

“Competition Law as a Contributing Factor to Economic Growth and Development”

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ABSTRACT

“The heart of our national economy long has been faith in the value of competition”- (Standard Oil v. FTC)

Competition refers to rivalry among firms in the marketplace. Competition policy refers to government policy that preserves and promote healthy competition among market players. It also promotes other government policies and processes that enables a competitive environment to develop. It bans anticompetitive agreements between firms such as agreements to fix prices or to carve up markets, and it makes it illegal for businesses to abuse a dominant market position.

Economic development is a process that involves increasing human welfare over time which necessitates among other things, increasing the quantity consumed, quality and variety of consumer goods over time.

Traditionally, every economy is basically based on one major concept, competition which can sometimes be good or bad, depending on the end of the spectrum. Competition is an essential component of a free-market economy. It results in goods and services being provided to consumers at a lower price and so more is consumed and produced. There is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that competition policy has an important role to play in improving the productivity and therefore the growth prospects of an economy. Competition policy, properly implemented, promotes efficiency and productivity.

"Competition is not only the basis of protection to the consumer, but is the incentive to progress." - Herbert Hoover

Developing countries are beset by a number of barriers to competition. There is an urgent need for an effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries.

Key words: competition, competition policy, economic development, economic growth.

PROGLOUGE

For most people, the word "competition" brings to mind notions of struggles or contests with outcomes of victory or defeat. This general idea about competition applies to marketing as well. In marketing, competition can be thought of as a struggle between businesses for customers. And each time a customer decides to spend his or her money in a particular way, businesses win or lose.¹ In economics, competition is the rivalry among sellers trying to achieve such goals as increasing profits, market share, and sales volume by varying the elements of the marketing mix: price, product, distribution, and promotion. Merriam-Webster defines competition in business as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms."²

Economic development can be understood as the development in the economic wealth of a particular country, region or a community for the welfare of the people living in such country, region or community. From the point of view of policy, it can be defined as an endeavour which seeks to enhance the economic welfare and quality of life for people in the society by creating job opportunities for them or retaining the existing one and supporting or growing incomes and the tax base.

There are significant differences between economic growth and economic development. The term "economic growth" refers to the increase (or growth) of a specific measure such as real national income, gross domestic product, or per capita income. When the GDP of a nation rises economists refer to it as economic growth. The term "economic development", on the other hand, implies much more. It typically refers to improvements in a variety of indicators such as literacy rates, life expectancy, and poverty rates. GDP is a specific measure of economic welfare that does not take into account important aspects such as leisure time, environmental quality, freedom, or social justice. Economic growth of any specific measure is not a sufficient definition of economic development.³

¹*Competitive Environment*, <http://academic.udayton.edu/JohnSparks/tools/notes/competenv.pdf> (last visited on June 21, 2016).

²Merriam-Webster Online.

³*Meaning of economic development*, <http://www.svbic.com/node/24> (last visited on June 23, 2016).

Competition benefits consumers both directly, through lower prices, better quality and an improved choice of products, and indirectly, through its impact on economic growth. The World Bank's World Development Report 2005⁴ emphasised the importance of competition for investment and noted how competitive pressure leads to innovation, new products and new technology.

There is a widely held view that Competition Policy makes a positive contribution to economic growth. An OECD paper, based on a survey of members and invited non-members who participated in the 2002 Global Forum on Competition⁵, concluded that: "*There are strong links between competition policy and numerous basic pillars of economic development ... There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards*".⁶

This article explores the question whether and to what extent the Competition Laws contributes to the economic development. In particular, it attempts to look at the impact of Competition Policy on economic growth and development. This article further argues that there is a need for the developing countries to show their concern not only towards the adoption of an appropriate Competition Policy but also towards its effective implementation.

EVOLUTION OF COMPETITION LAWS IN INDIA:

Competition is a process of economic rivalry between market players to attract customers. It also refers to a situation in a business environment where businesses independently aspire

⁴The World Development Report (WDR) is an annual report published since 1978 by the International Bank for Reconstruction and Development (IBRD) or World Bank. Each WDR provides in-depth analysis of a specific aspect of economic development.

⁵The Global Forum on Competition (GFC) is organized every year by the OECD Competition Division and the OECD Centre for cooperation with non-member countries. This important international forum provides avenue in which important issues can be debated with competition authorities and other representatives of the non-member countries, with a view towards increasing the policy dialogue at global level. At the same time, given its broad focus on development, the GFC promotes a wider dialogue that encompasses the linkages between competition policy and other cornerstones of economic development. Seventy authorities from Asia, Africa, Europe, Australia and the Americas currently participate in the Forum.

⁶ OECD (2007), *Implementing Competition Policy in Developing Countries*, in Promoting Pro-Poor Growth: Policy Guidance for Donors (OECD, 2007)., <http://dx.doi.org/10.1787/9789264024786-9-en> (Last visited on June 23, 2016).

for the support of customers so that they can achieve their business objective. Free and fair competition is considered to be the strength of an efficient business environment.

Economy and businesses all over the world have faced many challenges in the past few years. The job of policy makers have also become difficult. In the path of moving towards globalization, India chose to open up its economy by removing controls and pursuing the approach of liberalization. As a result the Indian markets have to face the competition not only from within the country but also from outside. The financial crisis which gripped world made it necessary for the country to adopt strong and effective Competition Policy which would encourage the markets to work well for the benefit of businesses and consumers. It was argued that an effective Competition Policy is capable of boosting the economic fitness. Also that the competitive firms innovate more, and keep their prices down and quality high in order to serve consumers efficiently further leading to economic growth.

Competition Policy can be defined as the measures taken by the government for guiding the behaviour of enterprises and structure of the industry in order to foster efficiency and maximize consumer or social welfare. These policies involves enhancing competition in the market, liberalizing trade policy, fostering easy entry and exit conditions, reducing control etc. It also includes laws which prohibits anti-competitive behaviour by businesses, abusive conduct by dominant enterprise, and anti-competitive mergers. It also minimizes unwarranted government/regulatory controls.

After independence, India chose a centrally planned economic structure known as Nehruvian⁷ Socialism Model. This model was a mixed economy model that was neither a socialist economy like the USSR nor a market economy one like the United States Of America. Under the mixed model, both the private and public sector co-existed. The reason behind the adoption of mixed economy model was to assure that the Government played an important role in capital formation in the country in order to promote an inclusive economic growth and social justice.⁸ In order to promote economic objective, the Government reserved for itself strategic industries such as mining, electricity and heavy industries, serving public interest and the functions of the private sectors were

⁷Named after the First Prime Minister of India Pandit Jawaharlal Nehru.

⁸*Macroeconomics of Poverty Reduction : India Case study*,
<http://www.igidr.ac.in/pdf/publication/PP-057.pdf> (last visited on June 25, 2016).

made subject to Industrial (Department and Regulation) Act of 1951 (IDRA).⁹ The IDRA empowered the Government to regulate the functioning of private sector viz. size of plant and production size, price of goods produced and its distribution, foreign trade and exchange control, labour issues etc. Despite the commendable goals of the Nehruvian model, the result was undesirable.

The main objective of the industrial licensing system was to direct resources in socially desired directions, however it conferred upon the government authorities, discretionary powers to control investment decisions of private industries. It further resulted in imposition of trade barriers on competition and reduction in efficiency and consequently, the growth of the economy.¹⁰ For this reason, the Government was compelled to embark upon reformation of Indian economy which began in mid-1980s, during the regime of Mr. Rajiv Gandhi. These reforms of 1980s were followed by wholesale reforms in the year 1991 and later on the balance of payment crisis¹¹ initiated under the guidance of the then finance minister and Prime Minister of India Mr. Manmohan Singh. Many more rounds of reforms came up year after year to develop India into a market based economy.

Everyone had a clear picture in their mind that the professed model was not yielding desired results because the economy was growing at the rate of less than 3% per annum and income growth was around 1.75%. In October, 1960 a Committee called Mahalanobis Committee¹² was appointed by the concerned Government to examine the reasons of inequality in the distribution of income and levels of living. The Committee observed that the "planned economy" model practiced by the Government was successful in helping the big businesses to emerge. It also suggested looking forward to the industrial structure.¹³ On the basis of such observation made by the Mahalanobis Committee, in 1964, Monopolies Inquiry Commission (MIC) was constituted by the Government to enquire into the extent of and effect of concentration of power in the private sector and the prevalence of monopolistic practices in India. The findings of MIC

⁹ Act 65 of 1951.

¹⁰ Figures for 2015 are till May 2015.

¹¹ Bernard Weinraub, *Economic Crisis Forcing Once Self-Reliant India to seek Aid*, The New York Times, June 29, 1991.

¹² Pradeep S Mehta (ed.), *Competition and Regulation in India - Leveraging Economic Growth Better Regulation* (CUTS, Jaipur, 2009).

¹³ *Ibid.*

showed the that economic power was highly concentrated in over 85% of industrial items in India and also that the then licensing policy in the country had empowered big business houses to secure unjustifiably bigger share of licenses which resulted in pre-emption and foreclosure of capacity.¹⁴

The Monopolies and Restrictive Trade Practices(MRTP)Act was passed to enable the Government to control concentration of economic power in Indian industry.¹⁵ The MRTP Act was notified in the year 1970 and the MRTP Commission was set up in August 1970. The Monopolies and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967 and the same was referred to the Joint Select Committee. The MRTP Act, 1969 came into force, with effect from, 1 June, 1970.

The enactment of MRTP Act, 1969 was based on the socio-economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in the 1974, 1980, 1982, 1984, 1986, 1988 and 1991. The amendments introduced in the year 1982 and 1984 were based on the recommendations of the Sachar Committee.¹⁶

The Sachar Committee was of the view that since the advertisements and sales promotions constitutes well established modes of modern business techniques, the consumers should not face any sort of deception through such advertisements. The Committee also noted that fictitious bargain was another common form of deception and many tactics were used to persuade buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee recommended

¹⁴Ibid.

¹⁵It may be relevant to note that the Government had also formed the Hazari Committee which looked into aspects relating to industrial licensing procedure under the IRDA which indicated that the licensing system had resulted in disproportionate growth in respect of industrial houses. Subsequently, the Dutt Committee (Monopolies Inquiry Commission) was also constituted in 1964 to study monopolistic practices and the Dutt Committee also observed the economic concentration of power and suggested the introduction of the MRTP Bill.

¹⁶The Sachar Committee was constituted by the Govt. of India under the Chairmanship of Justice Rajinder Sachar in the year 1977.

that it should be made obligatory for seller to reveal the truth when he advertises and also to avoid half truth so as to prevent false or misleading advertisements.¹⁷

The Finance Minister of India in its budget speech in February, 1999 made the following statement in the context of the then existing MRTP Act.

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."

In October 1999, the Government of India constituted a High Level Committee¹⁸ to propose a modern Competition Law for the country while considering international developments and to suggest legislative framework, which may incorporate a new law or considerable amendments in the MRTP Act, 1969. The Raghavan Committee presented its report to the Government in May 2000.

One of the biggest drawback of the MRTP Act was that it failed to provide adequate remedy to complainants. It only accorded for orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive or unfair trade practices but could not impose penalties for breach of law. Also it failed to impose other expected penalties and fine.¹⁹

Secondly, it is a widely accepted notion that Competition Law has extraterritorial application in all the cases where the overseas conduct of defendant distorts competition in the domestic market. However the Supreme Court was constant on its decision of not

¹⁷ Summary Of Sachar Committee Report

, <http://www.prsindia.org/administrator/uploads/general/1242304423~Summary%20of%20Sachar%20Committee%20Report.pdf> (last visited on June 27, 2016).

¹⁸ The High Level Committee was constituted under the Chairmanship of Mr. SV Raghavan ('Raghavan Committee')

¹⁹ Dr. S Chakravarthy, *MRTP Act Metamorphoses into Competition Act*, [www. Cuts-international.org/doc01.doc](http://www.Cuts-international.org/doc01.doc) (last visited on July 1, 2016).

recognizing this principle and had held that the wording of MRTP Act did not provide for extra territorial jurisdiction.²⁰

Thirdly, MRTP Act did not define certain key terms²¹ such as abuse of dominance, cartels, collusion, pricefixing, bid rigging, boycotts, refusal to deal and predatory pricing. Some asserted that exclusion of definition was not of much relevance because MRTP Act in general covered all anti-competitive practices. If you take the example of RTP, it was defined in fairly general term and it included all trade practice that prevents, distorts or restricts competition and therefore there was no need for a new law.²² It can be said that the generic nature of MRTP Act was very wide but this generic nature often resulted in anonymous interpretation and application of the MRTP Act. These ambiguities resulted into atmosphere of general business uncertainty on key issues.²³ In pursuance of its mandate, the Raghavan Committee proposed the amendments to be made in the existing MRTP Act and proclaimed the need for new competition law. Further the Raghavan Committee was clear of the fact that during the 30 years of its existence the wording of the existing law had been considered inadequate by judicial pronouncements. Given the above, it was felt that drafting a new law would be most beneficial.

On the basis of the recommendations of the Raghavan Committee²⁴, competition law was drafted and was presented to the Government in November 2000. The Competition Bill was introduced in the Parliament and the same was referred to the Standing Committee.

²⁰ American Natural Soda Ash Corporation (ANSAC) v. Alkali Manufacturers Association of India (AMAI) and others (1998) 3 Comp LJ 152 MRTPC. ANSAC, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI complained, to the MRTPC to take action against ANSAC for forming a cartel to exports to India. SC did not go into the allegations of cartelization, it held that the MRTP Act did not give the MRTPC any extraterritorial jurisdiction therefore MRTPC therefore could not take action against foreign cartels.

²¹ CUTS, *Report of Competition Commission of India on Study of Cartel Case Laws in Select Jurisdictions* (October 15, 2007).

²² *ibid.*

²³ Both Supreme Court and MRTP Commission had in various cases such as: Haridas Exports v. All India Float Glass Manufacturer Association (AIFGMA), (2002) 6 SCC 600; AIFGMA v. PT Mulia Industries, 2000 CTJ 252 (MRTPC); Union of India v. Hindustan Development Corporation 16 SCC 499 (1993); DG (I & R) v. Modern Food Industries, 3 Comp LJ 154 (1996), had not been able to give any guidance to the business community as to what will constitute predatory price under MRTP Act. In Modern Food, Supreme Court did mention Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) but missed the significance of this judgment with respect to the market structure and the theory recouperment.

²⁴ SVS Raghavan Committee Report on Competition Law 2000, http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf (last visited on July 1, 2016).

After considering the recommendations of the Standing Committee, The Monopolies and Restrictive Trade Practices Act, 1969 was repealed and the Parliament passed the Competition Act, 2002 with effect from 1 September, 2009.

The Competition Act, 2002 was enacted in order to prevent practices having adverse effect on competition, and to promote and sustain competition in the business environment and to protect the interest of consumers and also to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto. The Competition Act, 2002 came into existence in January, 2003 and the Competition Commission of India (CCI) was established on 14 October, 2003. CCI functions as market regulator for preventing and regulating anti-competitive practices in the country. A Competition Appellate Tribunal was also established, which is a quasi-judicial body established to hear and dispose of the appeals against any direction issued, or decision made by the CCI.

The validity of the formation of Competition Commission came to be challenged before the Supreme Court of India in *Brahm Dutt v. Union of India*.²⁵ In the course of hearing, the Central Government informed the Supreme Court that they intended to make amendments to the Act. Thereafter the Act was amended substantially by the Competition (Amendment) Act, 2007. Under the amended Act, the Competition Commission was to function only as a Market Regulator and an Expert body performing Adversary and Regulatory functions. In the year 2009, there was yet another amendment. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified on 20 May, 2009.

Introducing this Act was a key step towards facing competition. The Competition Act, 2002 promotes free and fair competition in the market. The legislation prohibits anti-competitive agreements, abuse of dominant position and regulates mergers, amalgamations and acquisitions.²⁶

Manifestations in support of "contribution of Competition Laws and Policies to economic growth and development"

²⁵ 2005 (1) TMI 410 - SUPREME COURT OF INDIA.

²⁶ CS Prashant Kumar, *Competition Law In India- An Overview*, LinkedIn, (July 3, 2016), <https://www.linkedin.com/pulse/20140821065102-73187306-competition-law-in-india-an-overview>

There is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that Competition Policy has an important role to play in improving the productivity and therefore the growth prospects of an economy. Competition policy tends to make a positive contribution to economic growth and thereby increases the welfare of society through competition law enforcement and advocacy to make markets freer and more open. Reforming anticompetitive regulations, such as the lifting or removal of barriers to entry and exit to product and service markets and transparent rules for public procurement, are the measures that are capable of producing harmony that serve to boost a country's productivity and economic growth. The existence of effective Competition Policy reduces uncertainty for business and is an important element of a good regulatory package for private sector development. Since the markets do not always work well, Competition Policy, including Competition Law is vital. Anticompetitive action by firms is not the only cause but unreasonable regulations by national, state and local governments are also various causes of market failure.

Competition Policy is said to contribute to the economic growth and development of a country in the following manner:

First, competition results in goods and services being provided to consumers at a lower price and so more is consumed and produced.²⁷ Since most producers are also consumers and they pay higher prices for their inputs than foreign competitors, anti-competitive practices in those market will make the firm less competitive.

Second, a properly implemented Competition Policy improves efficiency and productivity. It has been observed that those firms which face vigorous or a strong competition in the market are supposed to be more internally efficient and more productive.²⁸

²⁷ UNCTAD (1998) survey the literature providing quantitative evidence of the benefits of competition policy. In a cartel involving real estate in Washington DC, prosecution led to a 32% decline in prices received by real estate sellers.

²⁸ Nickell (1996) examined the link between competition and total factor productivity for 670 manufacturing companies in the UK over the period 1972-86. He found that high rent firms have lower labour productivity growth on average compared to low-rent firms. Firms in less concentrate industries were also found to have higher total factor productivity growth.

Third, Competition compels managers to reduce waste, improve the technical efficiency of production, abandon outdated production techniques and operations and invest in new technologies.²⁹

Fourth, competition fosters innovation. There has been a firm belief that the firms who do not innovate are left behind.³⁰

Fifth, competition is followed by restructuring in sectors that have lost competitiveness. It directs resources to its most efficient use and leads to the closure of inefficient firms by flowing away resources from weak uncompetitive sectors towards the more competitive sectors and in this way resources are freed for more productive uses.

Economic analyses provide the findings that vigorous competition in domestic market has close relation with economic growth and international competitiveness. There is a strong correlation between long-run growth and effective enforcement of antitrust and Competition Policy.³¹ There is a robust evidence that intense domestic competition is positively associated with international competitiveness in Japan.³² Since the enactment of AMA in 1947, Competition Law and Policy has been firmly established, thereby enhanced "competition" in the market of Japan, although they have experienced ups and downs. Vigorous "competition" in Japan's market maintained by active Competition Law and Policy has played a big role for the development of the Japanese economy.

Many authors have studied the pro growth and pro-poor benefits of competition in the markets. Findings of these authors indicates that economies with competitive domestic markets generally tend to have higher growth rates and per capita income. International competition has seen an augmentation period in which interdependence of national economies has increased to a point where all economies are exposed to the influence of

²⁹ Dutz (2002) argued that the adoption of competition policy inculcate a culture of competition. A greater impact of 'discipline incentives' spurred the competitiveness of firms by reducing managerial slack (X-efficiency) and leads to the "natural selection" of domestic firms, i.e. closure of poorly managed firms.

³⁰ Blundell, Griffith and Van Reenen (1995) showed that while firms with higher market share indeed tend to innovate more, firms in competitive industries tend to have a higher probability of innovation. In particular, as large market shares generate an increase in the level of industry concentration, they might lead overall to a reduction in aggregate level of R&D investment.

³¹ M.A. Dutz and A. Hayri, *Does More Intense Competition Lead to Higher Growth?*, The World Bank Policy Research Working Paper (April 2000).

³² M. Sakakibara and M.E. Porter, *Competing at Home to Win Abroad: Evidence from Japanese Industry*, 83 Rev. Econ. Stat. (2001).

events and policies originating in other parts of the globe. The widely accepted economic notion that barriers to competition slows down the innovation, growth and prosperity is supported to some extent by the proliferation of policy and law initiatives dealing with competition at both national and regional levels. The adoption of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980 has been a key effort in articulation at a global level. Significantly, these rules also recognize the development dimension of Competition Law and Policy and provide a framework for international cooperation and exchange of best practice.³³

Dutz and Hayri (1999) studied the strength of association between intensity of economy wide competition and growth. To capture intensity of economy wide competition, they constructed three types of variables related to policy, structure and mobility. Policy measures capture the quality of the microeconomic incentive regime and the enabling legal and regulatory framework in areas that directly promote competition. Structure variables reflect the extent to which market structure is concentrated from an economy wide perspective. Mobility variables capture the ease with which new enterprises can enter and grow in any market. Their results indicate that there is a strong correlation between the effectiveness of Competition Policy and growth. They concluded that the effect of Competition Policy on growth is robust and goes beyond that of trade liberalisation, institutional quality and a generally favourable policy environment.³⁴

Bee San and Changfa Lo (2002) examined the social and economic impact of the implementation of the Fair Trade Law (FTL) on Taiwan's economy. They utilised a multi-equation system taking into account FTC's statistics on decision with sanctions, together with key macroeconomic indicators. Their results showed that the implementation of the FTL in Taiwan would significantly enhance Taiwan's international competitiveness and its exports. In addition, the implementation of FTL will also create more job opportunities and stimulate more innovation efforts.³⁵

³³ Hassan Qaqaya and George Lipimile (eds.), *The effects of anti-competitive business practices on developing countries and their development prospects* (UNCTD, UN, New York and Geneva, 2008), http://unctad.org/en/Docs/ditccclp20082_en.pdf (last visited on July 3, 2016).

³⁴ Dutz Mark and Hayri Aydin, *Does more intense competition lead to higher growth?*, CEPR Discussion Paper (1999).

³⁵ ASEAN Competition Conference, *Fostering the Promotion of Competition Policy for Regional Development* (15-16 November 2011, Bali)

A survey was being done by the members and invited non-members who participated in the 2002 Global Forum on Competition. On the basis of that survey, an OECD paper concluded that:

“There are strong links between competition policy and numerous basic pillars of economic development ... There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards”.

An OECD study of 53 countries conducted in 2002 found a strong correlation between the effectiveness of Competition Policy and growth (Dutz and Hayri, 2002). Competitive markets allow new firms to enter, efficient firms to thrive and substandard firms to fail and exit. In 1999, the Australian Productivity Commission found that its National Competition Policy reforms mean that “national output (is) ... 2.5% higher than otherwise – an amount equivalent to almost one year of economic growth”. This estimate did not include the dynamic efficiency gains also expected to flow from the competition reforms.³⁶

In 2005, the OECD quantified the benefits of liberalising product markets and reducing barriers to international trade and investment in its member countries. The findings indicated that the gains from such reforms are quite substantial and could lead to gains in GDP per capita up to 4% to 5% (OECD, 2005). They also showed that product market reforms that stimulate competition would provide the largest part of the overall gains in all OECD countries.³⁷

Examples of few countries having comprehensive Competition Policy statement includes Botswana, Australia, Mexico etc.

MEXICO

A comprehensive policy on competition i.e. The Federal Law of Economic Competition (LFCE) which came into force in 1993 in Mexico was adopted as a part of the National Programme of Economic Competition (PNCE) in 2001-2006. Mexico has been quite effective in systematically implementing competition regime in the country. In recent times,

³⁶Supra note 6.

³⁷ OECD (2015), *Competition law and policy: Drivers of economic growth and development*, https://www.oecd.org/development/002014381_CfD_E-book_FINAL%20VERSION%20FOR%20WEB.pdf (last visited on July 5, 2016).

Mexico has done exceptionally well in terms of attracting investments which can be traced from UNCTAD 2007 World Investment Report. This report mentions Mexico as the leading recipient of FDI among Latin American countries.

FDI flow in Mexico³⁸

Year	1980	1990	2000	2005
FDI (US\$ mn.)	2,099	2,633	17,588	18,055

Australia

Australia is a developed country and it sets a good example of an economy with comprehensive Competition Policy. It has National Competition Policy which incorporates the following elements into its Competition Policy: limiting anti-competitive conduct of firms; reforming regulation which unjustifiably restricts competition; reforming the structure of public monopolies to facilitate competition; providing third-party access to certain facilities that are essential for competition; restraining monopoly pricing behaviour; and fostering "competitive neutrality" between government and private businesses, when they compete.³⁹ The country's approach to promote investment through fostering competition is evident from its present investment regime.

India and Botswana

Countries like India and Botswana have already shown their commitment towards incorporating elements of investment promotion and growth in their Competition Policies.⁴⁰ Further, they look forward to develop the competition institutions simultaneously to effectively implement their Competition Policies. Both these countries have also embarked upon a process of economic reforms, and have been recognised as 'investment hotspots' in their respective regions.

Thus, from the above examples, one can safely anticipate that a strong institution to implement their Competition Policies would complement efforts already undertaken by the national governments and further strengthen their ability to attract investment.

³⁸ UNCTAD, *Handbook of Statistics* 344-348 (UNCTAD, Geneva, 2006).

³⁹ Hilmer, F, *National Competition Policy* (1993).

⁴⁰ *Supra* note 38.

Growing need for effective Competition Law and Policy in developing countries

Competition benefits countries as well as people through various mechanisms. A solid and rational competition framework is capable of enticing increased productivity as it creates a right platform to attract the most efficient firms. A strong Competition Policy can be an effective tool to promote social inclusion and reduce inequalities because it provides the customers with more options, acting as an automatic stabiliser for prices. It also promotes innovation as firms which face competitive rivals innovate more than monopolies. Competition mechanisms can also help in achieving other strategic objectives, such as environmental or health benefits.⁴¹

Most developing countries have a short history of competition law as compared to most developed countries. It has been observed that companies which have adopted Competition Laws since about 1990 often associated it with other cogent and important policy changes which includes privatisation, trade liberalisation and deregulation. The very idea of setting apart the effects of these policies is itself a challenge.

There has been a growing concern among some developing countries that adopting Competition Laws could result in hindering the international competitiveness of local enterprises as it is capable of imposing undesirable strict restrictions on mergers. It is essential for the firms to achieve economies of scale through mergers in order to cope with international competition. Thus, strict merger regulations could block the growth to minimum efficient size of firms in developing countries.

However, there is increasing information on the harm anti-competitive practices in both national and international markets can do to developing countries. Examples of domestic anti-competitive practices that especially affect the poor include:

First, ring tendering for polythene pipe supplied to the Nepal Drinking Water Corporation,⁴² and for school construction in China.⁴³

⁴¹ *Supra* note 37 at pg. 4.

⁴² Adhikan, R., *South Asia Watch on Trade, Economics and Development*, Kathmandu, presentation at FIAS Conference, Sri Lanka, June 2004.

⁴³ OECD (2002), *Global Forum on Competition 2002*.

Second, flower exports from Morocco being made uncompetitive by the combined effects of a trucking cartel, a freight forwarding cartel and compulsory use of the national airline.⁴⁴

Third, cartels of companies buying tea, sugar and tobacco forcing down returns to farmers in Malawi,⁴⁵ and cartels for retail sales of flour, bread and poultry affecting retail prices in Peru.⁴⁶

Fourth, "Bundling"⁴⁷ by dominant firms, such as the action of a gas company in south-western India forcing new customers to buy hot plates when they were connected to the gas supply.⁴⁸

Much has been written by economists on the harmful effects of monopoly on prices, output and consumer welfare. However, there has been little empirical research into the impact of Competition Policy on national economies and very little on the impact on developing countries. There are several possible reasons for this, including limits on the availability of data.

Some people argue that if a country is open to trade and investment, it does not need a Competition Law. Openness to trade and investment can have large and beneficial impacts on competition. However, foreign investment can bring heightened concern in developing countries about competition and, in any case, some goods and services cannot be traded internationally. Competition Policy and Law can benefit all countries, whatever their size and level of development, but the law must be appropriate to their needs.⁴⁹

Few claim that Competition Policy leads to increased unemployment and endangers incumbent industries and enterprises. Since competition drives out inefficient enterprises

⁴⁴ USAID study reported at International Competition Network Workshop, Paris, February 2002.

⁴⁵ CUTS (2003), *Spine Chilling Experiences of Anti-Competitive Practices in Malawi*.

⁴⁶ CUTS (2002), *Challenges in Implementing a Competition Policy and Law*.

⁴⁷ "Bundling" involves a dominant firm compelling purchasers of the product for which it is dominant to buy another product as well, which they might not want or might be able to obtain more cheaply elsewhere.

⁴⁸ CUTS (2002), *Competition Policy and Law Made Easy*, http://www.cuts-cier.org/pdf/Competition_Policy_and_Law_Made_Easy.pdf (last visited on July 6, 2016)

⁴⁹ OECD (2006), *Implementing Competition Policy in Developing Countries: an extract from "Promoting Pro-Poor Growth- Private Sector Development"*, Development Assistance Committee (DAC), <http://www.oecd.org/dataoecd/24/45/36563626.pdf> (last visited on July 6, 2016). ; MEHTA, QURESHI and BANSAL (2003).

from the market, it would result in unemployment and bankruptcy.⁵⁰ One cannot avoid the impact of Competition Policy in social context. As a matter of fact, ignoring the social impact of Competition Policies can be harmful in long term. However, in the heat of considering the social impact of Competition Policies, one cannot avoid the interest of consumers and user industries. Protecting the inefficient firms would result in imposing a burden on consumers and user industries, be it in terms of rise in price and/or reduction of quality of good/services. In order to tackle this situation, the developing countries should focus not only on adopting the effective Competition Policy but also on its effective implementation. Also at the same time these countries need to adopt other policies in order to prevent any negative impacts. Providing short-term unemployment benefits and adopting policies which promotes job mobility can be helpful. This would be beneficial in increasing the national economic welfare. For the economies which are undergoing the process of transition, proper arrangement of policy changes, including introduction of effective competition, can be of great significance. The experiences of Russia and Syria, for example, highlight the need for better understanding of how to introduce competition to transitional economies.

More empirical research on the harm caused to developing countries by inadequate competition, and on the consequences of increasing the potency of competition through the adoption of Competition Policy and Law, would be worth. Since the developing countries lack in finance and skilled people, these economies are required to choose vigilantly how to account for these limited resources in a manner more beneficial to them. For small countries that are members of regional groups, a regional Competition Law could enhance the impact of the domestic law. Co-operation arrangements with developed countries could provide help in staff training through exchange programmes and information exchanges.⁵¹

The intensity of competition in some developing countries markets is low because market in these countries is not easily accessible and the number of players in the market is also

⁵⁰ Shughart and Tollison (1991) examine the impact of antitrust enforcement by Department of Justice (DOJ) on employment in the United States over the period of 1932-1981. They found that on balance antitrust led to more unemployment. The elasticity of unemployment with respect to unanticipated antitrust case activity is 0.15. This translated to an average annual increase of about 5400 individuals in the stock of unemployment participants in the labour force.

⁵¹ *Supra* note 49.

limited, with large concentration.⁵² Even though the evidence exists backing the anticompetitive behaviour in developing countries' markets, their high concentration and entry barriers they give way to conditions for anticompetitive practices to flourish.⁵³ On the other hand, international cartels and anticompetitive practices by foreign firms and multinationals also damage competition in developing countries markets. The existence of international cartels with anticompetitive effects in several markets, including those of developing and young countries, is also well known.⁵⁴

The priorities of developing countries may be quite different from those of developed countries. Developing countries are set upon by a number of barriers to competition. There is an urgent need for an effective Competition Law and Policy in these countries. However, various market characteristics and legal and enforcement difficulties have made it much harder to implement Competition Law and Policy in developing countries than in developed countries. Various factors causing such difficulties includes problems relating to small size, large barriers to entry, difficulties in fostering a competition culture and various other political constraints. In order to promote competition while operating in these constraints, each country needs to adapt effective implementation strategies. It can be observed that the uncompetitive markets are an even greater problem in developing countries. Thus, despite of these serious constraints on effective Competition Law and Policy, the developing countries must look forward to the enforcement of effective Competition Laws.

Competition Law and Policy intervention have been advocated as policy tools to deal with poverty in developing countries. These instruments should take deliberate measures aimed at expanding the entrepreneurial base, through the prohibition of anti-competitive arrangements and the control of mergers/acquisitions, and at promoting effective competition in infrastructure industries. Energy, telecommunications, and financial markets are important

⁵² Singh, A. (2002), *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, G-24 Discussion Paper Series No. 18, Geneva: UNCTAD, UNCTAD/GDS/MDPB/G-24/18.

⁵³ Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 World Competition; Law and Economic Review (2006).

⁵⁴ S. J. Evenett, M. C. Levenstein, et.al., *International Cartel enforcement: Lessons from the 1990s*, 24 World Econ. 1221-1245 (2001). ; M. C. Levenstein and V. Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 Antitrust L.J.(2004).

pillars of economic growth and also contribute to the creation of direct and indirect employment, which is an essential tool for alleviating poverty.⁵⁵

The international institutions like The World Bank, OECD, UN, UNCTAD while evaluating the conditions for achieving economic development in a country found that the major requirement is the formulation and implementation of effective Competition Law and Policy. These organizations help the developing countries in formulating and implementing Competition Policies.

The United Nations (UN) is the international organization which groups the largest number of countries, with almost two hundred member countries. It lays emphasis on the fact that importance and relevance of Competition Policy is the key ingredient for the growth and development of nations⁵⁶. On the operative side, the United Nations Commission for Trade and Development (UNCTAD) has several projects and initiatives on assisting the design and implementation of competition policies in young and developing countries.⁵⁷ The OECD aims at promoting and encouraging market oriented reforms in industrialised and developing countries, providing governments with assistance to tackle anti-competitive practices and regulations.⁵⁸ The World Bank spends a considerable amount of resources in promoting the establishment and implementation of sound competition laws and policies worldwide.⁵⁹

⁵⁵ *Supra* note 33.

⁵⁶ UN, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, Resolution adopted by the United Nations Conference on Restrictive Business Practices on April 22, 1980 and Resolution 35/63 adopted by the General Assembly at its thirty-fifth session, on December 5, 1980, <http://r0.unctad.org/en/subsites/cpolicy/index.htm> (Last visited on July 6, 2016).

⁵⁷ UNCTAD, *Competition Policy for Development: A Report on UNCTAD's Capacity Building and Technical Assistance Programme in Competition Law and Policy*, New York & Geneva (2004), <http://r0.unctad.org/en/subsites/cpolicy/index.htm> (last visited on July 7, 2016).

⁵⁸ The OECD has adopted several recommendations on several aspects of CP. It also has several initiatives serving national competition authorities in strengthening their capacities and helping them in bringing a coherent enforcement of competition law and organizes several activities that promote cooperation among competition authorities. For further information see, <http://www.oecd.org> (last visited on July 7, 2016)

⁵⁹ THE WORLD BANK, *World Development Report 2002 on Building Institutions For Markets* (Oxford University Press, Oxford-New York September, 2001), http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946_01092204010635/Rendered/PDF/multi0page.pdf (Last visited on July 7, 2016). ; THE WORLD BANK/ OECD, *A Framework for the Design and Implementation of Competition Law and Policy*, (Washington, D:C.-Paris 1999), <http://rru.worldbank.org/Documents/PapersLinks/2427.pdf> (last visited on July 7, 2016).

The non-governmental international organizations like CUTS also plays an important role in formation and implementation of Competition Policy in young and developing countries. Since 1984 the Consumer Unity & Trust Society (CUTS) provides assistance for instilling Competition Policy regimes and institutions in developing countries .⁶⁰

Despite of making numerous efforts and insisting on necessity of Competition Policy, not much concern have been shown by developing countries. While in some countries, formulation of Competition Rules and Policies has been quick, some others shows resistance to the adoption of Competition Laws. Not only in formulation, these variations also exist in the implementation and enforcement of Competition Rules and Policies in those countries which have adopted them.

Experiences from developing countries have shown that prudent Competition Policy and Law enforcement can assist specific key sectors to accommodate/include more players. Many rural communities in developing countries, who totally depend on the agricultural sector, are classified as poor. Therefore, a competition authority would pay attention to these sectors in order to tackle anti-competitive practices affecting them. Such intervention can directly and/or indirectly contribute to wealth maintenance and creation, which is key to poverty alleviation.⁶¹

Potential benefits of having effective Competition Policy in developing countries

Achieving the Millennium Development Goals⁶² requires rapid and sustained growth in developing countries. The adoption of Competition Laws and the establishment of a Competition Policy has positive effects on the country's economy. The reasoning is similar for developed and developing countries, though the later may even get further benefits. It is now widely accepted that the private sector must be the engine of growth, and that governments must create environments that allow the private sector to flourish.

Competition is essential if markets are to work well for the poor. When firms have to compete vigorously, they must find better ways to produce and distribute goods and services.

⁶⁰ CUTS (Consumer Unity and Trust Society, India), <http://www.cuts-international.org/> (Last visited on July 2, 2016).

⁶¹ *Supra* note 33.

⁶² The Millennium Development Goals (MDGs) are the world's time-bound and quantified targets for addressing extreme poverty in its many dimensions-income poverty, hunger, disease, lack of adequate shelter, and exclusion-while promoting gender equality, education, and environmental sustainability. They are also basic human rights-the rights of each person on the planet to health, education, shelter, and security.

Undoubtedly, it may benefit foreign investment in the country, but the main benefits will be perceived by the national market players in the domestic setting itself. Consumers and firms will also be the beneficiaries of competition policy. Consumers will be benefitted from lower prices, more choice and availability of products/services. Firms will become more efficient and market access will be easier for competitors.

Effective Competition Policy is capable of booming innovation as the producers will be encouraged by competitive market to invest in research and development of new products and new manufacturing techniques. All these repercussions are capable of causing economic growth and development which in turn will help in fighting against the poverty.⁶³

The analytical framework "Accelerating Pro-Poor Growth through Support for Private Sector Development" manifest the importance of Competition Policy to the poor. It involves discussions relating to effects of entry and exit barriers to entrepreneurship and the contribution made by competition to innovation and productivity.

Competition Policy is less interventionist than other mainly industrial policies adopted by many developing countries. Greater reliance on markets is inevitable as economics develop because central planners do not have sufficient information to know what is happening Graham notes that:

*"When the leading export sector of a nation becomes increasingly complex, industrial policy fails to work as well as it apparently did at earlier stages of development. Hence in order to continue to develop internationally competitive export industries, government... have found that as a pragmatic matter, adoption of less interventionist policies has been necessary."*⁶⁴

The World Bank's World Development Report 2005 emphasised the importance of competition for investment and noted how competitive pressure leads to innovation, new products and new technology. When it released Asian Development Outlook 2005 in April 2005, the Asian Development Bank headlined its view that effective competition policies are needed "if Asian countries are to maintain their high rates of growth and employment".

Finally, an effective Competition Policy may also lead to positive welfare effects, as the intensifying competition may lead to costs savings, weeding out inefficient firms, giving

⁶³Supra note 49.

⁶⁴Graham, *Competition policies in the Dynamic Industrializing Economies: the case of China, Korea and Chinese Taipei*, Mimeo prepared for OECD Development Centre.

larger market shares to more cost-efficient firms and leading higher entry in the market by new firms.⁶⁵

EPILOUGE

It has been broadly expressed that although steps have been taken towards promotion of competition through the adoption of market reforms and enactment of Competition Laws, there is need for a more comprehensive approach which should be based on a long-term approach, policy cohesion, evolution of effective institutions, engagement of multiple stakeholders, among others to ensure that a proper competition framework is evolved to attract investment for development.

From the foregoing it is clear that Competition Law in both developed and developing countries is essential to spur growth and development and to protect consumers therein. A major challenge in developing countries towards effective implementation of Competition Laws and policies are institutional, administrative and policy arrangements that makes the elimination of "uncertainties"(in the eyes of potential investors), difficult. These factors hinder countries' capacity to reap benefits from market reforms processes, due to failure to attract both domestic and international investors.

Young and developing countries need a Competition Policy, but they should possess a minimum basic, stable and strong institutional background in advance. There is no chance of success in establishing or applying a state Competition Policy if solid institutions are not present. Governments (and indeed other stakeholders) should pay attention towards the creation/development of an effective competition agency supplied with the requisite mandate, resources and authority to implement the competition law of the country for instilling transparency and predictability in the business environment.

The experiences of countries that have introduced competition laws suggest that Competition Laws should be introduced carefully and wisely by developing countries. Moreover, as discussed above, Competition Law is often used as a stimulant for the attainment of the UN's millennium development goals, which are of special importance for developing countries worldwide. The experience in developed countries shows, Competition Laws take time to implement. It is an exercise that should only be undertaken with a full appreciation of

⁶⁵ See, for example, although not referred exclusively to Competition Policy but to competition enhancing policies in general, AGHION and SCHANKERMAN (2004).

the implication of its introduction for economic efficiency and social goals. Rush or lack of patience leads to undesirable outcomes. The meal for economic development and growth is a long one, and courses should be taken one by one, in the proper order. Priorities should be established, and some policies and conditions are pre required for Competition Policy to establish and to be effective. It is thus enormously clear that Competition Law is a tool to be utilised in the attainment of economic freedom and prosperity, irrespective of its country of application. As Judge Learned Hand stated in the case of *United States v. Aluminium Co. of America*⁶⁶: "Possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy...Immunity from competition is a narcotic and rivalry a stimulant to industrial progress".⁶⁷

⁶⁶ 148 F.2d 416, 427.

⁶⁷ Evenett SJ, *What is the Relationship between Competition Law and Policy and Economic Development?* 44 (University of Oxford, 2005).