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DISCUSSION PAPER

COMPETITION POLICY IN SMALL ECONOMIES

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LIST OF ACRONYMS

AD	anti dumping
AOAN	Airlines Operators Association of Nepal
Bn.	Billion
BOI	Board of Investment
CARICOM	Caribbean Community
CER	Closer Economic Relations
COL	Ceylon Oxygen Ltd.
COMESA	Common Market for the Eastern and Southern Africa
CSOs	civil society organisations
CUTS	Consumer Unity & Trust Society
CUTS-CITEE	CUTS Centre for International Trade, Economics and Environment
DFID	Department for International Development
DSE	Development Policy Forum
EC	European Commission
EEA	European Economic Area
EFTA	European Free Trade Area
ESRF	Economic and Social Research Foundation
EU	European Union
FCB	Food Corporation of Bhutan
FDI	foreign direct investment
FSL	Food Specialities Ltd
FTC	Fair Trade Commission
FTCA	Fair Trade Commission Act
GATS	General Agreement on Trade in Services
GDP	gross domestic product
GNPL	Gandaki Noodles Pvt. Ltd.
HLL	Hindustan Lever Ltd.
IGL	Industrial Gases (Pvt.) Ltd.
IMF	International Monetary Fund
IPRs	intellectual property rights
ISI	import substitution industrialisation
ITO	International Trade Organisation
LDCs	least developed countries
LKR	Sri Lankan Rupees
MCP	multilateral competition policy
MERCOSUR	Southern Common Market
MIICF	Ministry of Internal and International Trade and Food
MITI	Ministry of International Trade & Industry

Mn.	**Million**
MNCs	**Multinational Corporations**
MRTP	**Monopolies and Restrictive Trade Practices**
MTI	**Ministry of Trade and Industry**
NAFTA	**North American Free Trade Agreement**
NATA	**Nepal Association of Travel Agents**
NBA	**Nepal Bankers Association**
NTBs	**non-tariff barriers**
NTC	**National Transportation Commission**
OECD	**Organisation for Economic Cooperation and Development**
Pro Public	**Forum for Protection of Public Interest**
R&D	**research and development**
RBPs	**restrictive business practices**
SAP	**Structural Adjustment Programme**
SAWTEE	**South Asia Watch on Trade, Economics and Environment**
SEC	**Securities Exchange Commission**
SLTA	**Sri Lanka Telecommunication Act**
SMEs	**small and medium enterprises**
SOEs	**State Owned Enterprises**
TBL	**Tanzania Breweries Limited**
TCC	**Tanzania Communication Commission**
TRC	**Telecom Regulatory Commission**
TRIMS	**Trade Related Investment Measures**
TRIPS	**Trade Related Aspects of Intellectual Property Rights**
TSh	**Tanzanian Shilling**
UNCTAD	**United Nations Conference on Trade and Development**
UR	**Uruguay Round**
UTTA	**United Transport and Taxis Association**
WTO	**World Trade Organisation**
ZCC	Zambian Competition Commission

BACKGROUNDER AND EXECUTIVE SUMMARY

Competition policy is not a new issue – it has been around since the time ill-fated charter of International Trade Organisation (ITO) was drafted. Similarly, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) provided a major fillip to the competition movement around the globe. Besides, organisations like the World Bank and Organisation for Economic Cooperation and Development (OECD) have conducted enormous amount of intellectual works in the areas of competition policy and law.

While developed countries, especially OECD members, were quick to adopt competition policy and laws as means to preserve and promote competition in the market place, developing countries, barring a few, did not show much interest in the issue. This is primarily because of heavy-handedness of state apparatus during that time. Since most developing countries were pursuing state assisted import substitution strategy, the sole objective was to protect domestic industries through high tariff walls. Foreign investments too were restricted through a number of clauses (such as imposing local content requirement, technology transfer requirements, and ceiling on repatriation of profits) and some countries had even earned the bad reputation of nationalising foreign owned companies.[i] Since State was the major player in the economy, preserving the monopoly of the State Owned Enterprises (SOE) was considered a vital ingredient of the economic development process. Finally, some countries (including OECD members) actively supported business concentration in the name of creating economies of scale and export cartels as part of their industrial policy.

When the import substitution industrialisation (ISI) strategy fell like rows of dominos starting from South East Asia to Latin America then to South Asia and Africa, the rationale for competition policy became crystal clear. This was further buttressed by two developments, which moved independently but concurrently – the implementation of Bretton Woods Institutions driven structural adjustment programme and the fall of Berlin Wall and consequently collapse of Eastern Bloc. Both these developments resulted in greater degree of openness in the global economy and consequently the need for competition policy. However, a group of countries were still reluctant to adopt competition policy for some inexplicable reasons. Finally, these dominos too fell after the formation of Working Group on Trade and Competition Policy following the conclusion of the first Ministerial Conference of the World Trade Organisation (WTO) held in Singapore in 1996. Number of countries adopting competition policy and enforcing competition legislation have registered a phenomenal growth after this turning point in the history.

In between these developments, competition policy is being implemented in a rather unique and unusual manner at the regional level. While Treaty of Rome remains the first treaty which included competition policy in Article 85 and 86 (now 81 and 82), a number of other regional trading agreements, notably North American Free Trade Agreement (NAFTA),[ii] Common Market for the Eastern and Southern Africa (COMESA),[iii] and Southern Common Market (MERCOSUR)[iv] too have included provisions relating to competition in their respective agreements. Moreover, in every bilateral free trade agreement and association agreement signed between the European Union (EU) and other countries or

group of countries, a section on competition has been deliberately included. Last but not the least, some economies, which do not have the capacity to have a national competition policy and legislation in place, have implemented the regional competition policy as a substitute for national competition policies. The Protocol VIII to the Treaty of Chaguaramas, which deals with anti-competitive business practices of CARICOM region of the Caribbean Community (CARICOM) is a glaring example.

Despite opposition by the majority of the WTO membership, the push for inclusion of the competition policy in the multilateral discipline was so intense that its *demandeurs* finally managed to get it included in the Ministerial Declaration of the fourth Ministerial Conference of the WTO held in Doha from 9-14 November 2000. The wordings of the relevant part of the declaration can be interpreted to mean that negotiations on competition policy shall start after the fifth Ministerial Conference of the WTO, provided WTO members reach a consensus to do so. However, the view of protagonists is that since negotiation is inevitable, all that need to be decided through "explicit consensus" are the modalities of negotiations. While antagonist and protagonists are likely to fight over this issue tooth and nail during the run up to the fifth Ministerial Conference of the WTO and at the Conference itself, the countries which are serious to safeguard their interests in this area have already started planning their negotiating positions internally. Those who are maintaining fairly rigid defensive position and not doing their homework to face eventual negotiation (should that happen) are likely to repeat the mistakes they committed during the Uruguay Round (UR) of multilateral trade negotiations.

Whether or not the negotiation takes place, one of the most controversial aspects of having a multilateral framework on competition is the following: given the sheer asymmetry between developed countries and developing countries on the one hand, and bigger developing countries and smaller developing countries on the other, it will be impossible to have a "one-size-fits-all" approach to competition policy for all the countries. For example, the peculiarities of small economies demand their government to become proactively engaged in correcting market failure and making the market function as a matter of priority. Competition policy has its own place in a small economy, however, it is quite different than what it is in a bigger economy.

Given the special position of small economies in the global economy, it has to be recognised that their competition problems could be addressed only by designing and implementing *sui generis* competition policies and legislation that suit their national requirement. Rather than following top down approach,[v] which could result in implementation problems at a later stage, it is better to prepare a document well in advance to map out the requirements of small economies and the kind of competition regime that would best suit them. The major objective of this discussion paper is precisely to do this. However, this discussion paper, like others, is not a conclusive document. It only flags certain issues for discussion among the policy makers, competition officials, business people, civil society organisations (CSOs) and above all, the trade negotiators – so that they could come out with better ideas on how to move forward.

Given the nature of economy and its requirement to attain critical mass in some sectors by capitalising on their comparative advantage, some of the measures, which are considered anti-competitive elsewhere might have to be relaxed, for the time being, in small economies. In their pursuit of economic development, they might need to shelter their

nascent industries from the competition of giant foreign multinationals. Because of the sheer contribution of the small and medium enterprises (SMEs) to the economic development, employment generation and poverty alleviation, they may wish to protect their SMEs from foreign competition. These are all legitimate policy objectives sovereign nations would like to achieve and they would not tolerate any attempt to restrict them from using these tools. If competition policy restricts them from exercising such options, it is more often than not likely to be resisted. Clearly, there is a need, therefore, to underpin 'development dimension' in the competition discourse.

Against this backdrop, South Asia Watch on Trade, Economics and Environment (SAWTEE), which has a decent background and experience on competition issues, particularly from southern perspective, decided to bring forth this discussion paper. The process of preparation of this document was further buttressed by the works done by its member organisations, notably, Consumer Unity and Trust Society (CUTS), Jaipur and Forum for Protection of Public Interest (Pro Public), Kathmandu. CUTS, for one, is currently conducting a programme titled *Competition Regime in Select Commonwealth Countries (7-UP Project)* in three South Asian (India, Pakistan and Sri Lanka) and four African (Kenya, South Africa, Tanzania and Zambia) countries. Out of them three countries (Sri Lanka, Tanzania and Zambia) happened to be small economies falling exactly under the definition SAWTEE has prepared for this discussion paper. Therefore, the reports of all three countries prepared under 7-UP Project have been used extensively in the process of preparation of this paper. Since finding of data and information pertaining to small economies[vi] is a daunting task, the country reports produced by CUTS under 7-UP Project were extremely useful in the process of preparing this paper.

We hope that this document will provide some food for thought to various stakeholders, particularly in the small economies, keenly interested on national, regional as well as multilateral issues surrounding competition discourse.

CHAPTER - I

COMPETITION POLICY: CONCEPTUAL FRAMEWORK

1.1 Introduction

It is in the interest of the developing countries to start preparing for negotiations because they should not be caught unprepared

After the inclusion of competition policy in the Doha declaration at the insistence of the EU, Japan, Korea and Norway (the major *demandeurs),* this subject has generated tremendous interest among the governments, businesses, academics and civil society organisations from the North and South alike. Despite the fact that developing countries were opposed to the inclusion of any new issues (including competition policy) in the WTO proscenium unless and until their concerns for 'implementation issues' were sufficiently addressed, it is likely that negotiations on this issue will take place after the fifth Ministerial Conference of the WTO to be held in Mexico in 2003. Therefore, it is in the interest of developing countries to start preparing for negotiations because they should not be caught unprepared. However, before discussing the desirability of the competition policy at the multilateral level and determining the possible position that the developing countries in general and small economies in particular should take, it is necessary to understand the meaning and significance of competition policy in an increasingly globalised world economy.

Competition policy is an ensemble of government actions aimed at protecting and promoting competition in the market. *A la* Richardson (1998), "Competition policy comprises measures and instruments used by government to influence 'conditions of competition' that reign in the markets".[vii] This may include well-motivated articulation of competition issues in industrial policy, trade policy, investment policy, service policy and consumer policy as well as enactment of competition law. However, competition law should be used only as the last resort, i.e., when all other measures fail to bring about competitive outcome. Competition policy can be regarded as a genus, of which competition law is a specie. The former covers a whole range of executive policies and approaches, while the latter is a piece of legislative enactment enforceable in a court of law.[viii]

Market power forms the basis of discussion on competition policy, without its appreciation it is difficult to comprehend the significance of competition policy

Even free and open trade policy form a basic tenant of competition policy provided that results in reducing the 'market power' of domestic enterprises. Since market power forms the basis of discussion on competition policy, one needs to define it and analyse its implications in order to better appreciate the significance of competition policy.

1.2 Market power and structure

Market power is defined as a situation where producer/seller has some control over the market such that it can raise the price of its goods or services without having to lose any consumer. Market power is dependent on market structure faced by a firm and consequently the shape and steepness of its demand curve. When there is perfect competition, each firm is a price taker and it can only sell at the going price. If it attempts to sell at any price higher than that, it will lose all its customers as they will switch over to its competitor(s). On the other hand, if it attempts to sell below prevailing price, it will be able to quickly clear its stocks as all the customers would come to it, but it incurs losses by doing so since

it cannot cover its costs. This is the reason why a demand curve of a perfectly competitive firm is horizontal, reflecting perfect elasticity of demand curve.[ix] In such a situation the firm does not have any market power. An elasticity of demand is a measure to ascertain how many consumers will reduce their consumption of the goods or services in question, should there be a price increase. If more than proportionately higher number of consumers switch to other goods and services as a result of change in price, the demand is considered more elastic and vice versa. Conversely, if a seller reduces its price, it witnesses more than proportionate gain in consumers base. Therefore, a firm is said to have lower market power when it is facing more elastic demand curve and vice versa. This is shown in Figure 1 in the Appendix. In the figure, a production of QC and price equal to PC is called 'Pareto efficient' or 'Pareto optimal'. Any movement beyond these points are considered inefficient from the welfare point of view. Since the demand curve of the firm is infinitely elastic, a small price change could affect consumer behaviour significantly.

An elasticity of demand is a measure to ascertain how many consumers will reduce their consumption of the goods or services in question, should there be a price increase

There lies a monopolistic market structure at the other end of the continuum, where because of the single producer/seller in the market, a firm can exert sufficient market power on the consumers. This is shown in Figure 2 (Appendix). The model of monopoly is central to the notion of market power in economics. A monopolist is the supplier of a product with neither perfect nor even "close" substitutes.[x] Theoretically, a monopolist seller can charge any amount of price to the consumers (within the range of consumers willingness to pay) without having to lose any of the consumers. As mentioned in the case of perfect competition, the degree of market power is determined by the shape of the demand curve and its elasticity. Unlike in the case of perfect competition, a monopolist faces a downward slopping demand curve. Its production and pricing policy will be determined by the point of intersection between the marginal revenue and marginal cost curves. The demand curve is also the average revenue curve for the firm.

Since a monopolist seller can exert sufficient market power, he or she can also charge any amount of price to the consumers (within the range of their willingness to pay) without having to lose any of the consumers

Notice that under perfect competition the firm would have produced QC units of output and charged PC to its consumers. However, due to market power, monopolist is not obliged to produce and sell at these levels. It would produce a lower quantity QM (<QC) and will charge higher price PM (>PC) to the consumers. Therefore, monopolist can extract consumer surplus and will earn higher profit, as shown in the figure. This results in inefficiency due to the loss to consumers. The triangle shown in the figure represents 'deadweight loss' – representing a loss to the consumers. However, if the monopolist can apply the price discrimination principle, it could extract this portion and serve the unserved segment of the consumers. This will remove the inefficiencies mentioned above.

Notice that a monopolist, like anyone else, tries to produce at the equilibrium level, i.e., where its marginal revenue equals marginal costs. A high 'price-cost margin' or for that matter any movement further from Pareto optimal solution is considered inefficient, reflecting the market power of the firms in question. Then comes the issue of elasticity of demand. Since a monopolist faces a lower elasticity of demand compared to a perfectly competitive firm, it has a greater market power.

A monopolist faces a lower elasticity of demand compared to a perfectly competitive firm and it has a greater market power

A third type of market structure is oligopoly, where there are a few sellers in the market, the extreme case of which being a duopoly where

there are only two sellers. When there is very limited number of firms there is a large interdependence among them and it is in their collective self-interest to cooperate than compete. The theory of 'prisoners dilemma' suggests that they are likely to cheat when they are strategically interacting with each other, despite the fact that both of them know that they would both lose by cheating. However, when there are repeated interactions, players tend to act rationally and not to repeat the mistakes committed in the past and hence are likely to cooperate leading to what is technically known as 'sub-game perfect Nash equilibrium.'[xi]

The slope of demand curve in an oligopolistic market structure is less elastic than that of a prefect competitor and more elastic than that of a monopolist

For the European Commission (EC), for example, the "duopolistic structure" of market tends to limit competition between holders of duopoly. Indeed any aggressive conduct on the part of either undertaking will very likely produce a corresponding reaction on the part of the other, whose market potential is comparable. The conviction will therefore arise that the maximisation of profits of both will be best served if they refrain from competing with one another.[xii] In an oligopolistic market structure, firms collectively wield significant market power. However, the slope of its demand curve is less elastic than that of a prefect competitor and more elastic than that of a monopolist.

Monopolistic competition encompasses some elements of market power and some elements of perfect competition

A fourth type of market structure is what is known as "monopolistic competition" – which has some elements of market power and some elements of perfect competition. A large number of sellers operate in such a market structure, however, unlike in the case of perfect competition, they do not produce homogenous goods. They produce differentiated products – which are close substitute to each other. Hence, due to cross price elasticity, when a firm increases its price beyond a trigger level[xiii], it will see a shrinkage in its costumer base, i.e., customers will move towards its competitors. In this market structure firms do enjoy market power within their own market segment, however, due to availability of a large number of substitutes, they will not have enough market power in the 'relevant market'. A relevant market should take into account product market and geographical market. As per the EC (1999):

> A Relevant product market comprises all those products and/or services, which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. Relevant geographic markets are defined as comprising the area in which the undertakings concerned are involved in the supply and demand of the products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

In order to distort, reduce or eliminate competition, dominant firms can abuse their market power in a number of ways

It is therefore possible to define relevant market as broadly as possible. However, it is not possible to haphazardly stretch the market too far like done in Tetra Pak case.[xiv] Competition authorities around the world proceed to define relevant market prior to establishing whether or not a firm has dominant position in the market. While a dominant position is not bad *per se,*[xv] abuse of this position (real or potential) is what competition authorities are invariably concerned about.

Dominant firms can abuse their market power in a number of ways, and consequently distort, reduce or eliminate competition. They can force smaller firms to merge with themselves or they can simply take-over these smaller entities. They can also resort to predatory pricing with the objective of driving the competitors out of the market and eventually enjoy monopoly position. They can create entry barriers for new firms

by investing heavily in advertising and promotion. However, market power is not the only means through which firms thwart competition.

1.3 Anti-competitive practices: areas of concerns

Even in the absence of market power, firms can make systematic attempts to reduce, distort or eliminate competition through various restrictive business practices (RBPs). RBPs are of two types – horizontal and vertical. When one firm on the same level of business makes collusive arrangement with another (retailer with retailer or manufacturer with manufacturer), such arrangements are known as horizontal. When a firm engages in RBPs with another firm at different level of business (manufacturer with wholesalers, distributors or retailers) such RBPs are considered vertical RBPs. While horizontal RBPs are considered hard-core arrangements and are outlawed in most jurisdictions, vertical arrangements may not always be bad *per se*. Some of them enhance efficiency of the distribution and are beneficial to the consumers as a whole. Therefore, only those vertical arrangements come under the scrutiny of the competition authorities that have anti-competitive effects.

Seen from a seller's perspective price fixing cartel is not only possible, but also becomes an imperative in an oligopolistic market structure

Cartel is one major form of horizontal RBP, which is formed to ensure joint profit maximisation. One way of doing so is to fix the price/charge for selling of particular goods or provision of particular services, which is known as "price fixing" cartel. As mentioned earlier, such collusive behaviour is not only possible, but also becomes imperative in an oligopolistic market structure, where interdependence between and among firms is very high. The end result of this arrangement is to restrict the choice of the consumers and create a monopoly like situation in the market with each firm holding significant market power. At the end of the day, each firm is able to earn monopoly rent because prices are fixed almost at the monopoly level. Since price fixing cartels are considered hard-core RBPs and considered illegal in most jurisdictions,[xvi] firms do not write contracts to enforce such arrangements. They would rather do it through tacit means.[xvii]

Market sharing is another form of horizontal arrangement, where members of a cartel allocate market among themselves and each member is assigned an exclusive geographic territory to look after. Other members promise not to encroach upon the territory of the former in return to its commitment for the same. End result of this arrangement is to create a monopoly position in each market for each firm and artificially creating market power which can be abused as and when the firm finds it necessary and convenient. An extension of this cartel, which is prevalent in most developing countries, is the syndicate system managed by transport operators (for details see chapter III).

Bid-rigging arrangement does not only ensure that the contract is awarded within and among the member of the 'rigging mafia' but also exclude other fair players from the market

Another form of cartel-like behaviour is bid-rigging arrangement, where the firms decide to collude at the time of bidding or tendering. In the case of repeated interactions, firms find it profitable to collude. They tend to decide who among themselves should be awarded the contract and ensure that the designated firm gets it. The firm, which forgoes the chance of being awarded the contract in favour of other is reciprocated by the winner next time around when there is similar type of bidding. Such arrangement does not only ensure that the contract is awarded within and among the member of the 'rigging mafia' but also exclude other fair players from the market.

Exclusive dealing is one such type of arrangement whereby a manufacturer does not allow more than one firm to take its distributorship in a particular territory

As opposed to horizontal measures, firms can engage in vertical arrangements with their suppliers or buyers (another layer in the supply chain) with the objective of eliminating competition and/or reducing choice to the consumers. However, as mentioned above, not all vertical arrangements are anti-competitive. Many jurisdictions have made explicit provision to exempt some vertical conducts from the scrutiny of the competition authorities. [xviii] However, it is worthwhile to discuss about the RBPs, which are vertical but have anti-competitive effects.

Exclusive dealing is one such type of arrangement whereby a manufacturer (for example) does not allow more than one firm to take its distributorship in a particular territory. Even if another distributor with same level of experience, marketing calibre, network, liquidity and capacity applies for the distributorship it will be denied the opportunity. Such kind of behaviour could be harmful to competition and is likely to be frowned upon by the competition authorities. Selective distribution is allowed in many jurisdictions only if objective selection criteria have been developed and they are implemented in a fair and transparent manner.[xix]

Similarly, tied-selling, i.e., combining the sale of fast moving items (generally in short supply) with the slow moving items (generally in abundance) is an offending measure which, despite being vertical, are frowned upon by the competition authorities (for details see Chapter III).

Re-sale price maintenance restricts the ability of an efficient retailer to pass on the cost saving to consumers

Re-sale price maintenance, i.e., the supplier at the higher supply chain (for example manufacturer) fixing the minimum price to be charged by the firm at the lower level of supply chain (wholesaler to retailer) is another form of vertical RBP which is outlawed in most jurisdictions. If the arrangement is to ask the distributor to fix the maximum price, it does not affect competition and is therefore not outlawed. However, when minimum price is fixed the efficient distributors are prevented from the possibility of passing on the benefits of their inefficiency to their customers. Such arrangements are therefore considered anti-competitive.

Likewise, price discrimination and providing special favour to one group of distributors or customers and not to others could have anti-competitive repercussions. A few examples of such practices are provided in chapter III.

If a merger or takeover is at the horizontal level, it can have anti-competitive effect provided firms engaged in such practice either already have some market power or are likely to have a significant market

Another major practice, which could be of both vertical as well as horizontal character depending on nature of transaction – i.e, merger or takeover – can have varied effect on competition depending on its nature. If a merger or takeover is at the horizontal level, it can have anti-competitive effect provided firms engaged in such practice either already have some market power or are likely to have a significant market power. Such practice is likely to raise concern for the competition authorities. On the other hand, if there is no significant market power (real or potential) even if the transaction is conducted at the horizontal level or if the same is conducted at the different level of supply chain (for example, a manufacturer buying up a retailer), there is not much anti-competitive threat.

Finally, one of the major anti-competitive practices relating to abuse of dominance is the predatory pricing. Only those firms with deep pockets, possessing dominant position in the market can afford to pursue this strategy. A firm wishing to predate its competitors sells below its cost of production in order to make the market unprofitable for its competitor

and drive the latter out of the market. The predator has to suffer losses in the interim because it is selling below cost. Then such selling should cause the incumbent firms to leave the market. Finally, the purpose of the predator is served only when it can attain monopoly position, gain significant market power and finally recoup all the losses it had suffered in the past. Proving the existence of 'predatory intent' however is a daunting task.

It has been empirically established that given the absence of barriers to entry, when there is monopoly profit in the market, other firms will enter the industry thus eroding the profitability of the 'predator-turned-monopolist'. The famous case of Matsushita television provides a telling example. In this case, though the US firms claimed that this Japanese company was attempting to predate them, the US Supreme Court found that at the rate in which Matsushita was moving, it would have taken 42 years for it to completely predate the US firms and establish monopoly position in the market, let alone recouping its losses afterwards. Therefore, it is an intricate task, economically as well as legally, to establish the existence of predatory dumping.

Given the fact that measures outlined above could have several deleterious consequences (to be discussed below), government have to make conscious effort to ensure competition in the market because competition is beneficial for the economy.

1.4 Raison d'etre of competition

One of the major benefits of having a competition policy is that it increases allocative efficiency of the business enterprises

As a general rule, when competitors vigorously compete for the market there is a tremendous pressure on them to reduce cost and improve quality of goods and services to woo the consumers. Inefficient firms are the first ones to be hit, as they are forced out of the market. Some firms are under pressure to merge with others. This results in a dynamic restructuring process in the economy and only the efficient firms survive in the market.

Another major benefit of having a competition policy is that it increases allocative efficiency of the business enterprises since the resources are allocated only to the efficient enterprises and not to the wasteful and inefficient ones. Finally, competition also promotes productive efficiency by allowing firms to exploit economies of scale necessitated by the imperatives to serve a larger consumer base, which was hitherto untapped or under-served.

Once all the firms become equally competitive in the market, they provide competitive threat to each other and this, in turn, deters firms from exploiting the consumers

When all the firms are equally competitive in the market, they continue to provide competitive threat to each other. This threat is credible enough to deter firms from exploiting the consumers. Therefore, it is often said that a good competition policy can complement consumer policy. Writes Jenny (1995):

> **At the simplest level, economic analysis suggests that when confronted to competition, firms will have a strong incentive, if they want to survive, to choose to produce the goods which are most desirable for the consumers (i.e., products for which demand is the most important) in order to maximize their profits, to produce at the lowest possible cost (i.e., in the most efficient manner) the goods or services they sell (again in an effort to maximise their profits but also not to be driven out of the market), to sell these products to consumers at the lowest possible price given the available technology and the cost of factors of production (in order to prevail over their competitors).** [xx]

The objective of competition policy is therefore to ensure competitive outcome by creating conducive environment in the market and if need be by cracking down on anti-competitive business practices through legislative and institutional mechanisms. This will ensure, *inter alia*, efficient utilisation of resources, consumer protection and better distributive justice.[xxi] Let us look at the counterfactual, i.e., absence of competition. Absence of competition leads to inefficient allocation of resources, consumer exploitation and the prevalence of rent seeking practices.

Since competition is least likely to take place by itself, the government has to be actively engaged in preserving and promoting competition. Lachmann (1999) remarks:

> **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 and needs continuous government attention. As economic experience has shown, competition has to be learned at home if a company is to be competitive in the world market. Hence the Government has to supply a competitive framework. A national competition law and policy can supply a competitive environment to national firms, which can lead to competitiveness on an international level in the long run.[xxii]**

On a global perspective, particularly in the context of globalisation, ensuring fair competition is a daunting task for the domestic competition authorities

Whatever we discussed so far relates mainly to the national level. However, both the shape and magnitude of competition problems are different while viewed from global perspective. In the era of globalisation, where free flow of goods, services, capital and ideas has become a reality, domestic competition authorities find ensuring competition a daunting task. Moreover, some anti-competitive practices take place at the global level and some competition problems at the domestic level spill over to another (especially neighbouring) market. National competition authorities, which have limited power, resources or jurisdiction to prosecute such offences are likely to find themselves in increasingly difficult position.

There is a growing body of literature to suggest that a global rule on competition is the only way to solve the problems of global scale. However, cogent argument exists on the other side too. There is no dearth of literature to suggest that global rule on competition will only help multinational corporations of the North to ratchet their market access to the South, and hence it is not wise to have such a global rule.

One negative aspect of such discussion however, is that such a secular issue like competition has now become coloured. There is a clear division among the WTO members on this issue. It has become a North vs. South issue – all the developed countries being the protagonist of a multilateral discipline on competition and all the developing countries being antagonists to the idea.

Issues for Comments

- **Can market power be considered the only variable to determine the degree of competition in a given market?**
- **Is it possible for the competition authorities and courts to prove the existence of predatory intent by analysing conduct of the alleged predator?**

- **It is often said that some of the objectives of competition policy and national economic policy run at cross purpose. If so, how to resolve such conflict?**
- **Why is it difficult for the domestic competition authorities to prosecute competition abuses in the context of globalisation?**

CHAPTER II

PECULIARITIES OF SMALL ECONOMIES

2.1 Introduction

The workable definition of small economies, for the purpose of this paper is: economies with relatively small gross domestic product (GDP) and population, which are marching towards market-oriented system. They include all small island economies, but not all the LDCs

No acceptable definition of small economies has emerged so far. Some tend to equate small economies with the least developed countries (LDCs) or small island economies. While Bangladesh is an LDC, it is not necessarily a small economy. Some others tend to regard economies with small population as small economies. By that token even countries like Singapore and Hong Kong (China) will figure in the category of small economies, which is highly misleading. There is no harm, however, in blanketing all the small island economies of Africa (e.g., Seychelles, Mauritius), Asia-Pacific (e.g., Maldives, Vanuatu, Fiji, Samoa, Tuvalu) and Caribbean (all CARICOM countries) under the category of small economies.

Moreover, LDCs like Mozambique, Lesotho, Liberia, Chad in Africa; and Afghanistan, Oman, Nepal, Maldives, Bhutan, Myanmar, Laos, Cambodia in Asia have all the characteristics of small economies this discussion paper is referring to. This does not, however, mean that some of the developing economies like Sri Lanka or Uruguay or transition economies like Mongolia, Kyrgyz Republic or Former Yugoslav Republic of Macedonia do not fall within the definition of small economies. The workable definition of small economies, for the purpose of this paper is: *economies with relatively small gross domestic product (GDP) and population, which are marching towards market-oriented system. They include all small island economies, but not all the LDCs.* Analysing some of the characteristic features of small economies will help us understand better as to which economies would fall under the category of small economies.

2.2 Characteristic features of small economies

Failure of import substitution industrialisation (ISI) strategy led most small economies to adopt increasingly open strategy towards economic management

Small economies are primarily characterised by small size of the market. While they are affected by the demand or supply shocks in the international markets, they do not have any ability to influence the functioning of the international market, despite the fact that they have high export concentration ratio.[xxiii] Most of these economies have a formidable agricultural sector and a very limited industrial and service sectors. Since the domestic industries cannot cater to the demand of the domestic consumers, their demands are met mostly through imports from the neighbouring countries[xxiv] and/or international market.[xxv] Most of these economies have experimented, at one time or the other, ISI strategy. However, failure of such strategy led them to adopt increasingly open strategy towards economic management. Except in the case of some sensitive products tariffs are generally low. They normally do not have the practice of maintaining non-tariff barriers (NTBs). Their export orientation ratio as well as import penetration ratio is high, reflecting an open trade regime.[xxvi]

The investment regimes of the small economies too are fairly liberalised

Their investment regimes are also fairly liberalised. They welcome foreign direct investment (FDI) in virtually all sectors of their economic activities, with little or no exception, by providing attractive incentives. They normally do not maintain control on remittances of dividends and profits and capital repatriation Therefore, these economies are fairly ‘open’ to outside competition. For example, Sri Lanka has actively sought FDI by introducing a range of measures to enhance its attractiveness as an investment destination. The government encourages private foreign investment in the areas of strategic

importance by offering a range of fiscal incentives.[xxvii] Similarly, in Nepal foreign investors are provided clearance of their proposal through a single window, which is known as one window policy. Except for a limited number of sectors, excluded mainly on cultural and national security grounds, all the sectors of the economy are open for foreign investors. Approval is almost automatic provided the relevant environmental criteria (which are not too stringent) are fulfilled.[xxviii]

Speaking from competition point of view, their markets are fairly 'contestable' not only through import but also through inward investment. However, the market is highly imperfect due to several reasons including information asymmetries, natural growth of firms, natural monopolies, government control over some business activities and collusion among firms.

Helleiner (2001), describes the peculiar situation of small developing countries as follows:

> Small economies are much more "open" to the rest of the world, other things being equal, than are large ones. Exports and imports of both goods and services in such economies account for much larger shares of total economic activity (or GNP); international factor flows (both labour and capital, but especially capital) figure far more prominently in their domestic labour and capital markets; because of the limited profit opportunities that small domestic markets afford, world market prospects are far more important in their investment decisions, and so on. It follows that small countries are much more vulnerable to shocks from the global economy than are large ones…[xxix]

Due to problem of accessibility and reliance on traditional form of trading, some small economies have a large non-monetised sector

Most of these economies are monoculture producers. The major income earners are subject to vagaries of the world economy, being commodity price takers. Due to problem of accessibility in some small economies (e.g., Nepal, Bhutan, Myanmar, Lao, Afghanistan etc.) and reliance on traditional form of trading, they have a large non-monetised sector – the sector outside the market economy. In some countries the composition of this sector could be as high as 40% of the economy. It is therefore difficult for the policy makers and economic planners to encompass these geographical areas into the mainstream economic policy making.

Under the prescriptions of the Bretton Woods institutions [International Monetary Fund (IMF) and the World Bank], most small economies have already opened up their economies. They have reduced tariffs, dismantled quantitative restrictions, introduce*d* partial convertibility of foreign exchange, created liberal investment regime, and privatised public sector enterprises. In fact in most of the small economies things move only when donor governments and/or multilateral organisations exert sufficient pressures. For example, liberalisation of economy is almost invariably due to the pressure from Bretton Woods Institutions.

Liberalisation of economy is almost invariably due to the pressure from Bretton Woods Institutions

However, there is a general propensity among the policy makers to resort to impromptu regulations, which are bound to be *ad hoc* in nature. This has resulted in asymmetry in regulations with some sectors heavily regulated and some sectors not regulated at all. For example, in Nepal financial sector in general and foreign exchange sector in particular are heavily regulated, but health and education sectors operate in laissez faire economy. The case of Tanzania is almost similar as far as asymmetry is concerned. For example, sectors like health, education, natural resources, agriculture, water and energy, banking, and communications are heavily regulated, but other sectors are not.[xxx]

2.3 Market imperfection

Due to imperfect market conditions, governments of the small economies dither about leaving everything in the hands of the market mechanism. There still exits a sizeable bureaucracy making economic decisions, though its presence has proved counter-productive in some cases. Competition culture is neither appreciated nor practiced in these economies. Companies are thriving in the absence of competition and weak government, which cannot ensure competition in the marketplace. Absence of a well-articulated competition policy and law has created a breeding ground for all sorts of anti-competitive practices.

If small economies were not encumbered with SAP, they would have probably never opened up their economies and continued to please the domestic industrial lobby

Concentration of economic power is high and growing in some cases. Those business enterprises, which were hitherto shielded from competition, made their fortune during the protectionist era. They are still among the hard-core supporters of protectionism within these economies. If governments were given the choice to listen to one lobby, they would only listen to this lobby. If governments were not squeezed into signing structural adjustment programme (SAP), they would have probably never opened up their economies and continued to please the domestic industrial lobby.

Market failure is common in small developing economies. It comes about as a result of the divergence between the ideal or textbook conditions of perfect competition on the one hand, and the actual ground economic conditions on the other. In other words, market imperfection is one of the causes of market failure. With the characteristics outlined above, market failure could happen at any time in the small economies. Even if governments attempt to address the market failure through interventions, they can hardly achieve the desired results. Such failures, which are known as government failures, could produce more serious repercussions in the economy than does the market failure.

2.4 Public choice theory in small economies

Consumers may not even know that they are paying higher prices due to protectionism prevalent in the economy

The campaign for protectionism highlights a classic problem of political economy in small economies like in many other economies: *concentrated benefits and dispersed costs*. The benefits of restrictions on foreign import are concentrated in the relatively small goods producing sector, while the costs are dispersed throughout the entire economy – to the consumers, who, due to asymmetric information, may not even know that they are paying higher prices due to protectionism prevalent in the economy. Producers therefore have a very clear and powerful incentive to lobby for protectionism. Even if consumers and tax payers know that they are being hurt due to the protectionist policy of the government, one consumer or tax payer or a small group of consumers and tax payers will not have any incentive to lobby the government primarily because their individual gains from the efforts will be minimal and secondly because others who did not contribute in any manner to the lobbying efforts (so called free riders) would also benefit should the government decide to dismantle walls of protection.

Politicians in the small economies are highly constrained because they are maximisers like any rational individuals. Just as a rational consumer's goal is to maximise his/her utility and producers goal to maximise his return, incumbent government's goal is to maximise the opportunity of being re-elected. While the public choice theory suggests this pattern in all the countries, this seems to be more applicable in the smaller developing economies than anywhere else.

2.5 Nature of competition policy in small economies

Even if some small economies have high per capita income they cannot be considered any thing else but small economies as per the definition adopted by this discussion paper. Howsoever developed such economies might be, they do share some of the unique characteristic features of small economies in several respects. Therefore, their approach to the application of competition policy and law too may be different from other developed countries. Luxemburg, the smallest economy in the EU, for example, shares the same problems that the small economies of some of the poorest regions in the world face in terms of the implementation of competition law.

Luxembourg has had its own national competition law since 1970, nevertheless, the law is not administered by an independent authority, and has not been very actively enforced

Luxembourg is subject to EC competition law through the direct application of Articles 85 and 86 of Treaty of Rome in its national courts, and through the actions of the EC, Court of First Instance and the European Court of Justice where a case involving Luxembourg has a community dimension. However, Articles 85 and 86 are not directly applicable by the Luxembourg national competition authorities. Luxembourg also has had its own national competition law since 1970, however, the law is not administered by an independent authority, and has not been very actively enforced, although there are some recent indications that this might be beginning to change. The philosophy of enforcement was reflected in a 1997 OECD Annual Report on Competition Law Developments in Luxembourg:

> "[I]n the process of redefining its position, in light of its particular economic structure and geographic position, as Luxembourg is not a major manufacturing country, it has to import most of its consumer goods. Furthermore its fabric consists essentially of small enterprises, which find it difficult to compete individually with foreign firms. For this reason, the objectives of competition policy cannot be the same as in neighbouring countries."[xxxi]

Iceland and Liechtenstein do not have competition law at all, while Norway has some form of competition law albeit slightly lenient in the case of merger control

Further, Iceland, Liechtenstein and Norway, though not members of the EU, are contracting parties to the Agreement on the European Economic Area ("EEA Agreement") along with the European Community and its individual member states. Under the EEA Agreement, the three countries are obliged to incorporate the competition rules in the Agreement into domestic legislation. Though there are elaborate surveillance and judicial mechanism to ensure competition rules are properly implemented in the European Free Trade Area (EFTA) member countries, Iceland and Liechtenstein do not have competition law at all, while Norway has some form of competition law albeit slightly lenient in the case of merger control.[xxxii]

Therefore, it is not surprising to see the resistance of competition in small economies. For example, how can small economies like Maldives or Bhutan benefit from having competition policy, institutional arrangement and legislation is not yet clear. There are numerous problems to be encountered while putting in place pro-competitive regime in the small economies, which shall be discussed later. However, the point being made here is that size of the economy is one of the key variables in making a decision on whether or not have a competition policy in place.

Chapter III

NATURE OF ANTI-COMPETITIVE PRACTICES IN SMALL ECONOMIES

3.1 Transformation of public monopoly into private

Privatised enterprises in small economies have failed to become vehicle for infusing competition in the economy due to a number of factors

Most of the small economies have initiated privatisation process as a part of the structural adjustment programme. For example analysis of privatisation policy in Nepal reveals that despite serious efforts, they have not been able to make privatisation process as broad based as possible. As a result of this, most of the public sector enterprises, which were earlier monopoly 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 privatisation. Due to the absence of clear cut guidelines, lack of regulation, lack of competition culture and legal framework, and virtual absence of post-privatisation monitoring and evaluation mechanism, privatised enterprises are not able to infuse competition in the economy. They are rather weakening the competitive base of the economy.[xxxiii] The situation of Sri Lanka is not too different. A classic example of how a government of a small country misses the wood for the tree is provided in Box 3.1.

Box: 3.1

Privatisation and competition in Sri Lanka

The Sri Lankan privatisation initiative is promoted by granting monopoly status to foreign investors either via an exclusive period of operation, as in the case of Shell Gas Lanka Ltd. and Prima Flour; or via licensing agreements operative for a specific period of time, as in the case of Lanka Lubricants. These artificial barriers to entry effectively provide a first-mover advantage to the incumbent company, which tends to inhibit potential competitors from entering privatised markets. The absence of an effective regulator in these markets is another factor that will inhibit competition in the long run.

Adapted from: Thushari de Zoysa and Pubudini Wickramaratne (2001)

If the privatisation process is not conducted properly, it would remove state monopolies and get them replaced by private monopolies

If the privatisation 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 monopolies of the state and pass it over to the private sector monopolies. Such a process could cause chaos and may not serve the public interest, without institutional mechanisms in place to redress the situation.[xxxiv]

Results of privatisation policy initiated in Tanzania, however, provide a mixed picture. As Musonda et. al (2001) point out: “Public monopolies have been very much reduced in sectors like transportation (air transport); media (newspapers, radio); communication (postal and telecommunication services) and agriculture (especially in crop buying etc.) by the process of privatisation, although there has been an emergence of private monopolies and oligopolies.”[xxxv]

3.2 Cartel

Market sharing and price fixing cartels are widely prevalent in most small economies

In small economies, market sharing and price fixing cartel are prevalent in various degrees. For example, in Nepal it is very normal for the business associations established with the objective of protecting their professional interests to have converted themselves purely into cartelising bodies. Examples include Nepal Bankers Association (NBA), Colour Photographers Association of Nepal, Nepal Association of Travel Agents (NATA), Airlines Operators Association of Nepal (AOAN), Brick Manufacturers Association of Nepal etc. So much so that even barbers in Nepal have formed their association named, Nepal Barbers Association and its members are instructed to charge a given price for their services.[xxxvi] The norm among these associations is such that those who under cut the price face strict sanctions from their associations, and at times even exclusion. Of late, however, price and advertising warfare has been noticed in the airline sector, but how long will it last is still uncertain.[xxxvii]

When a cartel gets tariff protection too, it is sure not to focus on enhancing its efficiency

In the context of Nepal, there cannot be a more classic example than that of sugar industry when one has to see how far cartel can go. In August-September 1999 leading sugar industrialists approached the government to increase tariff on import of sugar to 40% so as to prevent Brazilian sugar from coming to Nepal. Their justification was that since Nepal already had sufficient domestic capacity to produce sugar import was redundant and that a higher tariff was necessary to protect 'infant' sugar industry. When the government raised tariff, domestic industries, a cartel as they were, stopped supplying sugar in the market and pressurised government to increase the selling price of sugar. The government instead of clamping down on cartel by utilising the provision of Consumer Protection Act, 1997 succumbed to the pressures. Interestingly, the cartel timed the move to the beginning of the festive seasons and the government was forced to bow down [xxxviii] Another example of how cartel could frustrate the objective of economic efficiency is shown in Box 3.2:

Box: 3.2

Cost reduction <u>not</u> passed on to the consumers

In Nepal the cost of manufacturing mineral water has significantly gone down, apparently, as a result of increased market size and resultant economies of scale. The manufacturers of mineral water have therefore been passing on the cost saving resulting from efficiency to their dealers. And dealers in turn are required to pass on the cost to the retailers and finally to the consumers.

However, it is learnt that dealers operating through a cartel pass on only limited cost saving to their retailers and retailers keep the entire cost saving with themselves and do not pass on the same to the consumers at all! This is the situation when there are more than a dozen of manufacturers engaged in manufacturing and distributing mineral water in the market. However, it is not the manufacturer that is engaged in maintaining the retail price, but it is the middlemen who are doing so at the victimisation of the consumers.

This case represents a combination of collusive arrangements among the middlemen and resale price administered by them. Despite the provision contained in the Consumer Protection Act, 1997 clearly banning collusive arrangement among suppliers, the government has not been to take any action against the unscrupulous middlemen of mineral water.

Adapted from: Adhikari, Ratnakar and Dhrubesh C. Regmi (2001)

ZCC intervened in the price fixing arrangements of insurance companies in the Insurance Brokers' Association of Zambia

Similarly, as per a study conducted by CUTS (2000) in Bhutan, price fixation of the highest magnitude was found to be prevalent in perishable goods, photocopying and telephone booths. Even the traders accepted that collective price fixation was prevalent among cloth merchants and traders of foodstuffs.[xxxix]

In Zambia, where Zambian Competition Commission (ZCC) seems to be fairly active, a few price fixing arrangements have been busted. For example, ZCC intervened in the price fixing arrangements of insurance companies in the Insurance Brokers' Association of Zambia. The insurance companies were alleged to have agreed to standardise the commission rates payable to insurance brokers for all types of risks. They also standardised the maximum free cover limit of Kwacha 65 million for group life insurance and had engaged in the unethical practices of bypassing brokers and dealing directly with brokers' clients at significant discounts. The insurance companies discontinued these practices upon intervention of the ZCC. Standardising commission rates and setting a maximum free cover limit would have led to reduced competition.[xl]

3.3 Collusive tendering/bidding

Collusive tendering/bidding is widely prevalent especially in the construction and/or supply sector in Nepal

This practice is widely prevalent especially in the construction and/or supply sector, where contractors or suppliers sit together and decide the price at which one contractor or supplier will receive the contract. It is decided before hand that who would be winning the contract and the norm is that the winner has to be the one from within their group. Then the person who receives the contract compensates other contractors/suppliers. If such contracts are to be awarded on a perennial and regular basis, then the contractors/suppliers decide the timing and amount of contract each one of them is going to receive on a rotation basis. The manufacturers/suppliers of polythene pipes operate under this system in Nepal.[xli]

Fair Trade Practices Act of Tanzania contains strong provisions against bid-rigging

The players involved in the collusive tendering/bidding blame corrupt government officials, when the bidding is invited by the public sector. They contend that they have to bribe 10 to 15 percent of the contract price to the government officials in order to get the contract. They say, they have to resort to collusive tendering/bidding in order to keep their companies afloat in the market. It is, however, difficult to determine the sequence of rent creation and rent transfer in this case. It is like the chicken and egg situation. It is certain that some amount of rent is created when the bidder has almost monopoly (or monopsony) power in the market. Assuming that the government officials have the full knowledge of this information, they could force that rent be shared with them too. However, it could also be the other way round. Since government officials ask for bribe, it is necessary for the bidder to try and create some rent to be able to transfer a part of it to the government officials and take away the remaining part.

This reflects considerable apathy on the part of the His Majesty's Government of Nepal to regulate such practices. Even in a small country like Tanzania, Fair Trade Practices Act prohibits such behaviour. As per the Act, two or more persons (i.e. wholesalers, manufacturers, retailers or contractors) at an auction sale agree or arrange the price or prices for which all or any of them will bid during the auction sale, or all or any of them agree to abstain from bidding during the auction sale of a good or service, such conduct shall be considered illegal.[xlii]

3.4 Tied selling

Tied selling could be of two types: a) a subtle form for tied selling by combining the sale of slow moving item with fast moving items; and b) a blunt tied selling done by bundling related goods and services. Both the types of tied selling are widely prevalent in small economies.

For example, having to buy a slow moving item in return for the seller having sold a fast moving item is a routine affair in the case of Nepal. Since the market is imperfect, creation of 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. Since there is no legislation in Nepal to prevent the retailers from indulging in such practices, consumers cannot hope to get relief of any kind from such practices in the near future. It is envious for Nepalese consumers to note that some jurisdiction even prohibits such practices as bait pricing and switch selling.[xliii]

The hidden motive behind tied selling in the privately run schools in Nepal is to extract as much money as possible from the parents in the name of imparting 'quality' education

The more direct type of tied selling takes place in education 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. 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.[xliv] 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 they have done so very recently from another hospital of similar status or repute.[xlv]

3.5 Syndicate system

A syndicate system is nothing but a cartel of the transport entrepreneurs

Syndicate system is prevalent in many small economies but in Nepal it is rampant in transportation sector. A syndicate system is nothing but a cartel of the transport entrepreneurs who form an association, which determines the route and the frequency of plying buses or trucks for each members of the association. This system disallows any outsider to enter the road network and if they do so they are not only faced with sanctions but could also face physical assault. 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 lack of competition among the transport entrepreneurs, they are not bothered to upgrade the quality of services provided to the passengers. Moreover, they do not have any incentive to spend an extra penny to enhance the quality of their service as they are pretty much sure that this will not bring any extra benefit to them and that consumers will have no choice but to use their services.

For example, despite a clear-cut provision outlawing syndicate system in the Consumer Protection Act, 1997, Nepalese government could not muster enough courage to implement that provision because of the sheer strength and political clout of transport entrepreneurs. However, a few months earlier, the present government made a bold decision to implement this provision thus making syndicate system illegal. The effectiveness of this measure is yet to be seen.

The Zambian example, in which ZCC intervened to promote competition is quite illuminating, as provided in Box 3.3.

Box: 3.3

Anti-competitive conduct in transport sector

Section 10 of Zambian Competition Act guarantees the right to association, but prohibits anti-competitive trade practices by such associations. No one shall be unjustifiably excluded from participating in a trade association and such an association cannot recommend prices or terms of sale to its members.

The Commission intervened in the passenger transport sector in this regard, and investigated the alleged anti-competitive practices of the United Transport and Taxis Association (UTTA), which appeared to be in violation of the Act. In consultation with other stakeholders, the Commission addressed cartel behaviour of the UTTA in pricing, approval of fare by the Road Traffic Commission, and use of callboys at bus-stops. These practices clearly restricted the free flow of competition in the market. Though cartel behaviour in this sector has not been completely eliminated, there are signs that bus operators are beginning to set fares independently for different services, in defiance of the UTTA recommended fares.

Source: Economic Association of Zambia (2002)

3.6 Price discrimination

Though price discrimination makes perfect economic sense, it has resource transfer and consumer welfare implications

Price discrimination is normally based on the ability of the consumers to pay. If the airlines charge two different fares for business class and economy passengers and provide varied level of services to them, this is considered reasonable, as it makes economic as well as moral sense. Similarly, nobody frowns upon different tariff being applied by public utilities depending on category of users or timing of usage. In economic theory, price discrimination is not only considered desirable but socially optimal, because this allows producers/sellers to extract all the consumer surplus and get better return for the resources employed, leaving no segment of consumer underserved. A perfectly discriminating monopolist would charge different price to each consumer depending on his/her reservation price. While this strategy would exacerbate the wealth transfer implications of monopoly, it would also raise the monopolist's output to the competitive level, by ensuring all the consumers, prepared to pay more than resource costs of producing a unit of output are in fact served, thus eliminating allocative inefficiency.[xlvi]

However, if a group of consumers are made to pay higher price because of their lack of awareness about the market conditions, it becomes a clear cut anti-competitive practice. Similarly, if a manufacturer provides discriminatory incentive to various intermediaries (dealers or wholesalers) it could prevent the efficient intermediary from better serving the consumers if it has been discriminated against. It is the latter types of price discriminations that are widely prevalent in small economies. In a study conducted by CUTS and SAWTEE in Nepal, in which 55 respondents from various walks of life were interviewed, it was found that the consumers are perennially faced with the problem of price discrimination in the market.[xlvii] Similarly, in Sri Lanka's Ceylon Oxygen case, it was alleged by Industrial Gases Pvt. Ltd. that the former was providing discriminatory incentive to the bulk purchasers.[xlviii]

3.7 Abuse of dominance

3.7.1 Predatory behaviour

Any attempt to reduce price below cost with the intention of driving out competitor is considered predatory behaviour

As mentioned earlier, monopolist or dominant firms in small economies are so powerful that they don't want to see any new firm entering the market and trying to steal away their market share. This is not the case in bigger economies where size of the economy is such that it can accommodate large number of firms. In the 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 (especially new entrants) by reducing their prices to an unreasonably low level. One clear case of predatory behaviour in Sri Lanka is provided in Box 3.4 below.

Box: 3.4

Predatory behaviour of Ceylon Oxygen Ltd.

Ceylon Oxygen Ltd. (COL) was a monopoly in the production and distribution of oxygen and related products in the domestic market from its inception in 1936 until 1993. Industrial Gases (Pvt.) Ltd. (IGL) commenced operations in this market in December 1993. COL's market share was approximately 80 percent, with the rest of the market supplied by IGL. In 1994, IGL objected to the behaviour of COL on the grounds of unfair trade practices detrimental to IGL. It alleged that COL had resorted to predatory pricing tactics in the aftermath of IGL's entry into the market. In this regard, evidence on movement of COL's products was tendered. This included a reduction in the deposit fee on oxygen cylinders from LKR8500 to LKR3000. In addition, there was a decrease in value of maintenance charges from LKR75, to a range of LKR55 to LKR35 after IGL's entry. Further allegations were made of discriminatory discounts and exclusive dealing, evidenced by written agreements entered into by COL in October 1993 with its bulk purchasers, where buyers agreed to purchase their total requirements of industrial oxygen/related products from COL for an agreed period. It was also established that several substantial discounts were given on different types of gases and cylinder handling charges.

On this matter the Fair Trade Commission (FTC) identified three courses of conduct that would constitute anti-competitive practices, namely predatory pricing, discriminatory rebates or discounts, and exclusive dealing, and concluded that there was insufficient evidence to establish any of the charges except one. The provision in the purchase agreements stipulating that buyers must purchase their total requirement of oxygen gas from COL was held to amount to an anti-competitive practice. The FTC thus declared those agreements null and void. In a subsequent court proceedings instituted by COL, the Court of Appeal set aside this decision. The Court of Appeal held that the FTC did not have the power to declare the agreements null and void without rendering an opportunity for all relevant parties to be heard, and in doing so it had breached the rules of natural justice.

Source: de Zoysa and Wickramaratne (2001)

Proving the existence of predatory intent is a daunting task

This case presents a classic example of the inability of the aggrieved party as well as competition authority to prove the existence of predatory intent. Looking at the factual information available above, it appears to be a clear case of predatory behaviour – the dominant position of the firm and unreasonable reduction in prices/charges.

These practices were further buttressed by entering into exclusivity arrangement with the bulk purchasers. However, FTC while making its decision could not find predatory behaviour and only washed its hands off by establishing that exclusivity was the only anti-competitive practice. It declared this exclusivity contracts null and void, but could not find enough evidence to support IGL's contention, despite the fact that COL had monopoly position in the market, deposit fee were slashed by 65%, and maintenance charge was reduced by almost half, following the entry of IGL.

Dumping is a classic example of cross border predatory practice

Another type of predatory intent, which is typically found in the case of small economies, due to the small size of the market, is the predatory behaviour by foreigners (exporters). When predatory behaviour crosses border it becomes a case of dumping. One classic example of dumping which was prevalent in the Nepalese market during the period of 80s was the dumping of *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 monopoly position), until Gandaki Noodles Pvt. Ltd. (GNPL) started producing *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% lower than that in India. Even though predatory intent was suspected, Nepalese authorities could not do anything because Nepal did not have antidumping law or institution.[xlix]

The price under-cutting 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.[l] Now there is a stiff competition in the noodle market with the entry of new firms. While GNPL is loosing ground too, *Maggi* noodles' share in the market has shrunken to a very low level.

3.7.2 Exclusionary practices

Firms with market power can easily dictate their terms to market intermediaries

As the dictum goes "power corrupts and absolute power corrupts absolutely", the firms having market power cannot only dictate their prices and quality on the consumers, but also coerce their intermediaries into accepting their terms and conditions. Where business concentration is high and market contestability is low such abuse of market price becomes a rule rather than exception. A few examples of such practices as documented by various studies are presented below:

In Kibo Breweries vs. Tanzania Breweries Limited case, Tanzania Breweries with a monopolistic market share in Tanzania of over 80 percent was barring independent agents and mini-wholesalers from stocking competitors' beer brands and threatening to punish them by not selling beers to those who did not obey on the same terms as to those who obeyed.

The Commissioner for Trade Practices forbade Tanzania Breweries (TBL) from these actions and declared them to be illegal. TBL replied that even though the actions were by law illegal, they were justified because regulations on how to carry out the Act were not in place, and therefore the Commissioner had no mandate. The Permanent Secretary of the Ministry of Industry and Trade who happened to be a Board Member of TBL supported TBL.

Ceylon Oxygen Ltd. vs. Industrial Gas Limited (see Box 3.4 above for details) is another example. Besides the predatory practice of COL, IGL also made an allegation of exclusive dealing, evidenced by written

agreements entered into by COL in October 1993 with its bulk purchasers, where buyers agreed to purchase their total requirements of industrial oxygen/related products from COL for an agreed period.

On this matter the FTC found the provision in the purchase agreements stipulating that buyers must purchase their total requirement of oxygen gas from COL. This provision was thus held to amount to an anti-competitive practice. The FTC thus declared those agreements null and void.

3.7.3 Merger, amalgamation and takeover

Striking a balance between efficiency enhancing and consumer exploiting merger is a daunting task

Competition authorities around the world always face a difficult trade off – whether to allow competitors to merge, which can become potentially exploitative or to prevent a merger which forces firms to forgo efficiency which they could attain through economies of scale and other synergies. This trade off is much narrower in the case of small economies. A detailed examination of whether or not merger control is necessary shall be conducted in the next chapter. This chapter shall only focus on some of the practices followed by various competition authorities in small economies while regulating mergers.

The example in which the ZCC allowed the emergence of a monopoly in the public interest is of the beer sector. The Commission allowed a conditional takeover of Northern Breweries by Zambian Breweries Plc to prevent the latter from closing down in the face of competition with a dominant player. At the time of the takeover, Zambian Breweries had an 85 percent market share in the sector, and there was no other willing buyer. Northern Breweries had accumulated at least US$8 million in debt, and was on the verge of liquidation. To save jobs and the Rhino lager brand, and in the absence of other willing buyers, the Commission authorised the takeover.

Competition authorities allow mergers on public policy grounds even if they result in creation of market power

One of the objectives of competition law is to define a set of rules regarding agreements between firms that restrict competition or abuse a dominant position, including attempts to create dominant positions. Another major objective is the efficient allocation of resources, and the maximisation of national welfare by ensuring that competition is not distorted or hampered through the abuse of dominant positions. It follows that the aim of the law is not to restrict monopolies *per se*. Indeed, monopolies are not inherently bad. The Commission may therefore allow a merger to take place even though such an action would result in the creation of a monopoly, its prohibition would cause the failure of other social objectives. This is what is known as rule of reason.[li]

In those small economies having no competition law, merger or takeover control obviously does not exist at all. In Nepal, for example, one such merger took place between the local agents of Price Waterhouse and Coopers when their parent companies merged. Another example of buy out which is so visible is the case of United Breweries of India purchasing Nepal Brewery. Even in those countries, where competition law is supposed to regulate merger, the policy of competition authorities is rather lenient. In Tanzania the only merger case reported so far seems to be the merger between Coopers and Lybrand and Price Waterhouse. In this case relating to merger of two multinational accounting and business-consulting firms, the request for merger was made on 8 June 1998 and the approval was granted on June 27, 1998.[lii]

However, if the merger or takeover is likely to result in excessively dominant position and which, in the opinion of the competition authority, could be detrimental to the interests of the society in general and

consumers in particular, they have used their power to block such mergers. Again citing the example of Zambia, the ZCC has rejected the takeover bid of BOC Gases for Industrial Gases Limited. BOC Gases had an 80 percent market share, and Industrial Gases had 19 percent. Given the fact that sales in this line of business are of a long-term nature and conducted on business-to-business lines, the Commission felt that such a takeover would lead to market concentration under one supplier who would have considerable power over consumers.[liii]

If merger results in excessive monopoly power and is detrimental to public interest competition authorities do block them

In the case of Sri Lanka, the Fair Trade Commission Act (FTCA) seems to adopt a lenient position on mergers. The main element of section 13, which deals with merger control, is whether the proposed merger would likely result in the acquirer being in a position "to control or dominate" a market for goods and services. Despite the emphasis on control and dominance in section 13, it is section 15 (1) (a) (the public interest test), which determines the legality of the merger.[liv]

As per the public interest test of this section, FTC may authorise a proposed merger if it is not likely to operate against public. Looking at one of the reported merger cases, it appears that merger approval process in Sri Lanka is pretty smooth. The merger between Kelani Tyres Ltd. and Associated Ceat (Pvt.) Ltd. envisaged unification of tyre manufacturing businesses of two competitors with a view to upgrading and maximising the performances of these two businesses, as well as enhancing the quality of the tyres manufactured by both firms in accordance with international standards. The merger was also intended to realise economies of scale and lower the cost of manufacturing. The FTC approved the merger based on the fact that there was sufficient competition from imported tyres to prevent a single company from achieving a dominant position in the market for tyres.[lv]

Issues for Comments

- What concrete measures should be taken by the government to ensure that public monopolies are not transferred in to private monopolies after their privatisation?
- Why is cartel considered more pernicious than other form of competition abuses?
- Why is price discrimination often defended by economists, while competition authorities frown upon it?
- What kind of "rule of reason" approach should be followed while evaluating a merger?

CHAPTER IV

ISSUES AND OPTIONS

The debate on competition policy gained momentum after the formation of a Working Group of Trade and Competition Policy as mandated by Singapore Ministerial Declaration of the WTO. This also resulted in many countries joining the bandwagon by enacting domestic competition legislation. At present there are nearly 100 countries, which have enacted competition laws at the national level. Added to that is some regional trading arrangements which have also introduced competition policy and law in their respective trade agreements or treaties. Small economies are also under pressure from the domestic lobby or from the multilateral forces to enact competition legislation in order to ensure competition in the market place. This chapter looks at various factors to be taken into account by small economies while making a decision on whether or not to embrace a competition policy. It also highlights some of the problems areas and attempts to provide some solutions to such problems wherever possible.

4.1 Desirability of a national competition law

There is no hard and fast rule on what should be the objective of competition policy

Whether it is necessary to enact competition law to promote competition in the marketplace is the foremost question one has to answer in the context of small economies. Only around 100 countries have enacted competition law so far – some voluntarily and some under pressure from other countries or institutions. Even those countries, which have implemented competition law, were motivated by widely differing interests. For example, the objective of US antitrust policy was to protect consumers from potentially rapacious, price fixing trusts. The objective of the EU's competition policy, which are enshrined in the articles 85 and 86 of Treaty of Rome (now Article 81 and 82), if viewed in conjunction with Article 2 of the Treaty, strives towards a single major goal of creating common market in Europe.

Those countries, which have implemented competition policy and enacted competition law under duress, have entirely different stories. For example, Japan enacted its competition law under pressure from the USA. Indonesia enacted its competition law only after the currency crisis of 1997/98 and that too at the insistence of the IMF as a part of its bail out package. Countries like Malaysia, Singapore, Hong Kong, Brunei, Vietnam and Russia have not yet enacted a national competition law. While the major goals of competition law are to protect the consumers, enhance economic efficiency and prevent concentration of economic power, one would be inclined to ask the question how many countries in the world have these three measures of economic well being any better than in Singapore, Hong Kong or Malaysia.

Liberalised trade in general is a powerful tool to promote competition, but this cannot be fully relied upon

There is mounting evidence that while liberalised trade is, in general, a powerful tool for the promotion of competition, antitrust laws are weaker instruments not because they are inherently flawed, but because their effectiveness hinges on institutional and political preconditions that are not always present in the countries that adopt them.[lvi]

Meanwhile, considerable amount of debate has been going on in the area of desirability of fully exposing smaller economies to outside competition. Stewart (1999) argues, "There could be high social and political costs if smaller, weaker economies are opened up fully to international competition." She further states, "Unlike larger economies, in small economies, there are no hinterlands of domestic production that are insulated from international competition." Moreover, unlike a

There is a strong feeling that SMEs should not be fully exposed to competition with large MNCs

national economy, there is no mechanism in the international system to allow a global "government" intervention to buffer those economies in the wider market that do not get a "share of the cake". Small, technologically backward firms would bear the brunt of such negative effects and, by extension, so would the economies that consist largely of such firms. [lvii]

One argument is that small economies may not even require any competition law to check real or potential anti-competitive practices, provided there is a strong political will to do so. Consider Box. 4.1, which provides a glaring example of how exclusive distribution was done away with in a small land locked South Asian LDC.

Box: 4.1

Taming Unilever in Bhutan

India is the major supplier of manufactured products to Bhutan. All Indian companies operate through local wholesalers in Bhutan, who are licensed by the Bhutanese government to operate as such. In 1994, the Ministry of Trade and Industry (MTI) undertook an exercise to regulate the dealership of Indian companies. It demonopolised the wholesale distribution trade in Bhutan. It had two main provisions. Firstly, any trader will not hold more than 10 agencies, thus widening the scope of trade. Secondly, no major principal company in India will appoint the sole agent for selling goods in Bhutan.

In its first action, the MTI asked Hindustan Lever Ltd, Calcutta to appoint more than one wholesaler for distributing its goods in Bhutan. At that time HLL, the Indian subsidiary of the Anglo-Dutch TNC: Unilever, was operating through the Tashi Group of Companies as its sole wholesaler. Tashi is the biggest business house in Bhutan with varied interests from hotels to cooking gas. In response to the MTI's directive, the HLL responded that since the market in Bhutan is too small, it does not feel the necessity of appointing another agency. The turnover of HLL in Bhutan at that time was in the range of NUL 15 mn. per annum.

The MTI insisted that HLL appoint another agency, but the firm's response was evasive. HLL dodged MTI by claiming that either the new applicant party has little capital or that it has no experience of trading in consumer goods and so on. Finally, the MTI suggested the name of the Food Corporation of Bhutan (FCB), a government company, which has both capital and distribution network. Yet HLL did not respond positively. This time, the MTI sent an ultimatum to HLL stating that it will cancel Tashi's license to operate as HLL's wholesaler. This worked and HLL soon appointed FCB as its second wholesaler.

FCB rose to the occasion and soon multiplied HLL's business in Bhutan to nearly NUL 40-45 mn. by aggressive marketing through its 96 fair price shops in the whole country. Today, HLL is happy that its business has tripled by creating new markets, where Tashi could never have reached or was too complacent to make the efforts. In another similar situation, Nestle India Ltd heeded MTI's advice and it has more than two wholesalers, thus there is healthy competition in Nestle's products in Bhutan.

Source: Mehta, Pradeep S. (2001)

However, since the negotiation on competition policy is likely to reach a critical stage shortly, countries cannot afford to remain fence sitters. They must take sides now. While other policy instruments can act as an engine to promote competition, competition law – the last resort – may become indispensable because of several reasons. Firstly, the risk of market failure is always there in the case of small economies and without corrective measures taken by an institution such as competition authority, the market could not only become exploitative, but also inefficient. Secondly, government has a better way of dealing with competition abuses when a law is in existence.

Thirdly, in order to prevent the abuse of market power by the dominant firms, especially of foreign origin, competition law is a must. Fourthly, due to absence of competition law in small economies, various rent seeking practices have surfaced and they need to be checked at any cost. And finally, due to the possibility of a multilateral competition policy being introduced, small economies need to move proactively to ensure that they are not caught in a trap at the time of the UR. Mehta and Kumar (2001) argue, "a multilateral competition policy (MCP) appears to be one such agenda item where the poor countries might end up losers if they do not take part actively from the beginning. It is immaterial whether they sign any final accord that emerges from the negotiations."[lviii]

Resource starved countries devoid of experience cannot effectively implement competition law

However, the flip side is the challenges in enacting and implementing a competition law in a resource starved small economies, generally devoid of experience. The following challenges should be minutely looked into before implementing a competition policy or enacting a competition law:

4.2 Threshold limit and merger control

As per one school of thought "competition policy may hinder domestic firms' ability to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as mergers and acquisitions. Besides, the risks, uncertainty and low profits associated with competition limit their ability to conduct research and development (R&D), innovate an improve product quality."[lix] In some countries such as Japan, South Korea and Taiwan, there is a long and strong tradition of the state working closely with large enterprises to foster innovation and competitiveness.[lx] In these countries it is almost a taboo to consider regulating merger or collusion among the firms, which are essentially done to enhance their export competitiveness.

Determining threshold limit for dominant enterprises to trigger action is a challenging task for the legislators

Determining the threshold limit for dominant enterprises to trigger action is a challenging task for competition authorities of the smaller economies. Since the firm sizes are small, the competition authorities may need to be lenient on their ownership pattern or even market share. While 25% market share is considered dominant in many countries, small economies like Sri Lanka, for example, feels that even the one-third market share, which is allowed as per their present law, is insufficient and it should be increased to 50%.[lxi] Similarly, in Nepal some industries such as dairy, cement and sugar where market share of the dominant enterprises exceeds 30%, the government has not devised any mechanism to contain their growth because they have not exhibited anti-competitive behaviour so far.[lxii]

Venezuela, for example, faces another problem, which is atypical of small economies. Various sectors in that country falls under C4 (industrial concentration index) ranging from 42% to 98%, while in the case of steel C3 is 100% and in the case of batteries, chocolates and ice creams C2 is 98%, 91% and 90% respectively. Commenting on

these indices, Jatar (1999) writes, "Looking, for example, at the concentration ratios for Venezuela… no merger could be authorised in any of the sectors if [developed countries] parameters were used. For a competition agency under these circumstances, the evaluation of the degree of "effective competition" and of the existence – or non existence – of barriers to entry are extremely important tests.[lxiii]

CARICOM Competition policy does not deal with merger control at all

In the context when big firms are becoming bigger to be able to compete globally and competition authorities around the world are taking lenient stand on such practices, there is no need for the competition authorities of the small economies to frown upon firms having less than 50% market share. In a fairly globalised and/or regionalised economies, firms need to maintain a critical mass to be both efficient and competitive. Therefore, merger control laws, which often form the part of the competition law is not required in the case of small economies. For example, the Protocol VIII to the Treaty of Chaguaramas, which deals with anti-competitive business practices of CARICOM region,[lxiv] does not provide for Merger Control Regulation. In fact, the only economy that wanted to have a merger control law was Trinidad and Tobago, which is the largest economy in the Caribbean.

Moisés (1999) elaborately deals with the dilemma faced by developing countries in general and Latin American countries in particular on sequencing problem of exposing the domestic firms to the foreign competition or sheltering them so as to enable them to gain a critical mass required to face global competition in the following words:

> In fact, some argue that the vigorous application of standard Western antitrust policy has two potentially negative impacts in developing countries: retarding investment and making it more difficult for firms to enter long-term contracts. With regard to the former, they argue that the principal need is for direct capital investment, in part to offset the hardship caused by reform, and that, therefore, the short-term anticompetitive effects may backfire in reforming economies where the degree of risk requires a compensatory approach. Moreover, many mergers and joint ventures that might be considered unacceptable in a developed economy might have to be tolerated in reforming countries where the markets, given the weakness of judicial systems, need to rely far more on self-enforcing contracts. On the other hand, the available evidence shows that in order for countries to become competitive abroad, strong competition at home is a very important condition. It is very hard for a company to develop the managerial practice, the organisational culture, and the cost structures that are needed to conquer international export markets if it enjoys the comforts of a protected, subsidized, monopolistic market at home.[lxv]

Due to high degree of openness merger regulation can become irrelevant to the smaller economies

Due to high degree of openness merger regulation can become irrelevant to the smaller economies. 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 critical mass for developing economies of scale. This is the reason why merger regulation has not been included in the CARICOM Competition Policy.

A problem, however, arises when giant multinational firms establish themselves in small economies because of proximity to natural resources or availability of skilled manpower or some other reasons. When merger control rule is done away with, MNCs will also be excluded from such rules despite their abusive potential because of the requirement to provide 'national treatment' to foreign firms. Competition authority will then be left with no alternative should such MNCs force small domestic enterprises (competitive fringe) to merge with

themselves. Competition authorities have a tendency to bundle 'merger, acquisition and takeover' together because of their similar impact on competition. However, in the case of small economies certain distinction should be made between these actions. For example, a small economy can be lenient towards (even horizontal) merger because it may not have much anti-competitive effects. However, it should have a fairly rigid rule on acquisition and takeover because these measures could have the effect of reducing or eliminating competition – by eliminating competitor (s).

4.3 Structure vs. conduct

Conduct approach to dealing with competition abuses is a superior alternative, however, it is resource demanding

Most of the developing countries have given primacy to the structure of the firms' concentration rather than focusing on the conduct. With the emerging focus on conduct in most developed countries, the competition authorities in developing countries may also need to change their criteria of assessment or use the gateways more often. However, a movement from 'structure' to 'conduct' in the implementation of competition policy will require a significant increase in the capacity of the competition authorities. This, however, is lacking in most developing countries.[lxvi]

If competition authorities are asked to choose 'conduct' as the key to determining anti-competitive character of the firms, they will have to make use of 'rule of reason' and should be given considerable discretionary power to determine whether or not a particular 'conduct' leads to anti-competitive outcomes. However, providing discretionary power to the competition authorities in small economies is likely to breed rent-seeking practices, which should be avoided at any cost.

4.4 Implementation problems

Effective implementation of competition law requires such elements that cannot be generated overnight in the small economies

Having a competition policy and law as such is not a major problem for the smaller economies. If the stakeholders could convince the executive and parliamentarians of the need to prepare a competition policy and law showing economic efficiency, growth in FDI and consumer protection as the major outcomes, they would hardly oppose such a move. However, the main challenge lies in the implementation of competition law that would produce desired outcome. Enforcement of law requires a competition authority with adequate powers and sufficient budget. Competition analysis is demanding, especially if each case has to be assessed on its merits.[lxvii] Rigorous implementation of competition rules is a resource-consuming task. Since small economies have limited resources at their disposal, they need to make optimum utilisation of the same. Enforcement of competition policy and law may not become the number one priority area for them.

Effective enforcement of competition laws also requires a well-developed system of commercial law[lxviii], which most of the small economies are lacking. Most of these economies do not have a well functioning contract law, companies law, bankruptcy law or intellectual property rights (IPRs) laws. In smaller economies where political parties are known for their rent seeking behaviour and are dependent on private sector for their electoral survival, having a fair, independent, transparent competition authority insulated from political interference is a stupendous task. Effective enforcement also requires a fair and independent judicial system, which is not the case in most small economies. History is replete with the example of indifference of the state authorities towards the implementations of laws and regulations, even if non-implementation could have serious repercussion on the major segment of the society. The case of Columbia provided in Box. 4.2 is self-explanatory.

Box: 4.2

Apathy towards implementation of competition law in Columbia

In 1959, taking advantage of the democratic mood a more comprehensive law (55/1959) was passed. It was inspired by the philosophy of the existing antitrust legislation of the US, which, working under the assumption of an economy based on free enterprise and economic freedom, attempted to regulate monopoly, oligopoly, and market power for the first time in Colombia. This law defined and regulated unfair competition, restrictions to trade, collusion to interfere with trade, price-fixing, and other practices that hinder competition. It also attempted to control firms that have a dominant position in their markets and to regulate mergers and acquisitions, requiring a previous government authorisation for such actions.

This law also empowered the government to investigate violations to the regime through various superintendencies of the Ministry of Industry. In theory, consumer-citizens or competitors can take legal action against monopolies under the law, because it authorises the same agencies to accept denunciations of violations of the law. But in practical terms, consumers or citizens have a very low likelihood of succeeding because the authorities are required to act only when these denunciations come with sufficient evidence of the violation, which would limit considerably the capacity of the public to take effective actions.

While the government of Columbia has had the legal capacity to regulate monopolies or dominant firms and to prevent practices leading to the obstruction of competition, it has done very little in the decades since the law was issued. In 1993, it reinforced the legal capacity of the Superintendency of Industry and Commerce to act on behalf of the consumers, but after these changes no known action has taken place.

Such poor record of implementation of competition law in Columbia is due, *inter alia*, to lack of a strong consumer lobby and government's dependence on private sector for electoral survival.

Source: Hommes, Rudolf (1999)

Poor implementation of competition law in developing economies like Columbia and Thailand make the problem of implementation evidently clear

The situation in Thailand is not encouraging either. Despite the enactment of Excess Profit Prevention Act in 1947 (subsequently amended in 1964) and replacement of the same by Price Control and Anti-Monopoly Act of 1979, no attention has been paid to possible monopolies and RBPs, even though there appeared to be a high degree of market concentration in various sectors, such as cement, glass, sugar, oil refinery, petrochemicals, iron and steel and animal feed. There is also growing horizontal and vertical integration, as well as cross shareholding and joint ventures between big corporations and even between rival firms. In short, competition regulation is still weak and lacks analytical and investigative support.[lxix]

The implementation problem faced in small economies can be classified into the following categories:

4.4.1 Resource constraint

Resource constraint is probably the single major problem most small economies face

This is probably the single major problem facing most small economies, which is partly related to the problem of lack of political will as well. Politicians have other priorities to take care of and improving competitive situation in the country does not figure anywhere in their agenda. Therefore, they tend not to advocate for increasing the

budgetary outlay of the competition authorities. In this context, one should carefully look at two related questions. First and foremost, is it advisable for the competition authorities to be dependent on government's budget for funding its activities? Is it possible for competition authorities to be self-sustaining? Both the questions do not have "yes" or "no" answers – there is no black and white answer, but some elements of grey areas exist.

Intuitively speaking it is not advisable for the competition authorities to be dependent on government support. This does not only limit their funding possibilities, but also tie their hands. However, during the initial stage of their formation, most competition authorities have relied on government funding. The amount of support competition authorities receive from the government depends on several factors including the commitment of the government to the cause of promoting competition, total resources available with the government and pressures from other sectors competing for the same resource.

Looking at the limited budget allocated to the competition authorities in small economies, the priority of their governments become clear

Smaller countries generally do not have much resource devoted for the functioning of the competition authorities, even in terms of percentage of total budget. For example, Tanzanian competition authority had a total budget of TShs 49.63 million (US$ 66,636) and TShs 129.71 (US$ 162,056) in the years 1999 and 2000 respectively. These figures represented 0.004% and 0.01% of national budget during the corresponding periods. In most cases the entire budgets were expended to pay for salaries and honorarium etc.[lxx]

Compared to Tanzania, competition authority of Zambia, namely ZCC is better staffed and better resourced[lxxi], even though the government support provided to them was reduced in absolute terms in 1999. However, there is a considerable increase in the government support in the year 2000. It was provided with Kwacha 219.4 mn. in 1998, 286.4 mn. in 1999 and 434.7 mn. in 2000. However, due to sharp and continued devaluation of Kwacha, these figures when converted into dollar do not mean much. In terms of dollar their budget for 1999 was US$ 119,932, and US$ 139,738 for the year 2000. The Commission is facing problem to recruit requisite staff due to limited funding.[lxxii] Even in Sri Lanka where the competition authority is relatively better resourced, difficulties in recruiting staff have been attributed to the poor salaries and other benefits for FTC staff compared to the wage structure of the private sector.

However, Sri Lankan problem is not related to budget constraint, it is rather a problem of leadership or management. Though budget of FTC is much lower compared to the overall government budget, it has been fairly consistent over a period of last five years, hovering between 0.0027% and 0.0036%. The FTC office seems to be well resourced.[lxxiii]

Imposition of fine, charging fee for services provides and charging fees for cases brought to the competition authorities are some of the possible ways to augment their resources

Given the fact that resource constraints faced by the competition authorities can have telling impact on their performance and effectiveness, this issue should be tackled as the first priority. Since it is not advisable for the competition authorities to depend on government funding (not only because of limited funding but also because of the dependence it perpetuates), competition authorities should explore other sources of funding. Another possible source of funding is to raise resources through fine. However, this idea has been criticised on the ground that it provides incentive to the competition authorities to impose disproportionately higher fine in order to make themselves financially sustainable. This problem can be resolved through appellate mechanism. As there is a provision on each competition legislation for the party to appeal the decision of the commission if it does not agree with the same, it is not only possible for the party to contest the decision

of the commission on imposing fine, but also on the amount of fine imposed.

A second idea could be that competition authorities can start charging fees for the services they render to the government, business associations or regulatory agencies.

A third idea is to introduce the system akin to court fee, whenever firms want to bring complaint against their competitors. This does not only provide a source of revenue for the competition authority but also prevent firms from filing frivolous complaints. However, the major drawback of this system is that competition authorities should only receive and act upon on the basis of the complaints received from the firms. This excludes the possibility of consumer organisations or other interested groups from filing the compliant and the authority from conducting investigating *suo moto*. This become**s** problematic in such jurisdictions where competition commission has an added responsibility of safeguarding consumers' interest on top of maintaining competition and fair play in the market.

Tapping resources from multilateral and bilateral donor agencies and governments is another way to meet non-recurring expenses

Finally, competition authorities should tap the resources from multilateral and bilateral donor agencies, which are interested in promoting competition in small economies. Technical assistance can be sought from multilateral agencies such as the World Bank, UNCTAD, plurilateral agencies such as EC and bilateral donor such as Department for International Development (DFID). Such agencies do not normally support the recurring and operating component of the competition commission's budget. However, they would be more than willing to support the infrastructure (such as acquiring office equipments) and capacity building (such as training).

4.4.2 Capacity constraint

In order to run and manage the commission effectively and efficiently a minimum level of support facilities and infrastructure is required. This is related to the issue of budget constraint, which was so elaborately discussed in section 4.4.1 above. Competition authorities in small economies face serious capacity constraint in terms of availability of requisite infrastructure. For example, according to interviews carried out by Economic and Social Research Foundation (ESRF) with the competition authority during the field survey in Tanzania, it was found that the Commission had only one computer and one printer.[lxxiv] Competition authorities in Zambia and Sri Lanka, however, were found to be much better equipped than in Tanzania.

Capacity constraints could result, inter alia, from lack of training, frequent transfer of employees and lack of physical infrastructure

Capacity constraint does not only relate to the number of staff, but also opportunity for training and human resource development, which too are intimately related to budget constraints. Problems become even more severe if the competition commission is a part of the government bureaucracy. Because governments in developing countries in general and small economies in particular have a tendency to transfer staff from one agency to another at regular intervals, the skills acquired during the course of staff member's tenure in the competition commission will go waste, when s/he is transferred to another agency/department of the government.

So far, competition authorities are mainly dealing with domestic competition issues and yet finding it difficult to discharge their duty largely due to lack of capacity. FTC of Sri Lanka provides a classic example of capacity deficit. Quoting the Annual Report of FTC, de Zoysa and Wickramaratne (2001) state: "In 1999, [a budget of] LKR 8 mn. was allocated and the expenditure incurred was LKR 2.5 mn." At the same time the position of the staff in the FTC remain under-filled.[lxxv]

4.4.3 Lack of political will

There are strong reasons to believe that political will to promote competition through the implementation of competition policy and enforcement of competition law is lacking in small economies. A number of factors are responsible for this. First and foremost relates to political economy of protection, which was briefly touched upon in the second chapter. Those business houses, mostly owners of the industries, which thrived on the monopoly position in the market, are still in favour of protection despite the fact that economies have been considerably liberalised. They are accustomed to receiving monopoly rents and are transferring part of such rents to the politicians in power and have been able to maintain cosy relationship with the politicians at the strength of economic power. Therefore, they lobby the politicians not to frame competition policy or law at the first place. When they do not succeed in achieving the goal of blocking the enactment of these instruments, they put pressure on the politicians not to enforce them. This is reflected in the step-motherly treatment meted out to the competition commissions by politicians – by providing limited budgetary support,[lxxvi] by not sanctioning the staff positions[lxxvii], by restricting the power of the competition commissions (to be discussed below), by refusing to provide them independence (to be discussed below), and by simply refusing to cooperate.[lxxviii]

Governments, under the pressure of business lobby, have attempted to curb the power of competition authorities

As mentioned in Chapter II, politicians, who are maximisers and are always looking for opportunity to maximise the possibility of being re-elected tend to support the idea of *concentrated benefits and dispersed costs.* By restricting the ability of the competition authorities and promoting anti-competitive practice, politicians provide concentrated benefits to the industries (whose support is a must for them to be re-elected), but the costs of anti-competitive practices will be widely dispersed among a large number of consumers. Because of asymmetry of information, poor, unorganised consumers would not even probably know that they are paying the price of anti-competitive practices.

Politicians cannot get incremental votes by implementing competition policy – hence they are apathetic towards effective implementation of the same

Politicians can get more vote through pork-barrel tactic, pouring money in populist programmes, but they do not receive even a single incremental vote by increasing the budget of the competition authorities. Therefore, they always have a tendency to curtail the budget of the competition authorities.

4.4.4 Lack of independence

In most developed countries competition authorities are provided considerable autonomy and independence. They are by law, by nature, by construct and by design, insulated from political interference. However, most competition authorities in small economies are kept under the firm grip of the politicians so that they can be made to function at the whim and fancy of the latter. This problem is related to the lack of political will discussed above. They want to maintain control not only over the resources of the competition authorities[lxxix], but also sanctioning staff vacancies. They also want to retain the power of hiring and firing the commissioners, if possible so that they can have firm grip over the functioning of the authority. Box 4.3 provides an example of how politicians hold sway over the functioning of the competition authority in Sri Lanka.

Box: 4.3

How not to design a competition authority?

FTC of Sri Lanka functions as a quasi-administrative body and *comes under the Ministry* of Internal and International Trade and Food (MIICF). It consists of *seven members appointed by the Minister*. The members or the commissioners of the FTC hold office for a term of three years with *provision for reappointment*. The *Minister appoints one member as Chairman* of the FTC, who is a full-time member, and the other commissioners are part-time appointments.

The selection process of the commissioners and the structure of the present system do not guarantee the independence of the FTC. Political influence within the working of the FTC is pervasive. Under provision 3 of the Schedule to the Fair Trade Commission Act (FTCA) the *Minister has the power to remove any member of the FTC* by order published in the Gazette, without providing any reason thereof. The decision of the *Minister cannot be challenged in a court of law*. Further, provision 12 of the *Schedule empowers the Minister to terminate the appointment of the Chairman without giving any reasons*. The FTC may, with the *approval in writing of the Minister*, appoint a Secretary General as the chief executive officer to act under the direction of the FTC.

The Minister is given power under section 28 to make regulations in respect of any matter required by the FTCA (All italics added).

Adopted from de Zoysa, Thushari and Pubudini Wickramaratne (2001)

'Political capture' of competition authority is evident from the example of *Sri Lanka*

The box above provides a glaring example of how competition agenda is highjacked by the political process. Notice that it is not only the excessive interference of the politicians in the functioning of the FTC that makes 'political capture' possible, but the term of the commissioners and the possibility of reappointment – which further erode the independence of the commissioners. Since commissioners have shorter tenure, they have to keep the Minister happy for being reappointed. The best option would have been to have a longer tenure (say six years) for commissioners sans possibility of reappointment.

In some other cases, politicians tend to retain the authority of making major decisions by themselves, probably because they do not have faith on the competition authorities. For example, in Tanzania competition authority cannot make the final decision on merger or acquisitions. The responsibility of the authority is limited to make recommendation to the relevant minister. It is the relevant minister who makes the final decision. One can imagine the plight of the economies where decisions on competition issues are made by politicians and not by the independent authorities.

4.4.5 Lack of competition culture

Competition culture is absent in virtually every small economy. None of the stakeholders (business enterprises, policy makers, consumers) seems to be aware of the need to promote competition in the market place. While some feel that liberalisation of economy spontaneously ensures competition in the marketplace, others consider that competition policy is an impediment to the inflow of FDI. There is little or no discussion about competition policy in the academic fora or in the meetings of the business chambers.

Competition authorities have three major roles – adjudication, awareness creation and advocacy. While the first role is the major task of the competition authorities, latter two roles are directly related to promotion of competition culture in the society. Competition advocacy can be defined as *the process of providing active inputs in the policy-making processes so as to ensure that competition dimension is taken care of*. Competition authorities can discharge this role only in such environment where competition culture is existent. However, in order to inculcate, nurture and develop competition culture, the first task of competition authorities is to create awareness among the stakeholders about the meaning and significance of competition and how competition policy helps promote the same.

In order to inculcate, nurture and develop competition culture, the first task of competition authorities is to create awareness among the stakeholders

While the inability of the competition authorities in creating awareness among the stakeholders due to several reasons including budgetary and capacity constraints is to be blamed for lack of competition culture, politicians' indifference towards competition culture is equally to be blamed. The situation is murkier in those countries where competition authority is non-existent.

Before concluding this section, it is interesting to see whether enacting legislation is the panacea to all the ills facing the market. The answer is 'No'. In fact lack of legislation is not an excuse for not regulating anti-competitive practices of firms. Most of the newly promulgated constitutions have a clause that allows governments to take measures in the public interest to prevent concentration of economic power. Moreover, most countries, which have consumer protection act also prohibit the use of anti-competitive practices to maximise the gain to the firms. For example, the Consumer Protection Act, 1997 of Nepal prohibits cartel, syndicate and other forms of RBPs. But all forms of anti-competitive practices are rampant in the country and yet have gone unchecked, because of the weakness of the implementing machinery. An example of sugar industry cartel in Nepal (elaborated below) fits here. In this case, the cartel did not only pressured the government to raise tariffs but also managed to get the price increased in a regulated sugar industry. This explains the lax implementation of existing legislation. So, even if competition laws were to be enacted there is no guarantee that its implementation will be any better than the existing laws. Implementation problems in developing countries are so real that Moisés (1998) argues:

Lack of legislation is not an excuse for not regulating anti-competitive practices of firms

> "more important than competition policies are those other aspects of economic policy that, while not self-evidently linked to competition promotion, are more effective than legal mechanisms. Free trade; unfettered entry for foreign investment; flexible, efficient, and liquid capital markets; stable macroeconomic environments; and trustworthy and efficient judicial systems can do more to protect a company from the competition-killing behavior of rivals than a legal code erratically enforced by poorly trained, poorly paid, and easily corrupted civil servants."[lxxx]

4.5 Position of competition policy and law vis-à-vis other laws and policies

Developing competition policy and law is one thing but holding its supremacy over other policies is entirely different thing. Supremacy of policy and law depends not only on economic and political significance a country attaches to the issue, but also on a host of other factors. For example, the USA pursues anti-competitive conduct more vigorously than any other country. It has included the provisions of treble penalty for some anti-trust violations, and regarded some violation as criminal offence. Similarly, the means applied to check anti-trust abuses are so rigorous that competitors are not even allowed to verbally discuss about

Competition policy and law may not have supremacy over other policies and laws– it is determined by the priorities of the government concerned

price. But Japanese competition law has intentionally included weak provisions on some of the competition issues, including merger, cartels and collusive conduct. Japan has recognised the primacy of its 'industrial policy' over the application of competition rules. Indeed, Japan's powerful Ministry of Trade and Industry [MITI, now METI] never flinched from ignoring the basic tenets of antitrust regulations if they interfered with the export-oriented industrial policy for which it became famous.[lxxxi] Similarly, Taiwanese Fair Trade Law (competition law) contains a clause that gives explicit precedence to other laws where they conflict with competition law.[lxxxii]

This is a choice small economies will have to make by themselves. They should decide, for example, whether the policies of poverty alleviation, employment generation, and ensuing distributive justice should receive primacy over the competition rules.[lxxxiii]

4.6 Competition authority vs. sector specific regulators

Despite massive changes in technology several segments of infrastructure in the small economies will remain natural monopolies, because of the limited size of the market and lack of private sector entrepreneurial zeal to take up risky investment in sectors with high gestation period. Therefore, sector specific regulators will continue to play a major role trying to ensure that natural monopolies do not abuse their position in the market. One of the responsibilities of the sector specific regulators is to maintain price cap in the sectors under their jurisdiction. In doing so some regulators have to conduct such activities that impinge on competition. While simultaneous jurisdiction is not uncommon even in developed countries, this is a source of tension in most of the developing countries mainly because of lack of clear-cut demarcation of authorities and responsibilities. Some of the tensions as documented by Basant (2001) in some small economies are presented below.

Conflict between competition authority and sector specific regulators is not endemic to small economies

In Zambia clear overlap exists between the tasks of the ZCC and the Securities Exchange Commission (SEC). In a case where ZCC required the shares of the acquired entity to be floated in 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. This resulted in acquirer having the total control over the company with negative implications for competition, but ZCC could not prevent this since 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 competition authority and Tanzania Communication Commission (TCC) became obvious when the former filed a complaint against the latter for permitting 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., Vodaphone.[lxxxiv]

In Sri Lanka too there is a considerable overlap of power and jurisdiction between FTC on the one hand and Telecom Regulatory Commission (TRC) and National Transportation Commission (NTC) on the other. The Sri Lanka Telecommunication Act (SLTA), which established the TRC, does not clearly set out the powers of the TRC and the FTC, and neither does the FTCA. The FTCA does not exclude telecommunications from its scope, while the SLTA provides for the regulation of telecommunications without excluding such power from the FTC. However, in practice, the exercise of powers of the FTC and the TRC do not overlap. This is so because the FTC refers all matters

that come before it regarding telecommunications to the TRC. The FTC has not established steady links with the TRC, but they interact if any related matter arises during the functions of the TRC.[lxxxv]

Clear cut demarcation of their roles and responsibilities is one way of avoiding such tensions

It is impossible to completely eliminate such a tension even in bigger economies. What they have done is to make a clear-cut demarcation of roles and responsibilities of the two authorities, which has led to easing of tensions. Therefore, small economies too should draw a clear-cut line between two authorities to avoid problems. UNCTAD (2001: 8-7) provides some guidelines to follow, as provided for in Box 4.4.

Box: 4.4

Competition law and policy and regulation

Basically, competition law and policy and regulation aim at defending the public interest against monopoly power. Although both provide a Government with tools to fulfil this objective, they vary in scope and types of intervention. Competition law and policy and regulation are not identical. There are four ways in which competition law and policy and regulatory problems can interact:

***1. Regulation can contradict competition law and policy*. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of competition law; for example, regulations may have permitted price coordination, prevented advertising or required territorial market division. Other examples include laws banning sales below cost, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve regulatory goals. Modification or elimination of these regulations compels the firms affected to change their habits and expectations.**

2. *Regulation can replace competition law and policy*. In natural monopolies, regulation may try to control market power directly by setting prices (price caps) and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

3. *Regulation can reproduce competition law and policy*. Coordination and abuse in an industry may be prevented by regulation and regulators, as is done by competition law and policy. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. However, different regulators may apply different standards, and changes or differences in regulatory institutions may reveal that seemingly similar policies have led to different practical outcomes.

4. *Regulation can use competition policy methods*. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Coordination may be necessary in order to ensure that these instruments work as intended in the context of competition law requirements.

Source: UNCTAD (2001)

4.7 Development dimension

One has to be extremely sensitive while devising a competition law so as to ensure that development dimension is properly taken into account

Ideally it is good for the smaller economies to have competition among all the major players in the market. However, all the sectors in the economy may not be equally capable to face competition especially from the foreign companies. The role of small and medium enterprises may not be that high in generating export revenue, however, their contribution in terms of providing employment opportunities is enormous. If we expose such enterprises to foreign competition, the vital nerve of the national economy may collapse. Therefore, one has to be extremely sensitive while devising a competition law so as to ensure that development dimension is properly taken into account.

Some examples of taking development dimension into consideration while designing competition law, *inter alia*, include: a) exempting small and medium-sized enterprises, when the impact of their RBPs is insignificant in the relevant market (e.g., EC's example of 5% *de minimis* market share rule)[lxxxvi]; b) Granting exemptions to certain specific dynamic and growth oriented sectors, which are deemed to need temporary shielding from full-fledged competitive forces; and c) safeguard in favour of socio-cultural values protecting certain specific cultural sectors.[lxxxvii]

Some countries keep selected sectors of the economy out of the purview of competition law

Some countries keep selected sectors of the economy out of the purview of competition law. For example, in Tanzania limited exemptions are provided to the areas of sovereign acts of the state and the labour market, in particular the trade union collective bargaining rights.[lxxxviii] In India, the earlier Monopolies and Restrictive Trade Practices (MRTP) Act of 1969 used to exclude public sector enterprises from its purview. However, this sector is no more excluded from the purview of the Act, thanks to an amendment made in 1990s. As per Sri Lankan Fair Trade Commission Act, companies and ventures registered under the Board of Investment (BOI) and professional conduct do not come within the purview of the FTC.[lxxxix]

Infant industry argument calls for sheltering nascent sectors of the economy from outside competition. Even the developed countries of today had made use of such mechanism 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. However, providing indiscriminate and perennial protection without any checks and balances to the infant industries could be dangerous. Therefore, in order for them 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, transparent, time-limited, degressive, involving minimum discrimination, and constantly reviewed.

Exemptions, if provided, should be selective, transparent, time-limited, degressive, involving minimum discrimination and constantly reviewed

Some argue that labour market, regulated industries, agricultural sector, cooperative institutions, energy sector, media and pharmaceutical sector should also be exempted from competition.[xc] However, blanket as well as eternal protection to all sector mentioned above could prove counter-productive. Therefore, there is a need to make selective protection based on the contribution of the sector in question to the social, cultural and economic sphere of any given country at any given point of time. It has to be also recognised that providing protection to domestic sector, especially the infant industries is the second best option. It is therefore illuminating to observe the following conclusion of Lachmann (1999) from his monograph titled *Development Dimension of Competition Policy and Law*:

We can draw the conclusion that history and economic theory seem to support the view that at the beginning of economic development (industrialisation), companies in developing countries need temporary aid. Free trade is the first best solution in a world of perfect competition. Yet, in the light of the existing disadvantages of developing countries and the reality of existing trade barriers, free trade is insufficient to enhance competitiveness. Governments need to be enabled to give short term, degressive, limited waivers (second best solution) in order to help their industries become competitive on a national and international level. These waivers must be reviewed continuously. It has to be ensured that [they]… do not continue for too long. Also, the procedure, period of validity and size of waivers must be transparent, so that the recipients are informed and can thus take long-term decisions and have an incentive to "grow up" quickly in order to be competitive. Government protection might otherwise become an incentive for infants to grow up too slowly! Although the theoretical benefits are convincing, there are technical problems in implementing optimal infant industry protection. The institutional capacities of many developing countries are too weak to follow such a policy successfully, and the power of interest groups and danger of rent-seeking should not be underestimated. Hence, wherever possible one should stick to free trade.[xci]

Issues for Comments

- What is the relevance of merger control rules in the case of small, open economies?
- What are the possible means to overcome the deep seated implementation problems facing small economies?
- What are the possible sources of financing the operations of a competition authority that strives to become independent of the government?
- Why is it necessary for competition discourse to underpin development dimension?

CHAPTER V
INTERNATIONAL PERSPECTIVE

5.1 Vulnerability of small economies

Small economies are vulnerable to anti-competitive practices of an international dimension. It will be extremely difficult for them to uncover and prosecute violators of competition rules at the multilateral level, if they were to solely rely on the domestic competition policy instruments. This problem should be considered at three levels.

Vulnerability of small economies to international competition problems calls for taking into account their special needs and situation

First and foremost, one should consider the problems that could be faced by small economies which neither has a domestic competition policy nor a regional framework applicable in the domestic market. They are the ones to be hardest hit by international anti-competitive conducts. Small economies by definition are going to be affected by international shocks. A merger or cartel at the international level can have telling impact on the markets of the smaller economies but they will not be able to take any action against such anti-competitive practices if they do not have relevant law and institutions in place, which are capable of conducting investigations and imposing sanctions.

Secondly, there are small economies like Kyrgyz Republic, Macedonia, Sri Lanka, Tanzania, Zambia which have competition laws but do not have any extra territorial application of their domestic legislation. Even the law at the domestic level is poorly enforced due to a number of factors mentioned in Chapter IV. These countries too have little sense of respite when an anti-competitive practice takes place at the global level unless they have an explicit provision of conducting 'effect' tests.

Finally, there are some small economies, which have full fledge competition law, if not at the national level, at the regional level and well functioning institutions howsoever small they might be. The example, probably the only one, is that of CARICOM, which is even capable of prosecuting anti-competitive practices at the global level. However, they too are likely to be handicapped due to lack of cooperation from other jurisdiction and lack of information and expertise to handle high profiled international cases. Therefore, there are some cogent arguments to suggest that multilateral discipline helps the weaker nations in this regard.

5.2 Arguments in favour of multilateral discipline

Firstly, evidence suggests that the cartels prosecuted by the competition authorities in OECD countries have had a significant negative impact on the trade and welfare of the weaker nations. A background paper for the World Bank 2001 World Development Report concludes that, in 1997, developing countries imported US$ 81.1 billion of goods from industries which had seen a price-fixing conspiracy during the 1990s, and that these imports represented 6.7% of the total imports and 1.2% of GDP in developing countries. Consider Box. 5.1:

Box: 5.1

International cartels: reason for concern

Globalisation and liberalisation have increased opportunities for firms to participate in price-fixing and territory dividing cartels, undermining the benefits of healthy competition, which can help consumers, small businesses and economies. Cartels can also maintain their position with high barriers to entry for other producers, which is particularly effecting in thwarting competition from developing country producers who are either new or struggling into international trading arena.

There is evidence that the cartels prosecuted by the competition authorities in OECD countries have had a significant negative impact on the trade and welfare of developing countries. A recent background paper for the World Bank 2001 World Development Report Contains five case studies of international cartels (bromine, citric acid, graphite electrodes, steel tubes and vitamins) and analyses their impact on developing countries. Participants in the cartels were almost exclusively large firms of the OECD countries. The paper concludes that, in 1997, developing countries imported USD 81.1 billion of goods from industries which had seen a price-fixing conspiracy during the 1990s, and that these imports represented 6.7% of the total imports and 1.2% of GDP in developing countries.

Moreover, in many of the affected industries there were emerging exporters from developing countries which did not participate in the cartel and whose exports may well have been affected. It should also be noted that, so far, there have been very few successful prosecutions by competition authorities in developing countries against such cartels and that actions by OECD competition authorities only address the impact of such cartels in their markets.

Sources: Mehta, Pradeep S. and Ujjwal Kumar (2001)

Secondly, export cartels are generally outside the realm of domestic competition law, and often actively promoted by governments. The example of soda ash cartel uncovered by Indian competition authority is still fresh in our mind. However, many small economies do not have the capacity, resources and courage to uncover such cartels and punish the violators. Cooperation is extremely hard to come by in the cases of export cartel as they are, more often than not, actively promoted by the exporting country's government itself. There is a need for an international regime to tackle them. A multilateral regime on competition could help tackle such problem.

A holistic approach should be taken to reduce the impact of international competition problems on the small economies

Thirdly, the interface between trade remedy laws, especially anti-dumping rules and competition rules, *is* not well established. However, despite the desire of the developing countries supported by Japan to link these two issues, the USA insists on dealing with them separately. The USA and the EU are the most frequent users (abusers) of anti-dumping rules. Anti-dumping rules hurt exporters of the exporting countries and consumers of the host country and the only beneficiary is the high cost, relatively inefficient domestic import competing industries. A prominent critic of anti-dumping, Finger (1993) concludes:

> **"Anti-dumping, as practiced today, is a witches brew of the worst of policy-making: power politics, bad economics, and shameful public administration. Antidumping law is an oxymoron. Expansion of the power of the state to act against imports in the name of**

antidumping has been built on the meanest of violations against the principles of rule of law. Antidumping is a particularly insidious threat in that it appears to bring systemic justification to the trade restrictions it creates: it is as if the GATT system were programmed to destroy itself."[xcii]

In lack of coherence between anti-dumping rules and competition policy, strong sectoral lobbies are able to push their governments into imposing anti-dumping duties without taking into account the interests of other stakeholders. However, future WTO negotiations will also likely involve discussions on placing anti dumping (AD) laws in the context of an overall competition policy.[xciii] Should this happen, it will be easier for establishing a better discipline on such an unruly horse like anti-dumping.

Interface of competition rules with trade remedy laws is neither appreciated nor articulated too well

Tribelcock (1998) has an even stronger opinion about this issue. He argues, "Because trade remedy laws apply pricing constraints to foreign firms that do not apply to domestic firms, they are inherently discriminatory." As per him, therefore, a political deal at the multilateral level should aim at developing countries agreeing to global competition rules as demanded by the developed countries provided the former agrees to substantial curtailment of their trade remedy laws and some supranational oversight in their application – a deal which Mexico in effect accepted under NAFTA. More radical proposals would entail the complete repeal of anti-dumping laws and their replacement with non-discriminatory harmonised cross-border predatory pricing laws, along the lines of regime adopted by Australia and New Zealand in 1990 under the Closer Economic Relations (CER) agreement.[xciv]

Fourthly, due to globalisation of world economy FDIs are moving rapidly from one country to another. However, all the FDIs are not so called green field (fresh) investments, which normally contribute towards increasing productive capital, market as well as employment opportunities of the host country. On the contrary, most of them are through 'merger, takeover and acquisition' of the existing firm, whether through forced merger, outright takeover or acquisition of public sector enterprises during the privatisation process, which could potentially reduce competition in the market. They neither result in increased productive capital nor employment opportunities. However, many domestic competition authorities in the developing countries do not have extra-territorial jurisdiction to regulate the flow of such investments, even if they wished to do so.

Fifthly, there has been insistence from various quarters that competition policy should not be considered a new issue for the multilateral trading system. As per them, consideration of the connection between trade and competition policy dates back to the origins of the GATT, in the stillborn Havana Charter for an ITO[xcv]. The Havana Charter wanted the proposed ITO to take action against restrictive business practices. Although the Charter was adopted by about 52 nations, it was not ratified by the US Congress. Adoption of the charter would have consolidated the issues covered by the GATT and issues of RBPs into a single international trade treaty.[xcvi] Indeed, the agenda for the Bretton Woods negotiations at New Hampshire in 1944 that led to the GATT Agreement included competition policy. However, in the actual GATT Agreement, issues of competition were generally excluded.[xcvii]

However, various WTO Agreements, namely, General Agreement on Trade in Services (GATS); Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement; Trade Related Investment Measures (TRIMS); The Agreement on Safeguards; Antidumping

Agreement; The Agreement on Subsidies and Countervailing Measures; and a plurilateral agreement i.e., the Agreement on Government Procurement talk about regulation of anti-competitive practices either of the governments or private firms to a large extent.[xcviii] There is a feeling that these achievements should be consolidated into a single agreement to create better impact. The issues outlined above, viewed collectively, make strong and forceful case for a multilateral discipline on competition.

5.3 Arguments against multilateral disciplines

Fear is ripe that such an international discipline could have deleterious impact on the small economies mainly because of their inability to cope with the regime itself. The major problem is the lack of competition culture among the stakeholders. Therefore, it is difficult to small countries to buy the idea of a multilateral competition discipline. Other difficulties stem, *inter alia*, from the following:

There is an imminent danger of competition policy agenda being hijacked by corporate interest

Firstly, while trade policy is meant to protect producers or sellers, competition policy's main objective is to protect the consumers. Inclusion of competition policy at the WTO may lead to the hijacking of competition agenda by the producers. Fear is ripe in the minds of the consumers and governments of the weaker nations alike that multinational corporations could use international competition policy as a market access tool especially by stunting or destroying state trading enterprises of the developing countries. Multinational companies (MNCs) of the developed countries want to achieve this objective partly through the plurilateral agreement on Government Procurement. However, they still feel that using this agreement along might be a torturous and rather frustrating process. Therefore, as the argument goes, these MNCs are using the 'competition policy window' to force open the hitherto protected market of developing countries.

Secondly, the question of harmonisation of competition law across the globe is politically infeasible because of heterogeneity of competition regimes around the world. The problem is further complicated by cultural differences. While some of the countries are formulating their *sui generis* competition policies, it is difficult to find a common denominator, which is present in all competitive regimes around the world. In terms of enactment of national laws too, there are some doubts. As mentioned earlier, only 100 countries have enacted competition law so far. Even some of the most dynamic economies of East Asia have not enacted it.

Competition policy places onerous burden on the domestic firms ability to enhance their competitiveness

Thirdly, as per one school of thought competition policy may hinder domestic firms' ability to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as mergers and acquisitions. In some countries such as Japan, South Korea and Taiwan, there is a long and strong tradition of the state working closely with large enterprises to foster innovation and competitiveness. Fear is ripe that a multilateral competition rule will outlaw such arrangement.

Fourthly, so far the developing countries are focusing on the 'structure' as the main indicator of competitiveness (or the lack of it) in a given market. However, protagonists of multilateral competition rules emphasise on 'conduct' rather than structure. A conduct-focused analysis will require a significant increase in the capacity of the competition authorities. This, however, is lacking in most developing countries.

Fifthly, enforcement of law requires a competition authority with adequate powers and sufficient resources (financial, technical and human). Rigorous implementation of competition rules is a resource-demanding task. Since developing countries have limited resources at their disposal, they need to make optimum utilisation of the same. Enforcement of a multilateral competition discipline may not become the number one priority area for them.

Finally, all the sectors in the economy may not be equally capable to face competition especially from the foreign companies. For example, SMEs make enormous contribution to the economies of developing countries, but they continue to be weak and vulnerable. If we expose such enterprises to foreign competition, the vital nerve of the national economy may collapse. Therefore, a multilateral competition policy devoid of development dimension may spell disaster.

Based on recent analyses, three clear reasons have emerged as a result of which the debate on competition is occupying centre-stage in the WTO discussions. They are as follows:

- **Competition law enforcement is gaining an increasing international dimension. The challenges it raises can only be addressed through international co-operation involving countries at all levels of development.**
- **There is close connection between the WTO objective of trade liberalisation and a commitment to effective competition law enforcement.**
- **Despite differences in domestic legal and institutional structures, there is growing international consensus regarding the fundamentals of competition law and policy. This consensus relates not only to the basic approaches to anticompetitive practices but also to core competition principles, such as transparency and non-discrimination.**[xcix]

5.4 Possible implications for small economies

At the time of Singapore Ministerial Conference of the WTO, all the countries had unequivocally agreed to set up a Working Group to study the interaction between trade and competition policy. Now, developing countries as well as USA and Canada do not see any merit in discussing this issue at the WTO. Despite the reluctance of the rest of the world, EU, Japan and Korea have managed to get the issue of competition policy included in the Doha Ministerial Conference. The relevant paragraphs read thus:

> 23. Recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.
>
> **24. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels,**

Technical assistance and capacity building are all niceties contained in the Doha Declaration

to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.[c]

From the perspective of small economies, the following observations can be made from the above three paragraphs of Doha declaration:

The relevant paragraphs on competition policy, as contained in Doha Declaration, fail to take into account the problems of small economies

Firstly, there is no clarity on whether or not negotiations will take place on competition policy in the near future. The *demandeurs* of competition policy – the Europeans, Japanese and Koreans – interpret the paragraph as an unequivocal support of the WTO Member Countries to launch negotiations on competition after its fifth Ministerial Conference to be held in Mexico in 2003. However, the antagonists (especially developing countries) argue that the negotiation will start only if there is a consensus among the Member Countries to do so. As per the former version, negotiation will not require any consensus but modalities of negotiations do. As per the later version, the decision on whether or not to start negotiation will require a consensus of the Member Countries. However, this issue was further clarified by the Chair of the Session, i.e., Trade Minister of Qatar, whose support tilted in favour of the latter view. But a further problem is that the clarification from the chair could be merely considered a political statement, which may not have legally biding force.

Secondly, paragraph 24, which has been referred to as the cornerstone of a balanced multilateral competition policy regime, itself contains a 'preambular' type of language. Developed countries have practically not committed anything to help what they call "better evaluating the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development." Therefore, this is one area where clarification should be sought by small economies during the Mexico Conference if competition policy is going to be included as an agenda for negotiation.

Thirdly, most of the issues included in the work programme of the Working Group on Trade and Competition Policy are imposed by the Northern countries, with the South having almost no say on what should be the future areas of work for the Working Group. The wordings, "Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them" may not carry any meaning unless and until developed countries make fundamental transformation in their attitude.[ci]

5.5 The issue of development dimension

As mentioned earlier, one of the issues that has been highlighted in the context of a multilateral rule on competition is that of development dimension i.e., whether such a rule will take into account the development needs of the weaker countries or not. This has been aptly highlighted in the Singapore Ministerial

Declaration as well in the following words, "In the conduct of the work of the Working Group, we encourage cooperation with the above organisations [UNCTAD and other appropriate intergovernmental fora] to make the best use of available resources and to ensure that development dimension is fully taken into account."

It might, therefore, be useful to see how should development dimension be interpreted in the context of the eventual negotiation, if at all it takes place, on an international rule on competition.

Besides, the provision for preferential and differential treatment to the developing countries, any negotiation on competition policy should take into account, among others, the need for developing competition cultures at the national levels in all developing countries; recognition of differences at the national levels; prevalence of political market failure; and the need for providing technical assistance to the developing countries, especially the least developed among them to design and implement their own competition policies and laws at the national as well as regional level.[cii]

It is necessary for the economically powerful countries to move beyond rhetoric this time around

If smaller economies were to gain from having a competition regime and cooperation agreement, it would be necessary for the more experienced and powerful countries to go beyond the exchange of information and assist in cases that affect those economies through positive comity.[ciii] However, if the past actions of the developed countries are any guide, so called special and differential treatment to be granted to developing countries will be confined to papers and conference. There will be much discussion about 'technical cooperation', 'capacity building' and 'creating level playing field', but they are not likely to be implemented in practice.

Issues for Comments

- **How should the global rule on competition be designed such that vulnerability of small economies too is taken into consideration?**
- **How powerful are the arguments in favour of inclusion of competition policy with the WTO proscenium and how powerful are the arguments against?**
- **Why can't a single policy be adopted to address competition abuses and trade remedy issues in a coherent manner?**
- **What can be done to ensure that the niceties contained in para 23-25 of the Doha Declaration are operationalised?**

CHAPTER VI

CONTOURS OF SMALL ECONOMIES' COMPETITION POLICY

6.1 A case for regional competition policy

Given the multilateralisation of competition law and policy it might be necessary for the smaller economies to have some kind of competition regime. Since most small economies do not have an experience of having a competition law and they do not have required resources to have their own law, a regional competition law could be a better alternative. In this regard, the Caricom Competition Law could serve as an effective model to begin with. Small economies of the Pacific, Africa and Asia can gain significantly from this model.

Regional competition policy is one solution for the small economies, but this arrangement too is not without problem

Regional competition law has also been recognised by the EU in its Communication to the Working Group on the Interaction between Trade and Competition Policy titled *A WTO Competition Agreement and Development*. As per the document, "in some cases a commitment may be assumed to introduce a competition regime at the regional rather than the national level."[civ] Similarly, Singal (n.d) argues, "One should take into account the specific situation of certain countries, for instance small economies participating in a regional integration agreement. In this case, it may make more sense for competition rules to be developed at the regional rather than the national level."[cv]

Some of the neighbouring countries of small economies already have a competition law because of the size of their economy itself. And some small economies have their own competition laws (e.g., Zambia, Tanzania, Sri Lanka). There is a significant scope for information sharing and learning from others' experience. While small economies like Nepal, Bhutan and Maldives can learn from the implementation experience in India, Pakistan and Sri Lanka; Lesotho, Mozambique and Swaziland can learn from competition regime in South Africa and Zimbabwe.

Such cooperation and pooling of resources become all the more important if smaller economies would like to be able to punish the global 'mega-cartels'. Taking the example of vitamin cartel once again, one finds that it is only the OECD countries, which have successfully prosecuted this cartel. It has to be noted that none of the developing countries have so far been able to prosecute it so far despite the existence of a *prima facie* case. This is because each competition authority has to conduct its own investigation to reach to the finding on the violation of the relevant laws and calculate the extent of damage. Resource strapped small economies will not be able to do it alone. Therefore, there is a strong case for establishing a regional competition authority by pooling resources.

6.2 Problems of domestic competition laws

If the competition law has to be enacted at the national level, small economies are bound to face enormous difficulties. Firstly, they lack skilled human resource to staff competition authorities. Secondly, it is difficult for the competition authorities to maintain their integrity and independence when they receive funding from the government. Thirdly, the staff of the competition authorities should be qualified enough to

handle the complex tasks demanded by his job, however, due to the limited budget of the government and its subsidiary agencies (assuming that competition authority becomes a part of the government machinery with the same compensation package being provided to its staff as in the government), qualified people always find it attractive to join private sector than joining competition authorities. Finally, peculiarities associated with small economies make it extremely difficult, if not impossible, for the competition authority to enforce the law.

Small economies too require sophisticated laws to regulate the behaviour of firms, in particular MNCs

With the increase in the complexity of the issues at stake, skill requirements for adequate functioning of a competition authority too, have risen significantly in recent years.[cvi] While small economies may choose to have a simple and workable competition law, possibility of its circumvention is very high. Foreign MNCs will be the first one to take advantage of such possibilities. For example, there is a strong tendency among the international cartel to migrate from countries with stringent competition rules to those with relatively lax rules.[cvii] Therefore, small economies too require sophisticated laws to regulate the behaviour of firms, in particular MNCs. However, application of such laws will require fairly sophisticated competition promoting machinery, which may not be possible in the small economies due to several constraints. Therefore, striking a balance between these two conflicting objectives is a major challenge for the smaller economies.

While developing competition culture through education and advocacy programme are important at the domestic levels, there is no hurry for the small economies to rush to prepare a domestic competition law. Flexibility and progressivity are two important terminologies often used in the context of competition law. Even those countries that want competition issues included in the WTO proscenium recongnise this. In order to inculcate competition culture among the key stakeholders (business, government and consumers) competition education should be initiated without any further delay. There is no need to create a competition authority to conduct this educative and awareness creating function. Existing government departments could be entrusted with this responsibility. Should they feel overburdened, a number of civil society organisations, including consumers groups, will be more than willing to assist the government in this noble initiative.

Increased competition is always good for the consumers and therefore consumer groups support formulation of a competition policy and enactment of competition law. But small economies are already fairly open and their firms are facing competition from foreign producers on a massive scale. As noted by Stewart (2001), “there is already a trend whereby Trinidadian [larger economy’s] products are flooding the market of rest of the [CARICOM] region, causing business failures and unemployment. This raises the question of trade-off between consumer welfare and efficiency on the one hand and economic and social dislocation on the other.”[cviii]

In the name of competition policy the interest of SMEs should not be compromised

Therefore, special and differential treatment is not only necessary for the smaller economies to adjust with the pace of global competition rule, but also necessary for certain segments or sectors within the small economies themselves. Some sectors of special strategic interests and high growth areas should be kept out of the reach of the competition law. SMEs, which play special role in employment creation and innovation and which are indeed the backbone of the small economies, but are disadvantaged in terms of economies of scope and scale, should be sheltered from competition for all practical purposes. Writes Chakravarthy (1999), “In the name of competition, the interests of [SMEs] should not be injured, as all that will happen by the competition law holding its field, is to extinguish them and throw many people out of employment without any corresponding gain to the local population.”[cix]

6.3 Concerns about merger control

Competition authorities have a deep-seated concern about mergers. Some jurisdictions, especially the EU, have strong rules even for vertical mergers, despite the fact that some vertical mergers are pro-competitive and efficiency enhancing. They tend to look at all mergers through same lenses and feel that mergers are bad *per se* anti-competitive. The rationale for merger control in a competition law is simple: it is better to prevent the acquisition of market power than attempt to control or break up the market power once it exists.[cx] While it is necessary to distinguish between vertical merger and horizontal mergers and treat them separately, one cannot even tell with certainty that all the horizontal mergers are bad *per se*. On the contrary, some mergers are useful to enhance competitiveness as well as efficiency of enterprises, especially in the small economies – because they help the enterprises achieve critical mass required for them to be efficient.

Even if the competition authorities focus on the structure of the economy, a small economy, Zambia, for example, has set a threshold of 50% for unilateral and concentrated market share to analyse the impact of mergers and takeovers. The market share should, however, be based on the relevant market criteria, which should take into account both product market and geographical market dimensions.[cxi] If the domestic market is the only relevant market, firms in small economies may not be able to exploit economies of scale or scope even if it posses a market power of 50%. In that case, it will not be logical for the competition authorities to consider that the firms have dominant share in the market and apply such regulations to the firm, which would have been applicable to other dominant undertakings. Moreover, competition authorities should also keep in mind that dominant position *per se* is not bad, it is the abuse of dominant position that should be frowned upon.

In small economies, even if merger control regulation is included in their competition laws, notification requirement should be made purely voluntary

In developing countries, various types of measures exist on merger control. For example, there is no merger control or pre-notification requirement in the Indian competition law, South Africa requires approval for M&A above a threshold limit, Sri Lanka and Tanzania require notification and approval. Similarly, Zambia requires notification and approval for horizontal M&As.[cxii] In some countries mergers must be notified after they have been consummated, while in other countries, the system of notification is purely voluntary.[cxiii] Ideally, small economies should not have a merger control provision in their competition law at all. Even if it is included under pressure from different lobbies, the notification requirement should be made purely voluntary.

6.4 Independence of competition authorities

In order to provide independence to the competition authority, it is advisable for the government to hire commissioners as well as staff from the private sector rather than man it by transferring some staff from ministry of finance, commerce or industry. The term of the commission's staff should be such fixed as to enable them to receive adequate exposure and experience to work with the system. But it should not be fixed for too long period, which has a danger of breeding 'regulatory capture'. The initial budget of the commission should be provided from the government budgetary allocations and the responsibility of generating resources for subsequent operation should be left to the commission itself. The commission can generate resources through fines levied to various business enterprises and trade associations for their anti-competitive conducts. It can also raise money from various multilateral and bilateral institutions such as the

World Bank, UNCTAD and DFID for its human resource development, institution building, educational and advocacy related works.

The moment competition authority is under a government ministry, political interference becomes inevitable. Therefore, it should be made a separate corporate body like the one in Tanzania.[cxiv] Or it should be elevated to the position of a body, which is only accountable to a Parliamentary Committee, e.g., Public Accounts Committee – not to the bureaucrats or the executive branch of the government.

Over-zealous desire to provide absolute power to competition authority should be resisted

As Lord Acton rightly observed, "power corrupts and absolute power corrupts absolutely", so the over-zealous desire to provide absolute power to competition authority should be resisted. The competition authority should not only be made accountable to the Parliament, but provisions should be made for the appeal of their decisions. Therefore, the aggrieved party should have the right to file an appeal against the decision of the competition authority in a High Court or Supreme Court as the case may be.

It might so happen that the smaller economies may not be able to effectively discipline large MNCs, given the power asymmetry. In many cases, the GDP of the country is a fraction of the annual global turnover of the MNC. A competition law becomes meaningless if it can only stop abuse of dominance in theory. New and creative ways of helping developing countries, and smaller economies in particular, to benefit from a competition regime with respect to cross border issues needs to be developed. This is a challenge that has to be faced in the several trade negotiations, including the ongoing work in the WTO Working Group on Trade and Competition Policy.[cxv]

6.5 International cooperation

The issue of international cooperation cannot be overstated. Since the small economies do not have necessary expertise, experience, human resources, legal tools and technological ability to ensure competition in the marketplace, it has to seek cooperation from other countries at three levels. First, learning from their experience in the implementation of law. Second, sharing of information and devising mechanism to curb cross border anti-competitive practices. Third, the consumers of the small economies should be given access to the competition laws of the bigger neighbouring countries, in case the former do not have a competition law of their own.[cxvi] However, this issue might raise some sovereignty concerns and there could be the possibility of extra territorial applicability of other legislation, competition law having set the precedence.

For small economies, technical assistance requirements too are quite significant

For the small economies, technical assistance requirements too are quite significant. If the small economies are required to formulate and enact competition policy and law, the following forms of technical assistances will be required:

- Scholarships for academic/professional training;
- Internships at Competition Authorities to gain experience;
- Visiting staff from experienced agencies to guide and assist, particularly in procedural matters in the early years of new competition agencies;
- Resource persons/financial assistance for training workshops targeted at specific groups, such as lawyers, economists, and judges;
- Assistance in facilitating workshops for product and consumer groups;
- Guidance to develop an information data-base system in new competition agencies;[cxvii]

- Imparting strategies for facilitating better cooperation and coordination with other competition authorities, especially the ones with better knowledge, experience and outreach; and
- Providing knowledge on conducting investigations and making determinations in a conduct paradigm through rule of reason approach in an impartial manner.

Issues for Comments

- What are the pros and cons of having regional competition policy instead of national ones?
- What are the capacity constraints of competition authorities in small economies and how could they be addressed?
- How could the independence of competition authorities be ensured in small economies?
- What is the role of international cooperation to ensure effectiveness of competition policy in small economies?

CHAPTER VII

CONCLUSIONS

The debate on competition policy reached a new height with its inclusion in the Doha Ministerial Declaration of the WTO and its possible inclusion as a negotiating issue at the Cancun Ministerial Conference of the WTO. While opposition of the developing countries to the inclusion of competition policy as a part of negotiating agenda for the global trade talks can somehow be justified, there is a case of preparing a proactive agenda on trade and competition issues. It is remarkable to see how the establishment of Working Group on Trade and Competition Policy at the WTO during its first Ministerial Conference held in Singapore in December 1996 had already changed the landscape of discussion on trade and competition issues at the global level. Between 1996 and 2001, the number of countries putting in place competition policy and enacting competition legislation increased significantly.

Competition policy is an ensemble of government actions aimed at protecting and promoting competition in the market. This may include well-motivated articulation of competition issues in industrial policy, trade policy, investment policy, service policy and consumer policy as well as enactment of competition law. However, competition law should be used only as the last resort, i.e., when all other measures fail to bring about competitive outcome.

As a general rule, when competitors vigorously compete for the market, there is a tremendous pressure on them to reduce cost and improve quality of goods and services to woo the consumers. Inefficient firms are the first ones to be hit, as they are forced out of the market. Some firms are under pressure to merge with others. This results in a dynamic restructuring process in the economy and only the efficient firms survive in the market.

Another major benefit of having a competition policy is that it increases allocative efficiency of the business enterprises since the resources are allocated only to the efficient enterprises rather than being allocated to the wasteful and inefficient enterprises. Finally, competition also promotes productive efficiency by allowing firms to exploit economies of scale necessitated by the imperatives to serve a larger consumer base, which was hitherto untapped or under-served.

When all the firms are equally competitive in the market, they continue to provide competitive threat to each other. This threat is credible enough to deter firms from exploiting the consumers. Therefore, it is often said that a good competition policy can complement consumer policy. To look at counterfactual, one does not need to go far. A closer look at the functioning of the Nepalese economy provides glaring examples of anti-competitive practices.

Since competition is influenced by structure of market, nature of the economy and various cultural practices and norms, it is impossible to harmonise competition policy at the international level. It is also a folly to think of a "one-size-fits-all" competition policy that suits the needs and requirements of each country. Even among big economies, there are considerable variations in the nature of competition policy and competition legislation, one cannot think of a situation where small economies can adopt the

same competition rules as the big economies. If the competition rules of the big economies are imposed on the small economies they are bound to have serious repercussions on the economy let alone correcting distortions in the market. This is because small economies have various peculiarities, which make it all the more important for them to have a different type of competition policy.

Small economies, by definition are those economies, which cannot influence the global market through their exports but are in turn affected by the movement in global prices due to demand or supply shocks. Though most of these economies are relatively more open not only on import and export, but also on investment and degree of market contestability fairly high in these economies, a number of anti-competitive practices are prevailing in these countries. Market failure is considered to be the major cause for this. Whenever market process cannot ensure effective allocation of resources, political process should come to the rescue. However, the political process in these economies is not only opaque and convoluted, but also heavily biased in favour of the interest of the organised groups and lobbies leaving the vast array of unorganised group in despair.

Similarly, competition problems of these countries too are atypical, which are again because of market as well as government failure. Such anti-competitive practices, which cannot even be thought of in the case of big economies, are still prevalent in the small economies. For example, transformation of public monopoly into private monopoly is the largest single competition problem afflicting small economies. This is partly because of the lack of regulatory environment, partly because of the government's desire to provide monopoly power to the privatised firms in a bid to get higher price from the acquirer, partly because of the absence of post-privatisation monitoring and partly because of the faulty process of privatisation including corruption. These are not the types of problems faced by any developed country in the past when they embarked on the path of privatisation. For example, British Government, when it privatised most of its public sector undertaking including utilities, never faced any of the above-mentioned problems. Similarly, collusive tendering/bidding and syndicate system are rarely prevalent in the developed countries these days.

However, cartel falls under grey area. In a jurisdiction like US, where cartel is considered a criminal offence and there are strict rules against cartels, it is less likely to happen. On the other hand, in a jurisdiction like the EU where the major objective of competition policy is to promote the common market within the Member States, some kind of cartelising behaviour is noticed off and on. Further, in jurisdictions like Japan and Taiwan, where competition law is not taken very seriously, cartel might not be considered too serious an offence. However, the recently busted international vitamin cartel has thrown open new challenges to the competition authorities around the world. Three lessons can be learned from the busting of this cartel. Firstly, competition authorities require a rigorous investigative mechanism to uncover such international cartels. Secondly, cross border implications of international cartel are so massive that it could have destabilising effects on some small and vulnerable economies if corrective actions are not taken in a timely manner. Finally, international cooperation is necessary in such areas.

The author, however, does not intend to suggest that the competition problems akin to big economies are not prevalent in the small economies at all. Such problems as tied selling, writing exclusionary contracts[cxviii], and providing discriminatory

incentives to intermediaries are quite common even in the developed countries. However, one thing is certain that developing countries and in particular small economies are vulnerable to anti-competitive practices of an international dimension. It will be extremely difficult for them to uncover and prosecute violators of competition rules at the multilateral level, if they were to solely rely on the domestic competition policy instruments. Therefore, there are some cogent arguments to suggest that multilateral discipline helps the weaker nations. Some of them are as follows:

Firstly, there are evidences that the cartels prosecuted by the competition authorities in OECD countries have had a significant negative impact on the trade and welfare of the weaker nations. Secondly, export cartels are generally outside the realm of domestic competition law, and often actively promoted by governments. As cooperation cannot be expected in these cases, there is a need for an international regime to tackle them. Thirdly, the USA and the EU are the most frequent users (abusers) of anti-dumping rules. Due to lack of coherence between trade policy and competition policy, strong sectoral lobbies are able to push their governments into imposing anti-dumping duties without taking into account interests of other stakeholders such as consumers.

Fourthly, at present FDIs are moving rapidly from one country to another. FDIs through merger and acquisition mode can have severe anti-competitive implications, some of which could be outside the scope of national competition authorities to prosecute. Fifthly, various GATT Agreements already contain provisions relating to regulation of anti-competitive practices of firms to a large extent. There is a need to consolidate these achievements in a single agreement to create better impact.

The issues outlined above, viewed collectively, make strong and forceful case for a multilateral discipline on competition. However, there are concerns that such an international discipline could have deleterious impact on the developing countries' economies. Some of the problem areas include:

Firstly, while trade policy is meant to protect producers or sellers, competition policy's main objective is to protect the consumers. Inclusion of competition policy at the WTO may lead to the hijacking of competition agenda by the producers. Secondly, the question of harmonisation of competition law across the globe is politically infeasible. Thirdly, as per one school of thought competition policy may hinder domestic firms' ability to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as mergers and acquisitions.

Fourthly, a competition discipline based on conduct rather than structure could be highly resource demanding, which small economies might find difficult to afford. Fifthly, rigorous implementation of competition rules is a resource-consuming task. Since developing countries have limited resources, enforcement of a multilateral competition discipline may not become the number one priority area for them. Finally, all the sectors in the economy may not be equally capable to face competition especially from the foreign companies. Concerns are ripe that a multilateral competition policy devoid of development dimension may spell disaster.

For the sake of academic discussion it is always desirable to recommend that all the economies in the world should have a competition policy within a given time period because there are clear

benefits from having one. However, when one looks at the ground realities of the small economies, it does not appear to be feasible proposition. Implementation problems, resource constraints, question of independence, taking care of development dimension and above all creating competition culture among the major stakeholders are the problems which are so real that small economies cannot overcome them easily.

Therefore, one of the ideas floated by this discussion paper (which is of course subject to comments and criticism) is to have a regional competition policy for the small economies rather than having a domestic one in each country. Since the model of CARICROM is working perfectly well, it may be argued that this model should be equally suitable for other regions of the world where small economies are predominant in number. However, a couple of note of caution is worth sounding. Firstly, the regional competition policy should not be a stand-alone issue and it should move in tandem with free trade agreement or customs union arrangement within the region. Secondly, when there is asymmetry between the size of the economies (like in South Asia where India is the largest economy and Maldives is the smallest) there is a tendency among the big country to rachet up the competition standards to suit the requirement of its firms. Such temptation should be resisted, as is being resisted by CARICOM in terms of including merger control in their regime.[cxix]

One cannot overstate the need for technical assistance. Indeed, some multilateral (the World Bank), intergovernmental (UNCTAD) and regional (EU) agencies are willing to provide technical assistance to the small economies to develop competition policy and enact competitions law. These resources can be tapped by the small economies without much problem.

While there is a merit in having a regional competition policy, the welfare effects of a global rule on competition are still ambiguous. However, since negotiation on competition looks almost inevitable, small economies need to design a proactive position on competition policy for the next Ministerial Conference of the WTO. Therefore, extensive studies based on empirical evidences and a debate involving all the stakeholders are required to come up with a position on such a sensitive issue. It is hoped that the concerned institutions will take this as a 'clarion call'. If they prepare well in advance through consultation with their neighbours, bilateral trading partners and/or international multilateral and inter-government organisations, it will be much easier for them to face the challenges at a later stage. Starting with a 'no no' position and being caught unprepared when the negotiation actually begins is the worst of all. Small economies should make a conscious effort to avoid that. In any case, development dimension of the small and largely vulnerable economies should not be compromised at any cost.

APPENDIX

Figure 1
(Lack of) Market Power in a perfectly Competitive Market Structure

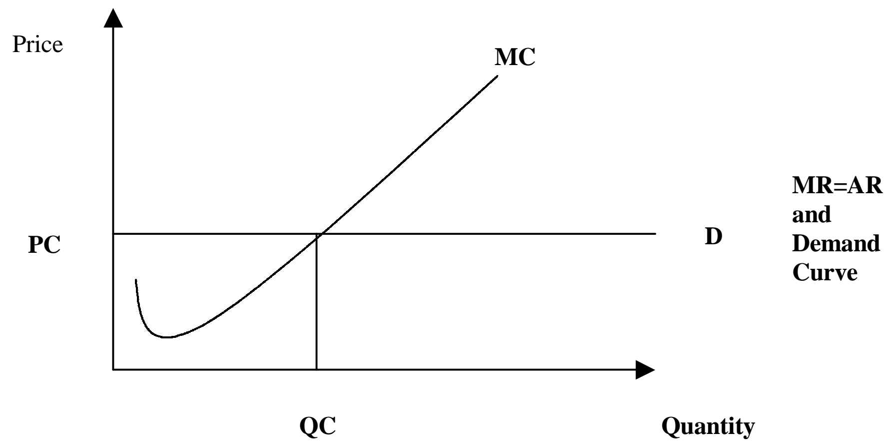
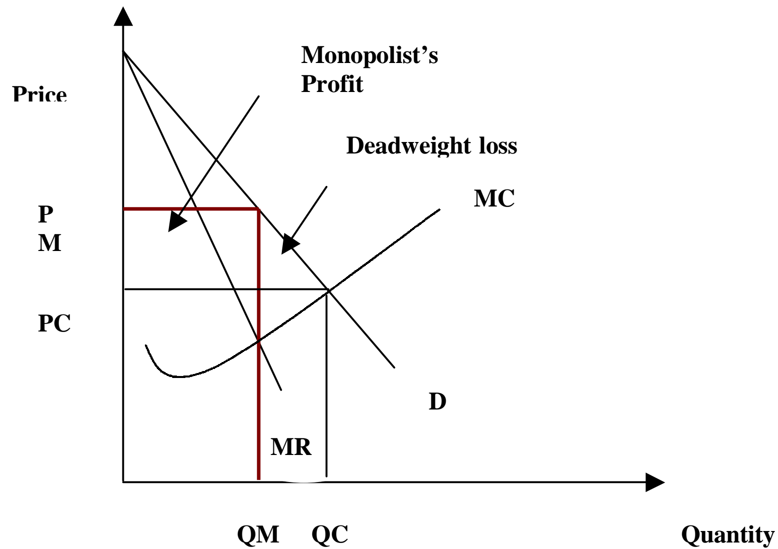


Figure 2
Market Power in a Monopolistic Market Structure



Abbreviations

D = **Demand Curve**
MR = **Marginal Revenue**
AR = **Average Revenue**
MC = **Marginal Cost**
PC = **Price in [Perfect] Competition**
QC = **Quantity in [Perfect] Competition**
PM = **Price in Monopoly**
QM = **Quantity in Monopoly**

Endnotes

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[i] India nationalised 14 banks including foreign owned ones in the year 1969.

[ii] **In Chapter 15 of the North American Free Trade Agreement ("NAFTA"), the parties agreed to adopt or maintain measures to proscribe anticompetitive business conduct and to consult periodically about the effectiveness of measures undertaken by each party. Furthermore, the parties agreed to cooperate on issues of competition law enforcement with respect to: mutual legal assistance; notification; consultation and exchange of information relating to enforcement. However, the competition provisions are not subject to the dispute settlement provisions of NAFTA.**

[iii] **Article 5. 1 of COMESA Treaty states, "The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market." See Warner, Mark (2000), "Competition policy and small open economies: investment, trade and competition policy in developing countries and some implications for COMESA" in *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa*, UNCTAD, Geneva: 59**

[iv] 1996 Mercosur Protocol of Defence of Competition has recently been ratified by the Member countries.

[v] Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is a classic example of a top down approach where Uruguay Round Agreement decided, one fine morning, that intellectual property rights (IPR) regime across the globe should be harmonised (or even homogenised) within a given period of time. And every member country of the WTO is required to comply with this requirement. Other top down agreements of the WTO include Agreement on Sanitary and Phytosanitary (SPS) Measures and Agreement on Technical Barriers to Trade (TBT)

[vi] Apart from data and information pertaining to macro economic or social indicators, which can be obtained from various publications of Bretton Woods institutions and United Nations System.

[vii] Richardson, J. David (1998), "Multilateralising Conventions" in R. Lawrence (ed.) *Brookings Trade Forum,* Brookings Institute, Washington, D.C.

[viii] Shingal, Anirudh (nd), "The WTO and Competition Policy" (to be published)

[ix] This is referred to as a demand curve with infinite elasticity, reflecting the ability of firm to sell any amount at prevailing prices, but its inability to move away from equilibrium price.

[x] Werden, Gregory J. (1998), "Demand Elasticties in Antitrust Analysis" in *Antitrust Law Journal*, Vol 66: 367

[xi] A Nash equilibrium point provides best outcome to the both players. Should they decide to deviate from this point, one of the parties cannot become better off without making another party worse off.

[xii] Faull, J and Ali Nikpay (1999), *The EC Law of Competition*, Oxford University Press, Oxford

[xiii] If there are some loyal customers of a brand, a small increase in price will not induce them to switch over to another brand. However, if price increase is large enough (trigger level), even loyal customers will start switching to competing brands.

[xiv] In Tetra Pak vs. Commission, the European Court of Justice ruled the definition of relevant market by Tetra Pak far over-stretched because this company, which manufactured paper packs for liquid foodstuffs considered the entire food packing industry as its relevant market. The company initially pointed out that plastic and glass packaging were directly competing with its product and hence should be included while defining relevant product market. Tetra Pak International SA v Commission of the European Communities, *European Court Reports*, 1994 page II-0755.

[xv] However, there are views that dominant position is bad *per se*. For example Panchu (1995) states: " A monopolistic position by itself thwarts, prevents and restricts competition without much need to indulge in improper trade practices. A giant is feared and not challenges because of his sheer size; he does not have to go about bashing the skulls of the Lilliputians all the time". See Panchu, Sriram (1995), "The HLL-TOMCO Case" in *Liberalised Trade and Fair Competition*, Consumer Unity and Trust Society (CUTS), Calcutta: 106

[xvi] In the USA price fixing (cartels) are not only considered illegal under the Sherman Act, but are also considered criminal offence.

[xvii] See Rees, R. (nd), "Tacit Collusion" in Oxford Review of Economic Policy, Vol 9, No. 2.

[xviii] For example, in the 1997 *Notice on Agreement of Minor Importance*, the European Commission has stated that since vertical agreements posed less of a threat to and risk for competition and therefore such agreements were viewed leniently. The new draft on the *Communication from the Commission relating to the revision of the 1997 notice on agreements of minor importance not covered by the provisions of Article 81 (1) of the EC Treaty* clearly states that "this new wider category of agreements will normally be viewed not appreciably affecting competition within the meaning of Article 81 (1) if the market share of *each* of the parties to the agreement does not exceed 15% (EC, 2001).

[xix] In *Gephav S. A. v. Biotherm et Compagnie case*, the French Supreme Court held that selective distribution networks as such did not violate the French Freedom of Prices and Competition Ordinance as long as the criteria used for selecting participants in the network are of an objective nature and do not have the purpose or effect of excluding certain specific forms of distribution and are not applied in a discriminatory way.

[xx] Jenny, Frederic (1995), "Economic Analysis and Institutional Aspects" in *Liberalised Trade and Fair Competition*, Consumer Unity and Trust Society (CUTS), Calcutta: 31

[xxi] Preventing concentration of economic power is one of the major objectives of competition policy in many jurisdictions. This is more so in countries, which have not reached the stage of full-fledged market economy.

[xxii] Lachmann, W (1999), *The Development Dimension of Competition Law and Policy*, UNCTAD Series on Issues in Competition Law and Policy, United Nations, New York and Geneva: 19

[xxiii] For example, of the 4,162 products exported by least developed countries (LDCs) to 30 major trading partners, 127 products account for 90 per cent of the total export trade. On an average, the top three commodities for each LDC account to over 70 per cent of its total exports. While exports of any single item may dominate their export basket, they count for relatively little in terms of the international supply, so that they are also unable to influence world prices. See Chandrasekhar C.P. and Jayati Ghosh (2000), "WTO and Poor Countries" *CUTS-CITEE Briefing Paper,* Jaipur: 3-4.

[xxiv] For example, over 70% of goods sold in Bhutan come from India (Mehta, 2000); and almost 40% of good imported into the Nepalese market are from India (MoF, 2001).

[xxv] For example, 80% of the goods sold in Bhutan are imported.

[xxvi] **For example, the import penetration ratio (import as percentage of GDP) in Tanzania is 27% and in Zambia it is 34%. See Basant, Rakesh (2001), "Synthesis of Phase –1 Country Report" in 7-UP Project *Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth,* CUTS, 7-8 September Goa: (Table 1), p. 35. Export orientation ratio of Sri Lanka was 37.33% and import penetration ratio was 49.25% in the year 2000. See de Zoysa, Thushari and Pubudini Wickramaratne (2001), "1st Phase Report – Sri Lanka," *Comparative Study of Competition Law Regimes of Select Developing Countries (7-UP Project)*, CUTS-CITEE, Jaipur.**

[xxvii] **They include the removal of restrictions on the repatriation of profits, establishing current account convertibility, and fast-tracking FDI approval. See de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[xxviii] Halliday, Anthony and Ratnakar Adhikari (2000), *Nepal's Services Offer*, report submitted to Ministry of Commerce and Nepal Accession to WTO, Kathmandu

[xxix] Helleiner, Gerry (2001), "Small Economies: Fragility and Poverty" SUNS, Geneva in suns@igc.org

[xxx] **Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), "The Competition Regime in Tanzania" Comparative Study of Competition Law Regimes of Select Developing Countries (7-UP Project), CUTS-CITEE, Jaipur.**

[xxxi] **Warner, Mark (2000), *above*, note 3: 54**

[xxxii] Norwegian competition authority reviews mergers, but does not require prior notification. However, in the case of the EU prior notification of merger is a must. Failing to notify merger in the case of EU makes the agreement illegal.

[xxxiii] See, for example, Adhikari, Ratnakar and Kamalesh Adhikari (2001), *Privatisation: Expectation and Reality,* Pro Public, Kathmandu for a detailed exposition on the competitive effects of Nepalese privatisation process.

[xxxiv] **Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30**

[xxxv] **Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.**

[xxxvi] Paudel, Madhav (2001), "Law Relating to Competition and Market Protection in Liberal Economic Framework and its Necessity in the Context of Nepal" (*in Nepali*), paper presented at a seminar on *Competition Law* organised by Nepal US Chamber of Commerce and Ministry of Industry, Commerce and Supplies, September 28, 2001, Kathmandu: 14

[xxxvii] Adhikari, Ratnakar (2000), "Aviation Sector: Price War is Here to Stay" in The Kathmandu Post, July 23, 2000.

[xxxviii] Adhikari, Ratnkar (2002), "Imperatives of Competition Policy" in The *Kathmandu Post*, March 5, 2002.

[xxxix] CUTS (2000), Consumer Protection in Bhutan – report of a study Commissioned by the Royal Government of Bhutan, Consumer Unity and Trust Society, Jaipur.

[xl] **Economic Association of Zambia (2002), "The Competition Regime in Zambia" *Comparative Study of Competition Law Regimes of Select Developing Countries (7-UP Project)*, CUTS-CITEE, Jaipur.**

[xli] Adhikari, Ratnakar and Dhrubesh C. Regmi (2001), *Anti Competitive Practices in Nepal*, Discussion Paper, January 2001, South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu and CUTS Centre for International Trade, Economics and Environment (CUTS-CITEE), Jaipur.

[xlii] Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.

[xliii] India's Monopolist and Restrictive Trade Practices (MRTP) Act of 1969 prohibited a company from offering some items "on sale" with the objective of luring the consumers (bait pricing) and try to sell some other products, which are not offered "on sale" (switch selling) once consumer comes to his shop. Since India is revamping this piece of legislation and creating a competition legislation afresh, it is likely that such provision will continue in the new legislation too or such provision will be transferred to another comprehensive consumer protection legislation, named, Consumer Protection Act of 1986.

[xliv] For further details based on an investigative reporting on this issue see Khadka (1998), "All Money No Charity" in *Spotlight*, June 19, Kathmandu.

[xlv] For further details based on an investigative reporting on this issue see Paudel, Keshav (1998), "Health for None" in *Spotlight*, December 4, 1998, Kathmandu

[xlvi] See Trebilcock, Michael J (1998), "The evolution of competition policy: Lessons from comparative experience" in Wu, Rong-I and Chu, Yun-Peng (eds.) *Business, Markets and Government in the Asia Pacific: Competition policy, convergence and pluralism*, Pacific Trade and Development Conference, Routledge, London: 86

[xlvii] Adhikari, Ratnakar and Dhrubesh C. Regmi (2001), *above*, note 21: 42

[xlviii] **de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[xlix] Nepal does not have antidumping law and institution even at present.

[l] **See Adhikari, Ratnakar (1997), "The Status of Competition Policy in Nepal" presented at the International Conference on Competition Policy titled *Competition Policy in Global Economy.* Co-organised by the World Bank, International Bar Association, Confederation of Indian Industries and National Centre for Applied Economic Research, India, in New Delhi, India, March 17-19, 1997.**

[li] Economic Association of Zambia (2002), *above*, note 39

[lii] Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.

[liii] Economic Association of Zambia (2002), *above*, note 39.

[liv] **de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[lv] **de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[lvi] Naím, Moisés (1998), "Does Latin America Need Competition Policy to Compete?" in Naím, Moisés and Joseph S. Tulchin (eds.) *Competition Policy, Deregulation, and Modernization in Latin America,* Lynne Rienner Publishers, London: 18

[lvii] Steward, Taimoon (1999), "Globalisation, Competition Policy and International Trade Negotiations" in Pradeep S. Mehta and Raghav Narsalay (eds.), *Analyses of the Interaction between Trade and Competition Policy*, CUTS-CITEE, Jaipur: 9

[lviii] Mehta, Pradeep S. and Ujjwal Kumar (2001), "Let's Be Proactive on Multilateral Competition Policy" Viewpoint paper, September 2001, CUTS-CITEE, Jaipur: 1

[lix] Basant, Rakesh (2001), *above*, note 26: 14

[lx] Lloyd, P.J (2001), "Competition Policy in The Asian-Pacific Region" in *Asian-Pacific Economic Literature*:6

[lxi] Kelegama, S. (2001), Competition Policy in Sri Lanka: An Overview, Mimeo

[lxii] See generally Adhikari, Ratnakar and Dhrubesh C. Regmi (2001), *above*, note 21.

[lxiii] Jatar, Ana Julia (1999), "Competition Policy in Venezuela: The Promotion of Social Change" in Naím, Moisés and Joseph S. Tulchin (eds.) *Competition Policy, Deregulation, and Modernization in Latin America,* Lynne Rienner Publishers, London: 95

[lxiv] One of the smallest economic groupings in the world with the combined population of 5 million.

[lxv] Naím, Moisés (1998), *above*, note 24: 18

[lxvi] Basant, Rakesh (2001), *above*, note 26: 19

[lxvii] Some mergers, such as, vertical integration may actually increase competition in the long run but distinguishing between welfare-enhancing and welfare-reducing conduct can be very difficult.

[lxviii] Lloyd, P.J (2001), *above*, note 60: 9

[lxix] Pupphavesa, Wisarn (1998), "Competition regulation and policy in Thailand" in in Wu, Rong-I and Chu, Yun-Peng (eds.) *Business, Markets and Government in the Asia Pacific: Competition policy, convergence and pluralism*, Pacific Trade and Development Conference, Routledge, London: 203

[lxx] Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.

[lxxi] The ZCC is accommodated in rented offices with an area of 652 square meters. Space and facilities are fairly adequate. Officers are provided with computers and share a photocopier. The Commission does not have a library or documentation centre even though space for one is available. A registry is used as a repository of printed materials and receives 16 periodicals and four national newspapers. The Commission has minimal communication facilities. There are three telephone lines and one fax line. There is also electronic mail connectivity, but no internet connection.

[lxxii] Economic Association of Zambia (2002), *above*, note 39.

[lxxiii] FTC has total office space of 4359 square feet, fifteen telephone lines, one fax line, one internet and e-mail connection, one photocopier and nine computers. No library facilities are available to the FTC. However, a variety of local newspapers and international magazines are being subscribed to.

[lxxiv] Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.

[lxxv] **Out of the total sanctioned cadre of 34, actual workforce employed is 23. See de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[lxxvi] See Section 4.4.1 above.

[lxxvii] For example, FTC in Sri Lanka operates under the supervision of Ministry of International and International Commerce and Food (MIICF). In 1996, when FTC made a request to fill 14 vacancies to be able to smoothly run the Commission, the MIICF only approved the filling of *three* vacancies.

[lxxviii] A classic example of non-cooperation was revealed in a abuse of dominance (exclusionary practice) adopted by a beer company in Tanzania, where the Ministry did not support the competition commission, but supported the business and hence the decision of the commission could not be enforced. See Section 3.7.2.1 above.

[lxxix] For example, in Tanzania the competition commission's budget is still tied to and managed by the Ministry of Industry and Trade's budget. In Sri Lanka, however, the budget is approved by the Parliament. But it has to be first forwarded to Department of National Budget.

[lxxx] Naím, Moisés (1998), *above*, note 24: 31

[lxxxi] Naím, Moisés (1998), *above*, note 24: 17

[lxxxii] Lloyd, P.J (2001), *above*, note 60: 5

[lxxxiii] The author does not intend to give the impression that other policy objectives run counter to the objectives of competition law. They are in no way mutually exclusive in all instances. In fact, in some case they are mutually supportive and complementary to each other.

[lxxxiv] Basant, Rakesh (2001), *above*, note 26: 24 – 25

[lxxxv] **de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.**

[lxxxvi] EC has prepared a Green Paper to amend its competition regime for cases relating to vertical restraints. It is extending the Block Exemption Rule (BER) to firms having upto 30% market share. See Leone, Velia M (1999), "Self-Assessment as Policy: Vertical Restraints and the Block Exemption Draft" in *EuroWatch*, August 15, 1999.

[lxxxvii] Brusick, Philippe (1999), "Competition Policy in A Global Economy: Towards A Multilateral Framework" in Pradeep S. Mehta and Raghav Narsalay (eds.) *Analyses of the Interaction between Trade and Competition Policy*, CUTS-CITEE, Jaipur: 107

[lxxxviii] Musonda, Flora, Wilfred Mbowe and Faye Sampson (October 2001), *above*, note 30.

[lxxxix] de Zoysa, Thushari and Pubudini Wickramaratne (2001), *above*, note 26.

[xc] Paudel, Madhav (2001), *above*, note 18: 8

[xci] Lachmann (1999), above, note 19: 37

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[xciii] Bloningen B. and Pursa T. (2001), *Antidumping,* National Bureau of Economic Research Working Paper 8398 www.nber.org/papers/w8398

[xciv] Trebilcock, Michael J (1998), *above*, note 22: 113

[xcv] Article 46 of the Havana Charter reads "Each member shall take appropriate measures and shall cooperate with the International Trade Organization to prevent on the part of private or public commercial enterprises, business practices, affecting international trade which restrain competition, limit access to markets or foster monopolistic control whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of the other objectives of the Charter."

[xcvi] Among the practices that would have been subject to ITO investigations were (a) fixing prices, terms, or conditions to be observed in dealing with others in the purchase, sale, or lease of any product; (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas; (c) discriminating against particular enterprises; (d) limiting production or fixing production quotas; (e) preventing by agreement the development or application of technology or invention, whether patented or unpatented; and (f) extending the use of rights under intellectual property protections to matters which, according to a member's laws and regulations, are not within the scope of such grants, or to products or conditions of production, use, or sale which are not likewise the subject of such grants.

[xcvii] Shingal, Anirudh (nd), *above*, note 8.

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[c] WTO (2001), *Ministerial Declaration*, WT/MIN(01)/DEC/1, 01-5859, Ministerial Conference Fourth Session, Doha, 9-14 November 2001.

[ci] Developed countries have attitudinal bias towards rachetting market access. For example, despite the fact that LDCs are provided a transition period upto December 2005 to implement the TRIPS Agreement, developed countries insisted that Vanuatu (an LDC) should implement TRIPS Agreement from the date of its joining the WTO, which is much earlier than the original deadline which they are legally entitled to. History of multilateral trading system is replete with examples of such double standards. See Grynberg Roman and Roy Mickey Joy (2000), "The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System" in *Journal of World Trade,* Vol. 34 No. 6, December 2000, Kluwer Law International, the Hague: 166

[cii] Adhikari, Ratnakar (2001), *above*, note 48: 2

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[cxi] See European Commission (1997), Commission Notice on the definition of relevant market for the purposes of community competition law, Official Journal C 372, 01/12/1997

[cxii] Basant, Rakesh (2001), *above*, note 26: 38

[cxiii] Jensen, Olivia (2001), *above*, note 110: 7

[cxiv] Musonda, Flora (2001), "Country Presentation: Tanzania" at *7-UP Project Culmination Meeting,* CUTS, *7-8 September*, Goa: 6

[cxv] Stewart, Taimoon (2000), *above*, note 100: 5

[cxvi] Mehta, Pradeep S (2001), *Taming Unilever in Bhutan!*, Mimeo, CUTS-CITEE, Jaipur.

[cxvii] Stewart, Taimoon (2000), *above*, note 100: 7

[cxviii] The famous case of Microsoft relates, among others, to tied selling of its Internet browser (internet explorer) to the windows package and writing of exclusionary contracts with their major buyers in order to exclude its competitor, namely, Netscape Navigator from the market.

[cxix] The largest economy in CARICOM, Trinidad and Tobago is insisting that the Protocol VIII to the Treaty of Chaguaramas include a provision on merger control.