transport network and if they do so they are not only faced with sanctions but also physical assault (Sharma, 2000). This system ensures that the consumers are made to pay what the syndicate wants, thus robbing them of their right to choose. Further, due to a lack of competition among the transport entrepreneurs, they have no incentive to upgrade or enhance the quality of the services provided to the passengers as they are fully convinced that this will not bring any extra benefit to them since the consumers have no choice but to use their services.

In January 2003, the Nepal Contractors Association Kaski (NCAK) filed a complaint at the District Administration Office (DAO) against the Gandaki Truck Operators Committee (GTOC) which was resorting to syndication in the name of cooperatives. The committee had been practising syndication after it announced its entry into the cooperatives system. This had compelled the consumers to pay an additional 1,000 rupees per trip for transporting, *inter alia*, sand and concrete. The truck operators increased the charge from 1,600 rupees per trip to between 2,200 and 2,700 rupees per trip after the formation of the "committee". However, the DAO failed to take any action against the syndicate members (Bhadgaunle, 2003).

Despite a clear-cut provision outlawing syndication in the Consumer Protection Act 1997, the government could not muster enough courage to implement that provision because of the sheer strength and clout of the transport entrepreneurs. Whatever little effort made by the government to bring the culprits to heel has failed. The syndicate system, which is not only rampant but has gone unchecked, has ripped off the consumers. Moreover, this has caused considerable damage to the industries because of the higher input costs resulting from the higher freight charges.

4.4. Bid rigging

This practice is widely prevalent especially in the construction and/or supply sector, where contractors or suppliers sit down together and decide the price at which <u>one</u> contractor or supplier will receive the contract. It is decided beforehand who would be winning the contract and the norm is that the winner has to be from within their group. Then, the person/firm who receives the contract compensates the other contractors/suppliers. If such contracts are to be awarded on a perennial and regular basis, then the contractors/suppliers decide the timing and the amount of contract each one of them is going to receive on a rotation basis. The manufacturers/suppliers of polythene pipes to the Nepal Drinking Water Corporation (NDWC) operate under this system in Nepal (Adhikari and Regmi, 2001). This practice is not only hurting the consumers, but also the taxpayers because the NDWC is a natural monopoly funded by the government. And when it incurs unsustainable losses, the government comes to its rescue, by making use of taxpayers' money.

Another example reported in a newspaper is the bid-rigging practice followed by the suppliers of rations to the Royal Nepalese Army and Nepal Police (Kantipur, 2003). This practice is directly hurting the taxpayers. Similarly, some municipalities in Nepal have refused to follow the guideline of the prevailing financial regulations of the country, which requires the awarding of a contract to the lowest bidder, at the time of execution of the development project because of the prevalence of bid rigging among the contractors (Gyawali, 1997).

4.5. Tied selling

Tied selling can be of two types: (a) a subtle form of tied selling by combining the sale of a slow-moving item with fast-moving items; and (b) a blunt tied selling carried out by bundling related goods and services. Both types of tied selling are widely prevalent in Nepal.

Having to buy a slow-moving item in return for the seller selling a fast-moving item is a routine affair in the case of Nepal. Since the market is imperfect, the creation of an artificial scarcity through hoarding or limiting supply is quite common. Even when the product is abundant in supply in the intermediary markets, it reaches the consumers in a quantity and at a price desired by the producers and/or middlemen. Since it has become more of a routine, consumers are not surprised if they are asked to purchase 25 sacks of Indian cement while purchasing 50 sacks of Nepalese cement.

A more direct type of tied selling takes place in educational institutions (schools) and hospitals. In most of the privately run schools, it is mandatory for the students to purchase books, stationary and uniform from the school itself – ostensibly to maintain uniformity among the students and maintain quality. However, the hidden motive behind such business is to extract as much money as possible from the parents in the name of imparting "quality" education (Khadka, 1998). Similarly, in some of the private hospitals and nursing homes, it is mandatory for all patients to undergo the pathological tests in the same hospital or nursing home once they have consulted the physicians, even if the tests have been done very recently in another hospital of similar status or reputation (Paudel, 1998).

4.6. Predatory behaviour

As mentioned earlier, monopolist or dominant firms in LDCs are so powerful that they do not want to see any new firm entering the market and trying to steal away their market share. This may not be the case in bigger economies where size of the economy is such that it can accommodate a large number of firms. In small economies, firms operate either under a monopolistic or an oligopolistic market structure. Therefore, in order to preserve their monopoly position (and continue to earn rent), they may attempt to drive out the competitors by reducing their prices to an unreasonably low level.

Another type of predatory intent, which is typically found in the case of LDCs, due to the small size of the market, is the predatory behaviour by a foreigner supplier. When predatory behaviour crosses a border, it becomes a case of dumping. One classic example of dumping, which was prevalent in the Nepalese market during the 1980s was the dumping of the *Maggi* brand of instant noodles by Food Specialities Ltd. (FSL), India (which later became Nestle India Ltd.). FSL was the only supplier of instant noodles in the Nepalese market (i.e. it had enjoyed a monopoly position), until Gandaki Noodles Pvt. Ltd. (GNPL) of Nepal started producing the *Rara* brand of noodles in direct competition with *Maggi*. In response to this, FSL slashed the price of its noodles to such a level that its sales price in Nepal was 25 per cent lower than that in India. Even though predatory intent was suspected, the Nepalese authorities could not do anything because Nepal did not have an anti-dumping law or institution.[9]

The price undercutting strategy was ostensibly adopted by FSL with the intention of driving *Rara* out of the market. However, FSL did not succeed in its endeavour and finally decided to maintain a low profile in the Nepalese market (Adhikari, 1997). Now there is stiff competition in the noodle market with the entry of new firms. While GNPL is losing ground too, *Maggi* noodles' share in the market has shrunk considerably.

A recent case of alleged predatory pricing behaviour that is visible in the market relates to the pricing of English language broadsheet dailies. There were two such newspapers in the country until 2002 – one private and one government owned. After the entry of the private newspaper *The Kathmandu Post* (TKP) in 1993, the share of the government-owned newspaper *The Rising Nepal* has shrunk considerably. In 2002, a new daily *The Himalayan Times* (THT) entered the market with an aggressive pricing strategy charging 2 rupees per copy, as opposed to the 4 rupees charged by the incumbent newspapers. THT was able to considerably increase its market share surpassing the circulation of TKP, which, in turn, fought back later by reducing the price to 1 rupee 50 paise. In response to this, THT has reduced its price to 1 rupee.

There is a suspicion among the competition experts that THT could have been indulging in predatory pricing. However, given the fact that consumers are gaining as of now and that there is no law to prevent such practices, it is unclear which course this price war will take in the future. One view could be that as long as there is a credible threat from the competitor, which could match the price howsoever low it might be, there is no reason for alarm. However, another view could be that TKP will be eventually wiped out of the market, clearing the way for THT to enjoy a near-monopoly position in the market and abuse its market power. The jury is still out to say the least.

4.7. Price discrimination

As per a study conducted by Adhikari and Regmi (2001) to document anti-competitive practices in Nepal, it was found that price discrimination was the most frequently occurring restrictive business practice. Seventy-eight per cent of the respondents interviewed during the survey mentioned that price discrimination was prevalent in the Nepalese market. Blatant price discrimination is observable in the financial sector – with banks providing lower interest credit for big borrowers and charging higher interest to small borrowers for the same category of loan.

The banking regulator (the Central Bank) used to impose a requirement on them, until recently, not to deviate by more than 0.5 of a percentage point from their published rates while discriminating between two types of customers, for each category of loan. Commercial banks, finding it difficult to discriminate between their customers by more than 1 percentage point, came up with an ingenious idea. They sub-categorized each loan category and preserved their right to discriminate between their customers by up to 3 percentage points.[10]

Banks justify their action by saying that they are basing their lending rates decisions on their risk perception, i.e. charging higher interest rates to customers with weak credit standing to compensate for a possible loss. However, this turns out to be a facile argument because the major portion of the banks' non-performing assets (bad debts) is concentrated in big business houses (belonging to the so-called corporate category).[11]

The major implication of such a discriminatory practice is the reduced access to credit for small business enterprises and start-up ventures, which not only imperils the competitiveness of existing small businesses, but also creates an entry barrier for new entrepreneurs. Since an alternative route for mobilizing capital (i.e. a capital market) is also not well developed in Nepal, market contestability is seriously lacking – at least in those sectors where capital requirement is high.

The Central Bank has also done away with the requirement not to deviate by more than 0.5 of a percentage point for each lending category arguably because it did not serve the intended purpose. Banks are now free to decide their lending rates, thus providing them with an opportunity to discriminate against the smaller borrowers to the extent that they feasibly could.

5. Development dimension of competition regimes and their relevance to LDCs

Though the overarching goal of competition policy is to promote economic efficiency and enhance consumers' choice, it can have several objectives. While some of them are complementary to each other, some others run at cross purposes. At the same time, competition policy does not function in a vacuum and it has to interact with various government policies. As mentioned earlier, there could be a considerable degree of conflict between competition policy and other policy objectives of the government. Promoting SMEs by shielding them from competition, promoting balanced regional development by offering incentives to those firms that invest in a particular location, and promoting "national champions" through trade protection and government supports – which are considered part of the boarder issue called developed dimension – can contradict the stated goal of competition policy.

The question of the development dimension is largely a Southern phenomenon, although this issue has received considerable attention in the policy-making processes of the developed countries as well. All the sectors of economies in the developing countries may not be equally capable of facing competition especially from foreign companies.

Further, the infant industry argument calls for sheltering nascent sectors of the economy from outside competition. Even the developed countries of today made use of such mechanisms in the past. For example, in Japan between 1961 and 1973, close to 1,000 cartels per year on average were exempted from antitrust law (Lachmann, 1999). However, in order for the infant industries to gain significant economies of scale and become globally competitive in the true sense of the term, such protection should be applied selectively, made conditional upon meeting performance standards, should be transparent, time limited, involve minimum discrimination, and be constantly reviewed. It has to be also recognized that providing protection to the domestic sector, particularly to infant industries, is the second-best option (Lachmann, 1999).

At the same time, there are arguments against merger control in LDCs, which could be detrimental to the developmental interest of the country. This arrangement clips the wings of those enterprises that wish to grow, so that they are never able to attain a critical mass and economies of scale (SAWTEE, 2003).

Against this backdrop, this section attempts to discuss the development dimension of competition policy in the following areas, mindful of the fact that there is a clear overlap between some areas.

5.1. National champion

Active industrial policy calls for governments' support for specific industries, possibly through approving economic consolidation and intervening in the industry structure, i.e. "picking winners" and channelling market forces into working for the particular interests of those winners (Pham, 2003: 1). A strong argument in favour of such "national champions" picked by the government, is that competition policy should not be too concerned with the emergence of dominant firms, or with mergers that will create firms with large shares of the domestic market, if large-scale operation is essential to succeed in the world market.

Generally, a strategy to promote a national champion is adopted by the countries in the initial stage of their industrialization. Once these champions become globally competitive, they are exposed to international competition. Some advanced countries have reflected this commitment in their legislation. For example, the competition laws of the UK and the Netherlands, which no longer require promotion of national champions, propose to limit ministerial intervention to national security grounds at the most; other national interest deliberations will be left to the competition authorities (Mehta, 2002).

However, some other industrialized countries continue to develop "national champions" in some critical areas even if they conflict with the objective of competition policy. For example, the German Economics Ministry overruled, for the second time, a decision of the Federal Cartel Office (FCO) rejecting E.ON AG's proposed US$ 10.2 billion takeover of Ruhrgas AG, Europe's largest gas importer. The Ministry argued that the takeover would create a powerful national champion to negotiate in international markets, despite the allegations from German scholars that the Ministerial prerogative was tantamount to "keeping the back door open for industrial policy" (Pham, 2003: 3).

Equally illuminating is the example of the merger of two dominant dairy companies in New Zealand with an international marketing group, which was approved by the introduction of legislation to exempt them from the business acquisition provisions of the country's Commercial Act, with a view to enhancing their international competitiveness. The new merged entity, named Fonterra Co-operatives Group Ltd., now controls 95 per cent of New Zealand's milk supplies, contributing 7 per cent of its annual Gross Domestic Product (GDP) and ranks as the world's 14th largest dairy company (Pham, 2003: 4).

In Japan, which achieved spectacular GDP growth and growth in its share of world exports by 10 percentage points between 1950 and 1973, competition policy was subordinate to industrial policy, an essential concern of which was to maintain the private sector's high propensity to invest. The then-powerful Ministry of International Trade and Industry (MITI) not only encouraged a variety of cartels, but also encouraged mergers between leading firms in key industries believing that large-scale enterprises were required for the promotion of technical change and for Japanese firms to compete effectively with their western counterparts (Singh and Dhumale, 1999: 12).

The Korean government broadly followed the Japanese strategy of economic development. It also had a strong industrial policy which, as in the case of Japan, dominated competition policy. The government helped create mammoth conglomerates, the *chaebols*, which went on to capture global markets (Singh and Dhumale, 1999). Though Korea has one of the highest levels of industrial concentration in the world, the giant *chaebols* compete with each other fiercely for government support proving their mettle by meeting specified performance targets for exports, new product development, and technological change. As in Japan between 1950 and 1973, the Korean government until recently has purposefully coordinated industrial investments by competing *chaebols*, so as to prevent overcapacity and excess competition (Singh and Dhumale, 1999).

Virtually all the countries in the world, whether developed, developing or least-developed, have made use of the national champion argument to foster the competitiveness of their industries in one way or the other. It must be remembered that comparative advantages of today are mostly the result of successful government interventions of yesterday. For example, it used to be argued that economic development in Britain was possible only by following the free-trade policy. However, as recent research points out, Britain propagated free trade only in those areas in which it was already competitive; in all other sectors of the economy, its average tariffs were higher than in France – a country blamed for pursuing a blatantly protectionist trade policy (Lachmann, 1999: 11).

While some countries have made explicit provision in their legislation to give precedence to industrial policy, some economies have made use of industrial policy in a more subtle manner. For example, Taiwanese Fair Trade Law (competition law) contains a clause that gives explicit precedence to other laws where they conflict with competition law. Similarly, the Australian Trade Practices Act allows for the possibility of the Australian Competition and Consumer Commission (ACCC) to grant immunity on public-interest grounds for Merger and Acquisition (M&A) cases, which would or might otherwise breach the provision on "substantial lessening of competition". This mechanism is called "authorization" and cannot be overturned once granted (Pham, 2003: 3).

However, in the USA, where it is proclaimed that competition policy itself is industrial policy, competition authorities have gone ahead and provided approval for some large mergers that have an impact not only on their own market but also on the international scene, precisely because of their potential to become "national champions". The mergers between G.E. and Honeywell, Boeing and McDonnell Douglas, and Exxon and Mobil are examples of such large-scale mergers, which were approved, despite the fact that these mergers would have led to a high market concentration *ex post*.

Even when one looks at the control of merger and takeover from a broader perspective – not merely from the narrow perspective of the "national champion" argument, the debate centres on one issue – whether these activities are desirable or not from a development perspective. The philosophy underpinning merger control is that big is unavoidably ugly. Textbooks on Microeconomics and Industrial Organization suggest that bigness or market power could create massive rents for the business enterprise thus taxing its efficiency to the detriment of the consumers. However, as per another school of thought, big is not necessarily bad because it provides the enterprises with the opportunity to attain economies of scale, avoid duplication of assets, enjoy synergistic benefits, and invest in research and development (R&D).

All these features lead to cost reduction, which could ultimately be passed on to the consumers.

Those who subscribe to the second school of thought also argue that competition law may hinder the ability of domestic firms to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as M&As. They also feel that the risks, uncertainty and low profits associated with competition limit their ability to conduct R&D and innovate or improve product quality.

As mentioned above, in an increasingly globalized world, big firms are becoming bigger so as to compete globally, and competition authorities around the world are taking lenient stands on such practices. Therefore, there is no need for the competition authorities of the LDCs to frown upon firms having less than a 40 per cent market share (Adhikari, 2003a). This realization has led some small economies to adopt competition law without any merger control regulation. For example, Protocol VIII of the Treaty of Chaguaramas, which deals with anti-competitive business practices of the Caribbean Community (CARICOM) region, does not provide for merger control regulation (Stewart, 2000).

Due to a high degree of openness, merger regulation can become irrelevant to the small economies in particular LDCs. Openness means that local firms have to compete at the international standards in the domestic market. The majority of firms are micro-firms so there is a need to achieve a critical mass for developing economies of scale and scope.

5.2. Protection of vulnerable sectors/segments

As mentioned earlier, although the role of SMEs may not be that important in terms of generating export revenue, their contribution in terms of providing employment opportunities is enormous.[12] If we expose such enterprises to foreign competition, the vital nerve of the national economy may collapse. Therefore, it is necessary to shield these enterprises for a temporary period so that they could be brought up to speed and face competition from large domestic as well as foreign enterprises at a later stage.

The South African Competition Act explicitly states that ensuring SMEs have an equitable opportunity to participate in the economy is one of the objectives of the legislation. Similarly, Chapter VIII of the Revised Treaty of Chaguaramas provides for a *de minimis* rule (Article 181), by which the Commission may exempt from the provisions of this section (Chapter VIII) any business conduct referred to it if it considers that the impact of such conduct on competition and trade in the CSME (CARICOM Single Market and Economy) is minimal. It has been interpreted that such a *de minimis* rule provides a carve-out for the SMEs to be subjected to competition discipline of the CSME (SALISES, 2004). At a sub-national level, the United

States Virgin Island Anti-Monopoly Law provides for the exemption of import cartel agreements between small entrepreneurs engaged in retail sale.[13]

It is generally accepted that competition is good for all economic participants in the long run, but that it is bound to create displacement in the short term. Therefore, it is necessary to protect the interest of the poor, marginalized and vulnerable segment of society from the onslaught of competition in the short term. As has been made amply clear by the foregoing analysis, due to market failure, displacement is bound to occur in the LDCs. For example, trade and investment liberalization and the application of competition law provide benefits to the relatively better-off firms and people from the upper echelons of society, leaving behind the vast majority of enterprises and people to suffer the burden of adjustment.

While some governments have made conscious efforts not to subject vulnerable sectors and sections of society to the strict application of competition rules, some others leave it to the mercy of market forces. For example, at the time of accession to the WTO, Nepal was able to bind its tariff on agricultural products at 42 per cent on average, and for some of the sensitive agricultural products, the production of which was linked to the livelihood of the poor, marginalized and vulnerable farmers, the bound tariff is up to 60 per cent (WTO, 2003). These rates, coupled with the trade remedy measures available under the WTO Agreements (which can be used now), are likely to provide a cushion to the farmers against the possible unfair competition such as dumping or surging of imported agricultural products.

At the time of drawing up its Foreign Investment and Technology Transfer Act (FITTA) 1992, HMGN has also made a deliberate effort to protect some sectors of the economy from foreign competition. Listed in Annex 1B of the Act, most of them were included in the reservation list in order to protect the vocation of the indigenous and ethnic communities. The exclusion of travel agencies, trekking, rafting and pony-riding enterprises, and the operation of small lodges and hotels from foreign investment was designed to protect the employment opportunities of the *Sherpa* communities, who live in high mountains and have been excluded from the national mainstream for a long time. This community owns the majority of the business enterprises listed above.

Similarly, as explicitly mentioned in the South African Competition Act, one of the objectives of the legislation is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (i.e. the black community). Accordingly, such exemptions have also been inscribed into the law.

Finally, since the working class (i.e. labourers) is considered vulnerable in developing countries and LDCs, competition law in many jurisdictions protects the collective bargaining rights of the labourers. Since their service also represents an input into the production process, there could be a tendency among firms, pressured by competition, to take away such rights of the workers. However, as mentioned above, countries which not only promote competition as the only goal and take other socio–

economic interests into consideration, tend to preserve this right of the workers. Moreover, countries which have signed the Core Labour Standard of the International Labour Organization (ILO) are obliged to guarantee these rights. Some of the countries that have explicitly inscribed an exemption for collective bargaining rights of labourers include South Africa and Zambia.

5.3. Efficiency defences

As mentioned earlier, the fundamental purpose of competition law is to ensure the efficient use of resources through vigorous competition. For relatively small open economies characterized by a high concentration in many markets, firms may not be operating at a minimum scale of efficiency, which causes efficiency issues to be particularly important. Since most LDCs bear the above-mentioned characteristics, it is important for them to learn from the associated practices elsewhere.

There may be instances in which apparent restrictions of competition can mean more efficient resource use (World Bank and OECD, 1999: 124). Such restrictions can be broadly classified into two categories – pro-competitive and anti-competitive. The first category of restrictions includes a merger between two small competitors to make themselves into a more effective rival to a larger competitor, and a joint venture between two potential competitors to develop a new product.

The second category of restrictions includes two competitors merging to take advantage of economies of scale thus making better use of resources, but charging a higher price to the consumer because of the market power that they are able to enjoy post-merger. Some other real-life examples of restrictions falling into this category are: two potential competitors entering into a joint venture to develop a new product to eliminate duplicate research and development (R&D) and avoid the cost of racing to be the first in the market, resulting in a delay in the introduction of the new product/process to the market; and two multi-product competitors agreeing to specialize production with each supplying the needs of the other, providing each other with the opportunity to know each other's costs thereby leading to less price competition.

Some countries (Australia, Canada, New Zealand, the UK and the USA) have either a statutory or an administrative provision for an efficiency exception or defence. The European Union (EU) allows for the exemption of anti-competitive agreements that also bring about economic benefits. According to Article 85 (now Article 81) paragraph 3 of the Treaty of Rome, some collusive behaviour restricting competition in a non-minor way may be exempted because of sufficient beneficial effects. Four conditions are required:

- the agreement must contribute to the improvement of the production or distribution of goods or promote technical or economic progress;
- it must allow the ultimate buyers a fair share of the resulting benefits;
- the restriction must be necessary for the attainment of the objective; and

- the firms concerned must be unable to eliminate competition with respect to a substantial part of the product in question.

The trade-off of expected efficiencies against expected anti-competitive effects is universally recognized as difficult. Scholars have suggested elegant and objective methods of doing so, but there are significant difficulties in applying them. A widely recognized model developed by Oliver Williamson (1977) would permit a merger that on balance increases “total surplus”, notwithstanding an increase in prices above the competitive level. That is, the cost savings resulting from efficiency gains generated by the merger must exceed the “dead-weight loss” caused by the expected anti-competitive price increase (OECD, 1996: 7). This approach is also known as the aggregate economic welfare approach or trade-off analysis (World Bank and OECD, 1999: 128). The major fallacy of this approach is that it ignores the redistributive consequences of the exercise of market power.

An alternative to the total surplus standard is the “consumer surplus” standard, which requires that the efficiency gains be so substantial as to ensure that the merger will not result in a wealth transfer from consumers to producers. This standard ordinarily would require the showing of a much greater magnitude of efficiencies than the total surplus standard (OECD, 1996: 7). This approach requires that the net effect increases or at least does not reduce consumer surplus. It is called the consumer surplus or pure consumer surplus standard because it prevents any redistribution of surplus from consumer to merging entities. It is also called a price standard because it does not allow a merger or agreement to increase a price materially (World Bank and OECD, 1999: 128).

Nevertheless, the consumer surplus standard is employed in some countries. The language of the European Commission (EC) merger regulation indicates that consumer surplus is the EU operative standard, as it was in the US, at least prior to the 1992 US Horizontal Merger Guidelines. In Canada, total surplus is apparently the relevant standard (OECD, 1996: 7).

Similarly, R&D cooperation is another area that is increasingly being accepted by competition regimes around the world as a means to enhance efficiency, outweighing its possible anti-competitive effect. For example, the Canadian Competition Act provides a defence for joint R&D ventures involving a specific programme of research that would not otherwise take place. Agreements among competitors with respect to cooperation in R&D are exempt from the criminal conspiracy provisions of the Act unless they lessen competition unduly with respect to prices, output, markets, customers, or channels of distribution (World Bank and OECD, 1999: 135). Similarly, the US courts are required under the National Cooperative Research and Production Act to judge joint research and production arrangement on a “rule of reason” basis.

There is considerable support for joint R&D at the conceptual as well as empirical levels. According to Jacquemin (2000: 25): “Cooperative R&D can be viewed as a means of simultaneously internalizing the externalities created by significant R&D spillovers – hence improving the incentive problem and providing a more efficient sharing of information among firms." D'Aspremont and Jacquemin (1988) have used a model to study the impact of R&D spillovers on a firm's optimal R&D investment. In comparing the symmetric cooperative and non-cooperative solutions, they find that large spillovers lead to higher R&D expenditures and production levels under the cooperative scenario; this behaviour is superior from a social welfare point of view.

However, contrasting with these potential advantages of cooperative R&D, effects leading to a harmful reduction in competition must also be considered. One danger is that cooperative R&D could be a way for a dominant firm to avoid competition through innovation, by co-opting potentially innovative rivals and by controlling and slowing down the innovation race. A second situation involves an extended collusion between partners, resulting from their action in R&D and creating common policies at the product stage (competitive level).

Discussions about R&D can for example spill over into illegal discussions on pricing policy (Jacquemin, 2000: 26).

5.4. Export cartels

Export cartels are associations of firms that cooperate in the marketing and distribution of their product to foreign markets. The competition laws of virtually all countries exempt such export cartels from prosecution by domestic authorities (Evenett, Levenstein and Suslow, 2001). Previously, only developed countries exempted their export cartels from their competition disciplines, but now developing countries as well as economies in transition are joining the bandwagon. While some scholars and several WTO members have recently condemned such cartels, others have argued that they allow efficiency gains that actually promote competition and trade (Bhattacharjea, 2004).

The study of Evenett, Levenstein and Suslow (2001: 45) lists 12 countries (OECD countries and economies in transition) where national exemption is provided to the exporters by their respective competition laws. Out of these, four countries (Germany,[14] Japan, the UK and the US) had some sort of notification/authorization requirement, while eight others (Canada, Estonia, Hungary, Latvia, Lithuania, Mexico, Portugal and Sweden) do not even require the same. In these countries, there is very limited information regarding the number or activities of export associations, and most of the provisions relating to the exemption of export cartels were explicit. However, implicit exclusion is now the norm in the EU. Any export cartel formed for the purpose of exporting goods to non-EU countries is outside the scope of Article 81 of the Treaty of Rome.

In the US, export cartels are shielded from antitrust action by three statutes, two of which involve a registration procedure. Consequently, they are more visible to foreign competition agencies (and private researchers). The 1918 Webb-Pomerene

Act (WPA) gives registered export associations qualified immunity from Section 7 of the Clayton Act (which regulates mergers) and the Sherman Act, which otherwise prohibits "Every contract, combination … or conspiracy in restraint of trade or commerce among the several States, *or with foreign nations*" (emphasis added).

Likewise, Article 6 of Mexico's 1992 Federal Law of Economic Competition contains explicit provision relating to export cartel: "Associations or cooperatives that sell their products directly abroad do not constitute monopolies". This provision exempts export cartels formed by associations or cooperatives, which do not sell or distribute such goods within Mexican territory, subject to the fulfilment of certain requirements. It appears that Pakistan is one of the developing countries to have introduced exemption from export cartels in its competition legislation, namely the Monopolies and Restrictive Trade Practices Ordinance of 1971.

Other developing countries or countries in transition, which have either amended or replaced their earlier legislation, or prepared a completely new legislation, have introduced such exemptions in their laws. Probably they have started understanding the virtues of the same!

For example, Section 3(b)(i) of the 1998 South African Competition Act, which replaces the old Maintenance and Promotion of Competition Act of 1979, lists "maintenance or promotion of exports" as one of the possible grounds for granting an exemption for a restrictive agreement or practice.

Likewise, Section 5(ii) of India's 2002 Competition Act, which replaces the earlier Monopolies and Restrictive Trade Practices Act of 1969, is a more far-reaching "carve-out": "Nothing in this section [on anti-competitive agreements] shall restrict … the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export." (Bhattacharjea, 2004).

As per Article 2(2) of Bulgaria's Law on the Protection of Competition, introduced in 1998: "…activities, the consequences of which restrict or might restrict the competition in another State, unless otherwise provided in an international treaty which has entered into force and to which the Republic of Bulgaria is a party". This provision could be interpreted to make an export cartel legal since the export cartel has a consequence of restricting competition in another State.

As mentioned above, currently the trend is towards making explicit mention of the exemptions provided to export cartels, given that it is pursued by almost every country. However, the debate on the efficiency implications *vs*. the "export of anti-competitive effect" (or beggar-thy-neighbour effect) of such a cartel is far from settled.

Based on the analysis of the export cartel practice of the American Natural Soda Ash Corporation (ANSAC) – a WPA association – and their efficiency claims, Bhattacharjea (2004), provides the following taxonomy of economic efficiency:

1. *Saving on variable costs:* of transportation, warehousing and handling, by being able to negotiate better rates for larger volumes.
2. *Saving on the fixed costs:* of market research and setting up and maintaining networks and facilities for shipping, customs clearance, storage, marketing and distribution, and liaison with government officials where necessary. These are likely to be specific to each destination, and individual producers might find that their volumes are too small to justify incurring such costs. Or they could avoid unnecessary duplication by centralizing these functions in a common agency.
3. *Pooling of risks:* Although not spelt out in any of the case reports, this appears to involve two separate considerations. First, access to the production facilities of many producers yields a more reliable source of supply, resulting in the cartel being better placed to meet orders. Second, common marketing gives each producer a share in a diversified portfolio of buyers, spreading the risks of non-payment by buyers, demand slumps, or disruption in deliveries caused by political or natural events in particular markets.

Similarly, as reported by Bhattacharjea (2004), an examination of Japanese export cartels in their heyday led to a finding that most of them did not appear to affect export prices or volumes; if anything, they contributed to cost reduction and quality assurance in some cases. In other cases, exporting firms cooperate by engaging in price fixing: either agreeing to sell their exports at the same price or to sell them through a single, joint sales agency that will accomplish the same thing. Firms may also use cooperative export organizations to jointly market products (Evenett, Levenstein and Suslow, 2001). These activities are clearly anti-competitive, with implications for the importing country's economy and consumers. They could have the same effect as hardcore international cartels (such as the infamous bromine, citric acid, graphite electrodes, steel tubes and vitamins cartels).

Despite criticisms, the international community does not seem to be too concerned about the export cartels, not least because of the limited volume of export made under such arrangements. No recent studies have been done to ascertain their impact. However, Dick (1992) reports that WPA associations covered 2.3 per cent of US exports in 1962 and a mere 1.5 per cent in 1976. The limited information available from other countries shows a declining pattern. The OECD reported in 1984 that between 1972 and 1982, the number of export cartels in the UK held constant, the number in Germany declined slightly, and the number in Japan declined markedly (Evenett, Levenstein and Suslow, 2001).

There is a general trend towards viewing export cartels as being beneficial for the developing economies. SALISES (2004) strongly supports both import and export cartels in the absence of which it would be difficult for small entrepreneurs to engage in international trade. Similarly, Scherer (2000: 395–403) acknowledges that most countries would be reluctant to prohibit cartels in commodities, which are major sources of export earnings, and recommends that any agreement should allow each country to exempt export cartels (or participation in international cartels) in up to three industries, defined at the four-digit level of the Standard International Trade Classification (SITC). He also makes a qualified case for permitting developing countries to maintain cartels in industries producing manufactured exports, to allow for economies of scale, coordinated marketing, financing of technology development, and even coordinated export pricing so as to avoid charges of dumping in foreign markets (Bhattacharjea, 2004).

In their submission to the WTO Committee, Thailand, India, China, Indonesia and Egypt invoked the principle of “Special and Differential Treatment” to argue that developing countries should be allowed to continue to exempt their export cartels, on the grounds that they were comprised mainly of smaller firms, while requiring developed countries to abolish their exemptions (Bhattacharjea, 2004).

6. Prerequisites for the implementation of competition policy and law in Nepal

Having highlighted the imperatives of putting in place an appropriate mechanism to ensure competition in the marketplace in the LDCs, despite the small size of the market, we now list out the essential ingredients or contours of the competition policy and law. Care should be taken, however, to ensure that the objectives of competition policy and law are achieved without having to compromise the development objectives of the country concerned. Moreover, these measures should have at their core the objective of enhancing the competitiveness of the domestic enterprises.

6.1. Competition policy

Trade liberalization: Competition from foreign firms provides a vital spur to the efficiency of domestic firms. It does not, however, follow that a liberalized trade regime obviates the need for a national competition policy because a large part of LDCs’ economies (such as retail, distribution) are not in traded sectors, and domestic consumers need to be protected from the abuse of dominance and restrictive trade practices by foreign firms (Jenson, 2001: 2). In order to have continued competition from foreign firms, it is also necessary to provide predictability in the domestic trade regime. Nepal’s recent accession to the WTO is likely to be instrumental in locking-in the trade policy reform that the government had initiated since the early 1990s (Adhikari, 2003b). Though some of the sensitive sectors of the economy are still going to be shielded from foreign competition due to relatively higher tariff bindings, the majority of the sectors in the economy are going to face stiff foreign competition. This, in turn, is expected enhance the competitiveness of the domestic enterprises exposed to foreign competition.

Deregulation and privatization: Government controls, the imposition of a permit system, impromptu regulations and work processes, besides a dilatory bureaucracy, have contributed to dampening the private sector’s entrepreneurial zeal and enthusiasm. Government organizations have only added to the nation’s economic burdens. Various negative tendencies such as “rent-seeking” surfaced in the economic system. As a result, Nepal suffered from low growth syndrome (Ligal, 1997: 14–15). In order to overcome these obstacles to private-sector participation and economic growth, the government initiated a series of economic reform measures including deregulation and privatization. However, in the context of Nepal, neither is the regulatory system up to speed[15] nor has the privatization process helped to infuse competition in the marketplace. Therefore, the government needs to initiate regulatory reform, make the privatization process more transparent and broad-based and institute a system of post-privatization monitoring to ensure that they contribute to the desired competitive outcomes. For example, as mentioned above, even if only regulatory reform in the banking sector contributed to eliminating discriminatory lending rates charged by the banks, the market contestability and competitiveness of the small incumbent, as well as the start-up domestic enterprises, would be enhanced.

Investment policy: A low level of domestic saving and a decrease in ODA are not the only reasons to encourage FDI. One of the major motives of encouraging FDI is to infuse competition in the domestic market. Another aspect of FDI which helps enhance the competitiveness of the domestic enterprises is the possible transfer of managerial skills and technology. This has already been seen from the experience of the commercial banks, which have not only been able to considerably upgrade their technology, but also are introducing new products to the market. Technology and skill transfers from foreign banks have helped local banks constantly upscale their services even after the former have left.[16] However, despite serious and genuine efforts on the part of the government, including the enunciation of a one-window policy, the success in terms of attracting FDI has been minimal. This is in part due to the current political crisis in the country and the deteriorating industrial security fuelled by insurgency.

Consumer protection policy: Although only briefly discussed in the earlier sections, consumer policy can complement competition policy by creating a strong constituency in support of building a competition culture in the economy. Given the propensity of the private sector to try and avoid competition as long as they can, the government should design an active consumer policy aimed at creating awareness among the consumers and building their capacity to advocate for the cause of promoting healthy competition with a view to complementing the former's effort to instil competition in the market.

6.2. Competition law

There is no hard and fast rule on what should be considered a benchmark for the enactment and enforcement of competition law, as this is largely a subjective issue and depends on a number of factors. It has been made abundantly clear that there is no "universal" law that fits every country. While the UNCTAD Model Law on Competition (2002) and the World Bank/OECD (1999) Model Law on Competition provide useful guidelines for enacting competition law, they should be tailored to specific requirements of the LDCs in general and in Nepal in particular. However, based on the foregoing discussion, it is not impossible to lay down the essential contours of the competition law for a country like Nepal.

Preventive as opposed to curative measures: Rather than focusing on curative measures (i.e. penalizing the wrongdoers after the offence has been committed), competition law should be such that it would facilitate the prevention of the offence itself. The requirement to register all potential anti-competitive practices with the competition authority, as done under the former Indian Monopolies and Restrictive Trade Practices Act (MRTPA) is something worth emulating in Nepal. While competition authorities around the world have been moving towards “conduct” as the criterion to trigger action, focus on “structure” could help them adopt preventative measures. Mere existence of “market power” (or monopolistic tendency) is not anti-competitive, but if the same is not properly watched, market power is a potent tool for “market exploitation”. For an LDC such as Nepal, given its institutional endowment and capacity, a focus on “structure” is a better tool to prevent anti-competitive practices from taking place.

In order to deter business enterprises from engaging in anti-competitive practices, fines and penalties should be considerably larger than the extra profits that they anticipate earning through their illegal behaviour (Khemani, 1995). Some countries have even found that the deterrent effect of penalties is enhanced considerably if the anti-competitive acts are characterized as a criminal offence and if individuals as well as enterprises are made liable – as found in the antitrust legislation of the USA. Moreover, it is advisable to base fines on the percentage of turnover rather than fixing an absolute amount. This will ensure on the one hand that small enterprises do not go bankrupt after having been fined by the competition authority, and on the other create a sufficient deterrent effect for companies with a high turnover to engage in anti-competitive conduct. Moreover, a minimum level of fine/penalty should also be specified such that the competition tribunal or courts cannot use their discretionary power to impose a negligible penalty on anti-competitive conduct of a significant magnitude.

Separation of investigative and adjudicatory powers: In order to promote specialization and to make an impartial judgment on the existence of anti-competitive practices, it is necessary to separate investigative and adjudicatory powers. Otherwise, the competition authority may become the investigator, prosecutor, judge and jury, all rolled into one (Khemani, 1995). Moreover, if both the powers are given to one agency, there could be a tendency in the competition authority to be biased in favour of the investigation report and the judgment could invariably go against the business enterprises, which have been seen as conducting anti-competition practices as per the report of the investigative agency. Should this happen, business groups will automatically be against the very existence of the competition authority (Adhikari and Knight-John, 2003).

Even in the case of adjudication, litigation should be used as the last resort and other mechanisms of alternative dispute resolution should be used as extensively as possible. Litigation tends not only to be costly but also to be adversarial in nature (Adhikari, 2003b).

Triggering an investigation: There must be clear criteria to trigger cases or investigations, in the absence of which, the law will create business uncertainty and undermine the competitive market process. While too strict an application of competition rules may impede the ability of companies to attain a critical size and tax their efficiency, too lax an approach may lead to the entrenchment of monopolistic enterprises in the market (Khemani, 1995).

The problem is further compounded by the fact that there are a number of grey areas in the administration of competition law. For example, a merger need not be harmful as long as it does not result in providing “market power” to a business enterprise. It is therefore advisable to specify the threshold level of “market power” for triggering an investigation at the time of drawing up the law. Likewise, while some business practices (such as cartels) are regarded as illegal in virtually all jurisdictions and hence prohibited, some other practices (such as exclusive dealings or vertical mergers) should be examined on a case-by-case basis applying a “rule of reason” approach (Adhikari and Knight-John, 2003).

Appeal mechanism: In order to enhance the credibility of the competition authority and to provide a fair opportunity for all parties to get access to justice, there should be an effective appeal procedure, whereby any party not satisfied with the decision of the competition authority on points of fact and/or law may appeal to a higher authority. The competition authority could also commit some errors of law and/or interpretation. However, the existence of an appeal mechanism poses a credible threat for the competition authority to exercise the utmost caution while delivering judgment against any business groups or enterprises (Adhikari and Knight-John, 2003).

Private as well as public enforcement: A sound competition law should include mechanisms that address the concerns of consumers and companies affected by anti-competitive practices. In some countries, private action for the redress of injury resulting from violations of the competition law may be instituted before an appropriate court or tribunal by those people (both private companies and consumers) who have been harmed (Knight-John, 2003). Such private action has at least two benefits: it supplements and reinforces public enforcement of the competition law, and it frees the competition authority from having to obtain such redress on behalf of private parties.

Prohibition and remedial orders: The appropriate remedy for many types of anti-competitive practices is to simply demand that the offending party stop engaging in the conduct or take other actions to eliminate the effects of the unlawful practices. Punishment is also appropriate if the conduct is egregious. However, some of the illeffects of anti-competitive behaviour are not readily apparent to business people, who may have engaged in the conduct initially in good faith. The competition law should empower the competition agency to prohibit the conduct or redress the harm caused by it (Adhikari, 2003c).

Protection of confidential information and avoidance of conflict of interest: If the competition authority were to receive cooperation from business sectors while conducting an investigation into a potential competition abuse case, they should institute a system for protecting the confidentiality of private information, which was acquired during the process of investigation or proceedings (Khemani, 1995). Such information, if handed over to competitors, could cause enormous businesses losses. Moreover, there lies a strong possibility that competitors would try to acquire and use such information for furthering their own profit motive, by using the officials of the competition authorities. Such activities should therefore be legislated as being illegal.

Competition advocacy: Since policy formulation is a dynamic and evolving process, the government is constantly involved in revising, reviewing and updating its policy space. At times, private restrictive business practices (RBPs) are often facilitated by various government interventions in the marketplace. Thus, the mandate of competition authorities should extend beyond mere enforcement of competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect the competitive market structure, business conduct and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower entry barriers, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace (World Bank and OCED, 1999: 93). This makes the government and competition authority more accountable, increases awareness of the costs and benefits of alternative policies, and helps to ensure that government policy objectives do not work at cross purposes (Adhikari, 2003b).

Of late, concerns have also been expressed by civil society entities with regard to the narrow tailoring of the existing definition of competition advocacy, as it focuses solely on the role of competition authority. As such, there is a strong demand – and a very valid one – from consumer organizations to expand the definition of competition advocacy to include the roles of other interested parties (such as consumer groups), which have a significant stake in fostering competition.

Budgetary provisions: Implementing competition law is a resource-demanding task. The competition authority requires a considerable degree of skill and competence to address complex issues ranging from how to determine dominance or at what level to set threshold limits to how to evaluate competition cases using a "rule of reason" approach. However, in several countries, competition agencies struggle with these issues and are unable to handle their caseload because of a lack of qualified staff.

The apparent problems, especially an exclusive dependence on the government budget for funding the activities of the competition authority, bring us to the related issue of whether and how the authority can become financially independent. Adhikari (2002a: 30–31) provides a list of alternative means to raise resources. First, resources could be raised by way of fines. While this option has been challenged on the grounds that it could create an incentive for the competition agency to charge unduly high fines to function as a financially sustainable unit, the establishment of an appellate mechanism would allow a party to contest not only the decision of the authority but also the amount of the fine.

A second alternative could be for the competition authority to charge fees for the services that they provide to the government and business associations, while a third choice could be to introduce a system similar to a court fee whenever firms file complaints against their competitors. The advantage of this approach is that it would deter frivolous complaints. A final option could be to obtain support from the bilateral and multilateral donor agencies for funding and technical assistance. In summary, the most practical solution would perhaps be a mix between state and other sources of finance, with the former option progressively forming less of the resource base than the latter.

Independence of competition authority: A common feature in most developing economies is the absence of political ownership and support for competition law. This also translates into undermining its independence as a professional "watchdog" of competition. Some of the prerequisites to create independence within the competition authority include legal independence, where the competition agency is not a part of any government department and where members cannot be removed without proper justification, financial independence, and, *de facto* independence, where it would have the cooperation of other government agencies in enforcing its decisions.

As suggested by Adhikari and Knight-John (2003), some practical options for enhancing the independence of a competition agency would be to stipulate that the agency should be accountable to the legislature or to a Parliamentary Committee, for instance to fix the term of Commissioners so as to enable them to receive adequate exposure and experience, but not too long so as to run the risk of political or regulatory capture, and to provide for start-up funds from the government budget whilst leaving the responsibility for generating more funds to the agency through fines, fees or donor support, etc.

Exemptions and exceptions: Based on the review of exemptions and exceptions provided for in the competition legislation of countries around the world and given the peculiarities of the Nepalese economy, it can be argued that the following areas should be excluded from the application of competition law: (a) SMEs, (b) small farmers and farmers' cooperatives, (c) R&D cooperation between competitors for the introduction of new product or process, (d) joint purchasing or import of raw materials by small enterprises to reduce their costs, (e) trade associations formed to gather and exchange statistics, determine product standards, exchange credit information, and institute environmental protection measures, (f) agreements entered into between the producers or suppliers to promote export, and (g) the collective bargaining rights of the workers. However, it is necessary for the government to review most of these measures periodically and to introduce a sunset clause to ensure that such exceptions are not provided permanently.

Based on the above analysis, it is necessary for Nepalese agencies drafting the competition law to be cautious about the process as well as the content of the legislation. Moreover, it is necessary for the government to take stakeholders into confidence before enacting the competition law. Once the law is enacted, a programme on competition education and advocacy should also be launched in order to create a competition culture among all the concerned stakeholders. Some useful initiatives are already under way on the side of CSOs.[17] It is necessary for the government to engage the private sector as well as other stakeholders in the process.

7. Conclusion

Despite serious efforts made by the LDCs to achieve their development objectives, they have not been able to do so due to a variety of reasons. While they have either consciously or spontaneously adopted various types of competition policy measures, including trade and investment liberalization, privatization, deregulation and trimming down of the government's role with a view to creating a space for the participation of the private sector in the economic development endeavours, they have not been able to infuse competition in their economies. Nepal is no exception.

Nepal has made a commitment to enact competition law at the time of its accession to the WTO. However, due to limited knowledge among the policy makers about the functioning of the competition policy and the design and implementation of competition law, they seem to be worried that competition law might remove the sovereign rights of the government to achieve legitimate policy objectives. Moreover, it is clear from the analysis of the functioning of the competition regimes in various developing countries that implementation of competition law is a stupendous task, not least because it is resource demanding and it requires a very high level of sophistication. Further, there is a fear that lack of political will, competition culture and the prevalence of mal-governance may imperil the prospects for their effective implementation.

Fortunately, however, a cursory glance at the competition regimes in developed and developing countries around the world suggests that they do not take "economic efficiency" as the sole criterion for judging the legality of various anti-competitive practices. Most of the competition laws do provide some policy space for the governments to achieve their development objectives.

It has been well established that competition law must be based on the socio-economic and political reality of each country concerned and that one size of competition law does not fit all countries. One also needs to understand that the implementation of a comprehensive competition policy and law requires a strong government, which many developing countries at a low level of industrialization do not have. Therefore, at the very least, for such countries there will need to be far fewer and simpler competition rules which are capable of being enforced. Clearly, it would be unfair, if not absurd, to subject a Sierra Leone-type country (or Nepal for that matter) to the same competition policy discipline as the US (Singh and Dhumale, 1999). Therefore, it is advisable for the LDCs to make full use of development dimension provisions while drawing up their competition policy and law.

Even if a state-of-the-art competition policy is designed and competition law enacted, taking development dimension fully into consideration and after a series of consultations with the stakeholders, their implementation could still be hampered by a number of factors. Unless and until a competition authority is provided with much needed independence – both in terms of decision making and budget – the chances are that it would not serve the intended purpose. If a minister is allowed to appoint the commissioners and authorized to remove them without any reasons given whatsoever, it would lead to disastrous consequences.

Another issue that merits attention is that the introduction of a development dimension to the competition policy does not mean that the government should use these measures on a permanent basis for all the sectors/areas. Therefore, the introduction of a sunset clause to the legislation itself could help remedy the likely problem of the creation of vested interests seeking eternal protection. Moreover, clear criteria should be laid down for providing exemptions and exceptions and the scope for discretionary decision making circumscribed. Discretionary power only means providing an incentive for the competition authority to engage in corruption.

One of the major objectives of competition policy and law implementation is to foster the competitiveness of domestic enterprises so as to enable them to compete in the international market. As has been made amply clear by the examples of Japan and Korea, rivalry among domestic enterprises at national level forces the enterprises to become competitive both at national and international levels.

It is worth sounding a word of caution, however. Competition policy is only one of the elements to help ensure competitiveness by forcing companies to be more efficient, engage in R&D and foster innovation in order to improve the quality of products and cut costs. There are a host of other measures that need to be taken in order to enhance the competitiveness of domestic enterprises – such as improving access to affordable credit, improving supply-side constraints, trade facilitation and above all good governance.

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Notes

1 For example, coffee comprises 82.7 per cent, 69.4 per cent and 63.6 per cent of the share of total export value of Uganda, Rwanda and Ethiopia, respectively. See Chandrasekhar and Ghosh (2000: 3).

2 On average, Nepal's applied tariffs on agricultural products are less than 10 per cent and on industrial products 12.5 per cent. However, the government was successful in maintaining its bound tariff on agricultural products at 42 per cent and on manufactured

products at 24 per cent on average. See WTO (2003).

[3] As per Section 2, the purpose of the Act is to promote and maintain competition in the Republic in order –
a) to promote the efficiency, adaptability and development of the economy;
b) to provide consumers with competitive prices and product choices;
c) to promote employment and advance the social and economic welfare of South Africans;
d) to expand opportunities for South African participation in world markets and to recognize the role of foreign competition in the Republic;
e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

[4] It is, however, like a chicken and egg situation, making it extremely difficult to find out which was the cause and which was the effect – whether corruption led to anti-competitive practices or *vice versa*.

[5] For example, in Tanzania, salaries of the personnel at the competition authorities were on par with government (which is very low), and much lower than that of the private sector. See CUTS (2002).

[6] Convinced of the need to develop competition culture in Nepal, South Asia Watch on Trade, Economics & Environment (SAWTEE), a Kathmandu-based NGO has been implementing a 3-year programme entitled *Competition Advocacy and Education Project (CAEP)*. The first workshop under the Project was organized in Birat Nagar, an industrial town in Eastern Nepal. One of the objectives of the workshop was to provide an opportunity for the stakeholders to comment on the proposed competition legislation of the country. People from various walks of life made a significant contribution to improving the draft legislation, but business people were found to be least interested in making any major contributions.

[7] A comparison of the lending rates offered by the then 11 commercial banks in two periods (January 1998 and May 2000) for three categories of loan (priority sector loan, importers loan and loan against fixed deposits) conducted by Adhikari and Regmi (2001), revealed that there was a clear pattern of interest rate cartel, facilitated by NBA.

[8] A comparison of the airfare charged by the then six private airlines as of June 1999, as documented in Adhikari and Regmi (2001), revealed that there was a clear pattern of fare cartel, facilitated by AOAN.

[9] Nepal still does not have an anti-dumping law or institution.

[10] Earlier they used to have working capital loan (WCL) as a category. Later they provide separate interest rates for their "red-carpet" clients (corporate and multinational), then the normal category, within which they have two sub-categories – prime and others. The interest rate difference between, say, a multinational company and a customer falling within the "others" sub-category could be up to 3 per cent (10 per cent for MNCs and 13 per cent for the "others" sub-category of clients. See http://www.nibl.com.np/interest_rate.htm (accessed on 28 March 2004) for a sample interest rate structure of a Nepalese bank, namely Nepal Investment Bank Ltd.

[11] For example, in the case of Nepal Bank Ltd., the oldest commercial bank of Nepal (as of December 1999), of the total loans of 8.5 billion rupees, 33 per cent is concentrated in the top five big business groups. The Golchha organization, the largest business house in the country, alone accounts for 39 per cent of the total loans of these five groups. It is to be noted that 6.6 billion rupees is the bad debt out of the total outstanding loan of 8.5 billion

rupees. See Upadhyaya (2001). As per the latest information, which is not readily available due to reasons of confidentiality, the situation is reported to be even more alarming. See also Spotlight (2001).

12 For example in the case of Nepal, SMEs account for 90 per cent of all enterprises, employ 95 per cent of the non-agricultural workforce and contribute 50 per cent of the industrial GDP. See Khatiwada (2001).

13 Article 1505 (Exceptions), Provision 11 of the Act states "the establishment of formal agreements between small entrepreneurs engaged in the retail sale of the same or similar commodities for the purpose of bulk purchase of those commodities in order to meet in good faith, competition of businesses with substantially larges sales volumes. For the purpose of this paragraph, the term "small entrepreneur" means a merchant whose gross receipts from all sources in any year cannot reasonably be expected to exceed US$ 250,000 and who will not employ more than 12 persons."

14 This requirement has recently been abolished.

15 Refer to the example of price discrimination prevalent in the banking sector discussed in Section 4.7 above, which is mainly due to the inability of the Central Bank to control such malpractices.

16 For example, Nepal Indosuez Bank Ltd. used to be a 50:50 joint venture bank between local shareholders (institutions and individuals) and the Credit Agricole Indosuez (CAI) Group of France. In 2002, the CAI group sold its 50 per cent stake to local shareholders, who then converted the name of the bank to Nepal Investment Bank (NIB) Ltd. No formal customer satisfaction survey has been conducted to assess the service level of the new entity, but, from casual observations, it can be concluded that the level of service has improved. The Bank having been judged "Bank of the Year" by the London-based Financial Times Group's – the Banker – for the year 2003 is a testimony to this. "As the only major bank in Nepal that does not have foreign banks as shareholders, NIB made significant improvements in its technology and services last year. These include the roll-out of debit cards for constant access to banking services, and telephone banking. It plans to launch internet banking and Visa credit cards soon" stated the release issued by The Banker on 03 September 2003, after handing over the award. Visit http://www.thebanker.com/news/fullstory.php/aid/593/Nepal.html for further details.

17 For example, since February 2004, South Asia Watch on Trade, Economics & Environment (SAWTEE) has started a 3-year programme entitled *Competition Advocacy and Education Project* mainly with the objective of building a healthy competition culture in the country. This project is being implemented in close coordination with the Ministry of Industry, Commerce and Supplies (MoICS).