LL.M. IV SEMESTER
SUBJECT: INTERNATINAL TRADE LAW
CODE: L-4004

TOPIC: Competition Law and International Trade

Introduction

One of the dominant economic themes in the last quarter of 20th century has been the process of globalization and a progressive international economic integration of the world economy. The moment is towards widening International flows of trade, finance and information in a single integrated global market. Globalization has the fundamental attribute to increasing the degree of openness in most country. The underlying rational for globalization is that free flows of trade, finance and information will produce best outcomes for growth and human welfare. However, it is inevitable that globalization may initially, in an unequal word, throw up gainers and losers. It follows therefore that if proper checks and balances are not laid down and complementary policies are not in palace, the growth, welfare and income gaps across countries may widen. Hence the need for a competition policy and law assume importance.

Concept of competition

A free Enterprise economy implies. Competition is the great regulative force which establishes control over economic activities. It ensure the economic salvation of society. However, A free enterprise economic does not imply unrestrained competition. The stream Laissez-faire approach of a self-regulating system has been replaced by a reorganization cognition that to achieve a substantially more competitive market; Reliance must be placed on legal regulation although the scope of regulation is a matter for debate as the term competition is itself vague with its diverse and sometimes conflicting goals. In a more euphemistic language of the Australian trade practices tribunal, competition is a “very rich concept containing within it a number of Ideas” and may be valued for many reasons as serving economic, social and political goals.

Rudoff Callmann developed the metaphor of competition as a “order of struggle” the antitrust laws are concerned with defining the fundamentals of competitive order and preventing “peace” in the competitive process “just as the law of the order of peace is violated by struggle so the law of struggle is violated by peace”. Competition policy as laid down in antitrust legislation is concerned with the maintenance of open competition as a fundamental principle of the economic order as a whole.

Competition embracing known - constructive effort violets the “rules of the game competition”. This dimension of competition is referred to as “unfair competition”.

In fact, the idea of competition has had for 2 centuries or more, a powerful influence on the way we think about our society, the way we organise things and the ways we conduct hour on economic and personal lives. There is, however, little agreement on what competition really and fails. However, competition is an essential element in the efficient working of markets. It encourage enterprise and efficiency and widens choice. It enable consumers to buy the goods they want at the best possible

price. By increasing efficiency in industries, competition in the domestic market weather between domestic firms alone or between those and Overseas firms also contribute to International competitiveness.

Western society is organised on the assumption that firms freely compete for markets for goods and services, for access two factors of production and for the ownership of other less efficient firm. In this competition game there are high rewards for successfully players and a promise of ever rising standards of living for all the spectators. Competition is said to place each productive resource in the precise position where it can my the greatest possible addition to the total social dividend. Competition is an excellent, tough and no-nonsense means of getting things done, of matching consumers needs to producer resources

How to measure competition?

In view of the different views on what constitutes competition. It is not surprising that a similar lack of agreement exists on how to estimate the competitiveness of an industry. Broadly speaking there are 3 man approaches: (1) structure (i.e. market characterized by purely competitive, oligopolistic, monopolistic or monopolistically competitive features (2) Conduct (how do the firms in the industries set their prices and output, handle their advertising and so forth?) and (3) performance (how does the industry compare with others in profit ability, growth product improvement and so on?)

Within each group there are many different approaches and no general agreement as to what particular tests prove. Generally speaking advocates of strong antitrust policy favour structural, tests since these are more likely than the others to show a lack of desirable of competition, the American economy being more competitive in conduct and performance then in structure. Structural tests also have the advantage, from this view point of being is to apply and of approaching the speed and simplicity of per se rules.

Structural Test

The easiest structural test of competition is the concentration ratio in an industry, the operation of market share held by the leading two, three, four or some other small number of firms. The most widely accepted structural tests is ease of entry into an industry. If there are no barriers to entry to prevent new competitors whenever an industry tends to word monopoly profits for inefficient performance, antitrust violation tend to be self corrective, such a test is accepted among economist, defendants, and even at times, by the supreme court (USA).

Conduct Test

Conduct test is the independence of river firms. Independence among rival firms is frequently argued in terms of whether the firms concerned have in the past been convicted to violating Section 1 of the Sermon act, since price - fixing is the clearest sign of lack of independent action.

Performance Test

Performance tests of competition seem the most logical. After all, it competition is desired it is desired not because it is good as an and of itself but because it leads to certain worthwhile results.

Perhaps, therefore, neither structural conduct test are as useful as the direct questions, does the industry concerned perform. Well economically? do the challenges firms, give us the economic results we want form industry?

In competitive process, firms, try to build into their goods and services qualities which will reduce people's sensitivity to their own and other people's price changes. This process of product differentiation leads to a greater emphasis being placed by firms on satisfying customers less economic needs.

Competition, which is workable and effective, is generally characterised by a sequence of pushing and pursuing acts of the agents in a particular market. It is the foundation of an efficiently working market system, which has several advantages over a planned economy and constitutes the precondition which protects freedom of decision and action of self-interested individuals or entities from leading to anarchy or chacs but rather to economically optimal, socially fair and desirable market results.

Need for a New Competition Law/Policy

The MRTP Act is limited in its sweep and hence fails to fulfil the need of a completion law in an age of growing liberalization and globalization. It is important to note that particularly by April 2001, all quantitative restrictions would have been completely phased out and with low level tariffs already negotiated during WTO rounds. India will be facing severe competition from abroad. A new competition law will prevent international cartels from indulging in anti-competitive practice in our country. Furthermore, if should be a precursor to the international competition law, which is sought to be placed on the agenda of the WTO. It is to benefit from reciprocity from other countries, which have legislated against the abuse of competition through dumping and predatory pricing.

The ultimate rason detre of competition is the interest of the consumer. Thus competition policy is a desirable objective and a useful instrument for serving consumer interest and welfare. There is a need to bring about a competitive environment.

The Monopolies and Restrictive Trade Practices Act, 1969, does not contain provisions to deal with anti-competition practise that may accompany the operation and implementation of the WTO agreements. Specific provisions may be necessary to deal with identifiable anti-competition practices that may accompany international trade in the WTO regime.

Report of the Committee on Competition Policy and Law

The High Level Committee on Competition Policy and Competition Law under the Chairmanship of S.V.S. Raghvan was set up by the Department of Company Affairs, Ministry of Law, Justice & Company Affairs in October, 1999. The committee was given a mandate to suggest a modern Competition Law in line with international developments to suit Indian conditions. The Committee submitted its report to the Prime Minister on 2nd May, 2000.

Pre-Requisites for a Competition Policy

The objective of competition policy is to promote efficiency and maximize welfare Trae liberalization alone is not sufficient to promote competition and there is a need for a separate competition policy

in certain, areas the changes in the policy environment have been far reaching. Although significant steps have been taken to increase completion in various sectors of the economy, a number of important things need to be done that are essential for a completion policy.

Therefore, the completion policy/law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO agreements. In particular, agreements relating to foreign investment, intellectual property rights subsidies, countervailing duties, antidumping measures, sanitary and phylosantary measures, technical barrier to trade and government procurement need to be reckoned in the competition policy/law with a view to dealing with anti-competition practices.

The Committee on Competition Policy and Competition Law dealt with Pre-requisite for a Competition Policy as follows.

Competition process is likely to run smoothly and thus lead to desirable results only if several pre-requisites are met. Micro-industrial Government policies that may support of adversely impinge on the application of competition policy would include.

- Industrial Policy
- Reservation for the Small Scale Industrial Sector
- Privatization and Regulatory Reforms
- Trade Policy, including Tariffs. Quotas, Subsidies, Anti-dumping action etc.
- State Monopolies Policy
- Labour Policy

In respect of conflicts between Trade Policy and Competition Policy, the Committee suggested that:

(a) The essence and spirit of competition should be preserved while positing the Competition Policy and seeking to harmonize the conflicts between Competition Policy and Governmental Policy.
(b) The Industries (Development and Regulation) Act, 1951 may no longer be necessary except for location (avoidance of urban centric location), for environmental protection and for monuments and National heritage protection considerations, etc.
(c) There should be no reservation for the small scale sector of products which are on open general licence (OGL) for imports. There should be a progressive reduction and ultimate elimination of reservation of products for the small-scale industrial and handloom sectors. Cheaper credit in the form of bank credit rate linked to the inflation rate should be extended to these sectors to enable them to become and be competitive. The threshold limit for the small-scale industrial and small-scale service sectors needs to be increased.
(d) The economic reforms of liberalization, deregulation and privatization need to be further progressed and should be so designed that they strengthen the competition policy and vice-versa.
(e) All trade policies should be open, non discriminatory and rule-bound. They should fall within the contours of the competition principles. All physical and fiscal controls on the movement of goods throughout the country should be abolished.
(f) Government should divest its shares and assets in State monopolies and public enterprises and privatize them in all sectors other than those subserving defence and security needs and

sovereign functions. All State monopolies and public enterprises should be under the surveillance of competition policy to prevent monopolistic restrictive and unfair trade practices on their part. Any form of discrimination in favour of the public sector and Government commercial enterprises except where they relate to security concerns must be removed. However, care should be taken not to create private monopolies out of public monopolies.

(g) The Industrial Disputes Act, 1947, and the connected statutes need to be amended to provide for an easy exit to the non-viable ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.

(h) Structures like BIFR need to be eliminated. It is better to repeal the Sick Industries (Special Provisions) Act itself.

(i) Concerns relating to trade dimensions vis-a-vis WTO agreements and principles need to be squarely addressed.

(j) Urban Land Ceiling Act should be repealed.

The Committee is of the view that the Government, while enacting an appropriate they, will constitute a foundation over which the edifice of Competition Policy and Competition Law needs to be built.

The Committee has recommended enactment of an Indian Competition Act, alongwith the setting up of a Competition Commission of India, (CCI), to act as a watch dog for the introduction and maintenance of the competition policy, repeal of the Monopolies and Restrictive Trade Practices Act, 1969 and the winding up of the Monopolies and Restrictive Trade Practices Commission. Alongwith other recommendations, the Committee recommended that the pending cases relating to monopolies and restrictive trade practise before the MRTP Commission may be taken up for adjudication by the Competition Commission of India from the present stages. The Committee also suggested that cases of unfair trade practices, pending before the MRTP Commission may be transferred to the consumer courts concerned under the Consumer Protection Act, 1986. Furthermore, the Committee recommended that:

(i) the State Monopolies, Government procurement and foreign companies should be subject to the competition law. The law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made.

(ii) all decisions of the Regulatory Authorities can be examined under the touchstone of competition law by the CCI.

(iii) bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit completion. In the competitive and globalize environment, there is need to encourage size, growth and international affiliation of professional firms. This should be encourages and restrains should be removed.

(iv) if quality and safety standards for goods and services are designed to prevent market access, such practices will constitute abuse of dominance/exclusionary practices.

Some of the major recommendations relating to (1) Restrictive trade Practices; (2) Mergers; (3) Dominance; (4) Resale price maintenance; (5) Administration and Enforcement are as follows.

Restrictive Trade Practices

Horizontal agreements and restrictive agreements should be covered by the competition law if they prejudice competition. Horizontal agreements relating to price, quantities, bids and market sharing are particularly anti-competitive, vertical agreement like tie-in arrangements, exclusive supply /distribution agreements and refusal to deal are also generally anti-competitive. Therefore, the Committee recommended that-

1. certain anti-competitive practices should be presumed to be illegal
2. agreements that contribute to the improvement of production and distribution ad promote technical and economic progress, while allowing consumers a fair share of the benefits, should be dealt with leniently
3. the 'relevant market' should be clearly identified in the context of horizontal agreements
4. blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal

Mergers

The Committee recommended that mergers beyond a threshold limit in terms of assets should require pre-notification. The threshold limit is the value of assets of the merged entity at Rs. 500 crores or more and of the group to which merged entity belongs at Rs. 2000 crores or more both linked to wholesale price index. However, mergers should be challenged only if they reduce or them competition and adversely affect welfare.

Dominance

The Committee did not prescribe any arithmetical figure like percentage of market share to define dominance. In view of the Committee, abuse of dominance rather than dominance should be the key for competition policy/law. Abuse of dominance will include practices like restriction of quantities, markets and technical development. Abuse of dominance which prevents, restricts or distorts competition needs to be frowned upon by competition law. Relevant market needs to be an important factor in determining abuse of dominance. It is recommended that abuse of dominance and exclusively practices should be dealt by the adjudicating authority by the application of "Rule of Reason".

Resale Price Maintenance

The Committee recommended that resale price maintenance should be judges under the Rule of Reason. It should not be treated as presumed to be illegal.

Administration and Enforcement

The Committee recommended that the Competition Commission of India may be established for implementing the Indian Competition Act. Competition commission of India will have to be a quasi-judicial body with autonomy and administrative powers. The commission will hear competition cases and also play the role of competition advocacy. The Committee also recommended that two members of the competition Commission of India will constitute the Mergers Commission. The Committee further recommended that the trial before the CCI should be summary in nature. The

investigative and prosecutorial wings will be separate but headed jointly by the Director General (Investigation and Prosecution). He will not haven suo motu powers of investigation rather all complaints will be made only to competition Commission of India.

The Competition Law Authority (Competition Commission of India/Mergers Commission) should also have the power to advise a de-merger or severance of inter-connection between undertakings or division of undertakings on the lines of Sections 27, 27A and 27B of the present MRTP Act, 1969, with suitable amendments. In this regard, the /committee is of the view that the Competition Commission of India/Mergers Commission will have only advisory power in character and it shold be left to the Government to take a final view on a demerger/Severance of inter-connection/division of undertakings.

The Committee recommended that Competition Commission of India should be armed with adequate powers for advocacy of competition policy, adjudication, and effective enforcement of the law and for implementation of its decisions. The Committee suggested following principles which are desirable in designing and implementation of Competition Law:

1. The Competition law should provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.
2. The Competition Law Authority should be a multi-member body comprised of eminent and erudite persons of integrity from the fields of judiciary economics, law, International trade, Commerce, Industry, Accountancy, Public Affairs and Administration. Having an appropriate provision for their removal only with the concurrence of the Apex Court may ensure their Independent functioning.
3. The Competition Law Authority should be independent and insulate from political and budgetary controls of the Government.
4. Competition Law should have punitive provisions for punishing the offenders besides other remedial methods (reformatory).
5. Competition Law should separate the investigation, prosecutorial and adjudicative functions.
6. The proceedings of the Competition Law Authority should be transparent, non-discriminatory and rule-bound.
7. The Competition Law Authority should have a positive advocacy role in shaping policies affecting competition.

The Competition Commission of India will have the power to issue orders for interim relief and to impose fines and sentences of imprisonment against those who violate any provision of competition law. Furthermore, the CCI will have power to impose recoveries, award penalties and award compensation in cases of abuse of dominance. The Committee also recommended that there should be provisions for treble damages and exemplary fines against frivolous and vexatious complaints.

For further queries you may reach us via..
E-mail –vikasrathimrt@gmail.com
Mob - 9058459666
Dr. Vikas Kumar
Assistant professor of Law
ILS, CCSU Campus, Meerut