CHAPTER 4

NEED AND CONSTITUENTS OF COMPETITION POLICY - ITS HISTORICAL EVOLUTION IN INDIA AND ROLE OF NEW COMPETITION POLICY IN THE FRAMEWORK OF WTO

Introduction

Competition policy is increasingly being accorded a central place in a nation’s economic policy framework. Liberalisation alone is not sufficient and there is a need for a competition policy to promote competition. Such a policy has a critical place in the restructuring of developing and transition market economies. It encourages competition by keeping a check on potential monopolies and making sure that businesses act fairly in relationship to each other. The purpose of competition policy is to promote efficiency by preventing practices of firms that would reduce national welfare through the exercise of market power (Ratnayke, 1998). Competition policy ensures economic efficiency, economic growth and international competitiveness.

Competition policy refers to all measures through which governments seek to promote the efficient and competitive operation of markets. It is a set of legislative measures and rules that directly impact on the behaviour of individual enterprises and the structure of industries. It is concerned with the easing of RBPs (Restrictive Business Practices) that hinder free and fair competition and encompasses measures
designed either to promote a more competitive environment or to prevent a reduction in competition (Ferguson, 1994 and Kathuria, 1999).

The World Bank defines competition policy as consisting of two elements:-

- A set of policies that enhances competition in local and national markets, for example, a liberal trade policy, relaxed foreign investment and ownership requirements, deregulation, and privatisation and;

- Legislation designed to prevent anticompetitive business practices and unnecessary government intervention i.e. competition law.

Competition Policy has emerged as the fourth pillar of national economic policy along with monetary, fiscal and trade policies. It is an essential pre-requisite for a modern functioning market economy. Competition policy is built on the conviction that competition drives firms to become efficient and to offer a greater choice of products and services at lower prices, aiding growth and development and bringing benefits to consumers. In a competitive market, firm is afforded incentives to produce efficiently and to respond to consumers needs in terms of product range and specifications, and wealth and prosperity will be more equally shared between producers and consumers. Competition policy is necessary to create and enhance the national competition culture and to shape competitive forces in the economy to ensure that they generate development and public welfare (Neumann, 2001).

Competition policy is a broad notion. Competition law is one component of competition policy. Competition law refers to legislation that prohibits or otherwise deals with anticompetitive practices of firms such as cartels, abuses of dominant positions, monopolisation and mergers, or any other practice that creates a dominant position or otherwise stifles competition. The major objective of competition law is efficient resource allocation, therefore maximising national welfare, to protect consumers from the adverse effects of market power, to help disperse power and income fairly, to help expand entrepreneurial opportunities and to create a mechanism through which attempts to create monopolies and exploitation of market power can be addressed (Richardson, 1998; Hoekman and Holmes, 1999; Motta, 2009).

**Role and Need of Competition Policy**
The economic liberalisation has increased the need and relevance of competition policy because while the liberalisation unleashes competitive forces, in the absence of safeguards, this may also provide scope for unfair competition. Competition policy is being shaped by the globalisation of markets, lower barriers to trade as well as investment, rapid technological change, government downsizing and the emergence of the demanding well-informed consumer. Competition policy has been accepted as a tool for addressing competition problems in transition economies, which are now characterised by extensive privatisation and deregulation. Competition policy wards off the ill effects of cartels and the transformation of public monopolies into private monopolies. Competition policy embraces objectives consistent with broader goals of liberalisation and deregulation. Competition policy contains advocacy tools to challenge anticompetitive behaviour by the government as well as consumer protection elements that support the goal of speaking for consumers. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation.

A sound competition policy is an equally attractive and complementary mechanism for curtailing the welfare-eroding effects of cartels, monopolies, and protectionism. Such a policy provides an important alternative for ensuring the procompetitive practices common amid market reforms in many transition economies. Diwan and Chakraborty (1993) contend that competition policy is an essential instrument for maintaining or improving international competitiveness. A strong, competitive domestic economy, nurtured by an appropriate competition policy, enables a country to grasp the opportunities presented by globalisation and to reap the material benefits associated with it.

There are three kinds of policies which can be used to promote competition. The first is concerned with the industrial structure and with reducing the level of concentration or, more usually, preventing it from increasing; the second, with preventing the abuse of monopoly power by dominant firms; and the third with conduct in industries aimed at preventing collusion and other restrictive practices (Jones and Cockerill, 1985). The main objectives of a competition policy include maximisation of
economic efficiency, consumer welfare, and to keep a check on concentration of economic power, by keeping public interest in mind. To accomplish the objectives of free markets, a conducive competition policy is required for conserving and sustaining the efficiency of open markets (Jhaveri, 2003 and Gogia, 2004).

Competition policy is a key to establishing a level playing field in the common market, which is a major request by industrial operators helping in particular those with competitive advantages to grow, expand and enter into other markets. Effective implementation of competition principles ensures the benefits deriving from removal of barriers to trade are not annulled by anti-competitive practices, such as abuses of dominant positions and cartel between producers, which harms both enterprises and consumers. Competition policy plays a central role as regards the existence of incentives to innovate. Competition policy is about protecting competition as the most efficient system for allocating resources and not about protecting competitors. It maintains and encourages competition as a vehicle to promote economic efficiency and maximising consumer welfare. The competition policy promotes competition and maintains the competitive environment through the efficient allocation of resources which results in lower prices, adequate supplies for consumers, faster growth and more equitable distribution of income. By lowering barriers to the entry of new firms into an industry, competition policy helps to create an enabling environment for entrepreneurial development, an essential prerequisite for a vibrant economy (Mehta, 2006 and Peter, 2010).

International competitiveness depends on a country’s ability to consolidate, upgrade and diversify its productive capacity. A well-implemented competition policy is a crucial ingredient in a successful development strategy. Competition policy can be used as a tool for enhancing competitiveness and development. Developing countries are adversely affected by anticompetitive practices. The creation of competitive markets empowers the poor, provide them with employment opportunities, and increase their access to cheaper and better quality products. Competition policy is an important institutional pillar for a thriving market economy wherein competitive pressures have
production efficiency and stimulate product and process innovation which are fundamental to international competitiveness and economic growth.

Kirakpatrick et al. (1985); Kambhampti (1996) and Martin (1998) view that large-scale enterprises in highly concentrated industries may exercise their market power in a way that has adverse efficiency and distributional consequences. Therefore, some form of flexible but effective competition policy is desirable, which can minimise the likelihood of adverse impact in particular cases without losing the benefits accruing from large-scale activity. Competition policy is guided by the belief that the domain of markets should be exploited as far as possible to perform allocative tasks with benefits expected in terms of allocative, productive and dynamic. Competition policy claims to protect consumers against monopolistic, collusive, predatory, restrictive and unfair business practices.

The increase in merger activity around the globe, particularly international mergers indicates the globalised nature of the economies of many developing countries; they however indicate a threat that comes with being part of a global economy. For smaller economies, international mergers present problems of dominant firms and increases in entry barriers to markets for many firms. This may prevent local firms from being more competitive. Foreign competition also presents an opportunity for domestic firms to be more competitive. The role of competition policy would be to create a suitable environment for competition and government intervention should only be in the public interest and where the welfare of the society is threatened and should play an elaborating role as provider of governance and services. Competition policy also considers the problem of international cartels. The existence of cartels means more collusion on prices and controlled market allocations. These activities cause harm to consumers and should be eliminated.

Experience of many countries and extensive research by many international institutions has shown very clearly that competition policy is most necessary for the economic development of a nation. The most developed nations of this world are a clear example, where competition policy has been used successfully to develop economies. By successfully implementing competition policy developed nations have significantly
reduced inefficiencies in their economies and firms in those countries have invested billions of dollars in R&D, innovation and human resource development. In addition, the developed countries have investigated and prosecuted firms engaging in anti-competitive practices. As a direct consequence of inter-alia, the strong enforcement actions, the economies of the developed nations have enjoyed a significant and steady growth over the many years and the firms in those countries have also benefited from a competitive environment. They have continued to produce goods and services that are cheaper and standardised quality. The welfare of society in most of the developed world has also improved significantly during this period (Amsden, 2001 and Aghion, et al., 2008).

Liberalising trade, promoting inward foreign direct investment (FDI), and encouraging entrepreneurship are ways of increasing competition in the domestic market under a comprehensive competition policy. The governments worldwide are recognising that encouraging competitive markets is one of the best ways to stimulate productivity, lower costs and widen consumer choice at the same time (Bhattacharjea, 2001 and Dube, 2008)

**Competition Policy Ensures Progressive Liberalisation**

To make the trade liberalisation successful, steps need to be taken to reduce cost and enhance the efficiency, to promote flexibility by eliminating artificial restrictions on entry, exit, and pricing in manufacturing and other industries, and to establish and strengthen incentives for investment, innovation, creation of efficient management structures and productivity improvement. Competition policy plays a very important role in all these areas. Failure to implement a holistic competition policy and related reforms will prevent developing countries from realising potential gains from external liberalisation (Kruger, 1984).

**Competition Policy Creates Congenial Business Climate**

A well-designed competition policy and law can effectively address market imperfections and failures. It creates a congenial environment for new entrepreneurs to launch their businesses, creating a level playing field. In many developing countries
with no competition law and weak regulatory authorities, corruption, inefficiency, and rent-seeking behavior are widely prevalent among individuals and organisations. A stable macro environment with appropriate trade and investment policies and good governance is a necessary condition to create a favourable investment climate in the country and a sound and complementary competition policy ensures a good business environment and productivity of the new investment (Djankov and Hoekman, 1998; Kansra and Sharma, 2000; Singh, 2002).

**Competition Policy Attracts FDI**

A well-defined competition policy and law helps to create a sound economic environment that attracts foreign investment by providing a stable and predictable legal economic environment for investors and by handling entry barriers and high concentration. The implementation of a transparent and effective competition policy can be an important factor
both in enhancing the attractiveness of an economy to foreign investment and in maximising the benefits of such investment. Competition policy can make an economy attractive to foreign investors by providing a transparent dispute settlement mechanism...
that is consistent with international norms. A competitive market, reinforced by competition policy, encourages foreign firms to construct state-of-the-art production facilities in host countries, transfer modern technology and also protects consumers. This is especially important for developing countries, in terms of technology transfer for economic development (Woolcock, 2001).

**Competition Policy Promotes Governance**

Competition policy promotes good governance in the corporate sector as well as in government by diminishing the opportunities for rent-seeking behaviour and the corruption that often accompanies it. Competition law and regulatory tools are invoked mainly to take care of the firm’s behaviour and market failures. Governments often intervene when markets fail but in the absence of a clearly defined competition policy and regulatory mechanisms, the intervention can be arbitrary and serve vested interests rather than the poor. Several developing countries are going through a phase of privatisation and deregulation. Many State-owned enterprises affected by these policies currently enjoy monopoly power in the market. In such a situation the absence of a competition policy and an adequate regulatory mechanism will simply mean the transfer of monopoly power from the public to the private sector. This is likely to harm the interests of consumers, especially the poor (Mehta, 2006b).

**Competition Policy Enhances Welfare**

Competition enhances overall welfare in the economy through increased efficiency within enterprises, optimum allocation of resources, technical progress, economic growth and stability. The long-term direct effects of competition policy are lower prices, better quality of products and enhanced market information, while indirect effects include equity, social impacts, economic freedom and opportunities. Empirical evidence suggests that barriers to competition lead to welfare losses within an economy, regardless of governmental or private constraints (UNCTAD, 2004). A study conducted by the World Trade Organisation (WTO) also shows that in the absence of enforcement of competition law, legally enforceable exclusive distributor arrangements and other anticompetitive business practices can have a major detrimental impact on welfare (Hoekman and Holmes, 1999 and Mehta et al., 2003).
Competition Policy Checks International Anti-competitive Practices

In this age of globalisation, where many anti-competitive practices have a cross-border origin, countries ignore the importance of competition policy and law at their own peril. International anti-competitive practices can also be harmful to small and developing countries without effective competition policy. The international cartels of private firms that engage in restrictive practices designed to limit competition in international trade do exist. These arrangements can be detrimental to economic development (Levenstein and Suslow, 2001). Cross-border mergers and acquisitions that lead to market dominance and the restrictive practices that some transnational corporations engage in further necessitate competition legislation. As trade and investment regimes are liberalised in most developing countries, the inflow of foreign products and companies creates new challenges for competition policy. While governments regulate domestic markets through various measures, including a competition regime, there is little regulation of international markets. Added to this complexity, very few people in developed and developing countries appreciate the international dimension of competition policy and its integral relationship with trade and consumer welfare, and national economic development. In order to face these challenges, countries require, in the first place, a national competition regime, backed by adequate resources. This would allow them to investigate and prosecute anti-competitive behaviour by transnational corporations operating in the domestic economy and to regulate them as appropriate competition law is subject to appropriate adaptation depending on local needs, aspirations and socio-economic, cultural and legal conditions.

Competition Policy Promotes Economic Development

Well-designed competition policy and competition based economic reform promotes economic efficiency and contributes towards the economic growth of the country. The strength of product market competition plays an important role in economic growth, by allocating resources more efficiently. Competition policy plays an important role in achieving productivity gains, which is critical for maintaining rapid economic growth. Several studies show a positive relationship between competition policy and economic
growth. A study conducted by the WTO has identified that national competition policies that are well adapted to the unique circumstances of the developing countries can support development and the anticompetitive practices of firms can impede economic development. Another study presented empirical evidence that showed a well designed competition policy and law can buttress economic development, and aid poverty reduction efforts (Mehta et al., 2003).

**Scope and Constituents of a Competition Policy**

Competition policy is a broad concept which covers all aspects of government actions that affect the conditions under which firms compete in a particular market and is considered as complex on its intentions and effects. The scope of competition policy is very broad, encompassing all government measures that directly affect the conduct and behaviour of enterprises and the structure of industry. Governments often do not have a coherent and explicit competition policy, which will instead be made up of separate but interconnected policies implemented by a range of government ministries and agencies. A competition law forms one element of a competition policy, providing the legal back up to the policy. While competition law itself is a central element, policies of privatisation, trade and foreign exchange liberalisation, good regulation and deregulation policies are extremely important in energising the economy through the forces of competition policy. Competition policy also has strong links with consumer policy. The key to success of competition policy lies in other policies being coherent with the overall economic development, on one hand, and the competition law coherent with and complementary to the competition policy, on the other (Jenson, 2001).

Competition policy involves the prohibition or regulation of Restrictive Business Practices (RBPs) or anti competitive practices that firms undertake in order to limit competition. Competition policy encompasses a range of other government measures that affect competition, such as policies towards international trade, foreign investment, licensing, regulation, taxation, government procurement and standard setting. But its core remains the regulation of RBPs by enterprises, so as to promote and protect a competitive market, which encourages lower prices, better quality, enhanced choice and
variety, efficient allocations of resources and innovation and growth (Bhattacherajea, 2004; Gopalakrishna and Prasad, 2006).

Chadha (2004) argues that competition policy, which aims at fostering active competitive environment for stimulating the process of creating globally competitive firms with enhanced investment and technological capabilities, encompasses all policy instruments which promote competition in market. Thus competition law pertaining to mergers and acquisitions, RBPs and collusions; competition policies relating to market access/entry, export subsidies, exchange rate and tariff and non-tariff barriers; competition policies relating to investment, including FDI, privatisation and disinvestments, taxes, interest rates and product reservations; competition polices for technological development, including IPRs, R&D, technology licensing and technical collaborations, all constitute comprehensive competition policy. The policy measures enacted to influence the entry of foreign firms, delicensing or easing import regulations are primarily aimed to affect the extent of competition in the Indian industry (Kathuria, 1999 and Basant and Morris, 2000). Competition policy must include liberalisation measures. Reservations of the small scale sector must be abolished, trade policy must be in conformity with competition principles and this implies removal of barriers to domestic trade such as sales tax and octroi; there must be privatisation of all state enterprises other than those in a few areas related to national security, removal of price and purchase preferences for PSEs, preference favour of the public sector in the Income Tax Act must also be removed. Foreign investment must be freely allowed in all sectors (Ram Mohan, 2000 and Hora, 2001).

**Competition Policy in Developing Countries**

Many developing countries including India undertook economic reforms which advocated a free competitive market economy as against the control and command economy. The central element in such reform programmes is liberalisation measures.
CONSTITUENTS OF COMPETITION POLICY

Government Policies
- Trade Policy.
- Industrial Policy.
- Deregulation Policy.
- Privatisation Policy.
- FDI Policy.
- R&D Policy.
- Taxation Policy.
- Consumer Protection Policy.
- Labour Policy.

Competition Law
- Anti-Competitive Agreements.
- Abuse of a Dominant Market Position.
- Regulation of Mergers.
- Competition Advocacy.

Figure 4.2
However, the rapidity of liberalisation created a number of problems for developing countries in their approach to competition. Many developing countries simply did not have the regulatory infrastructures to ensure that they did not replace publicly owned monopolies with private monopolies. This realisation prompted many developing countries to adopt competition policy during the last couple of decades. Globalisation has forced developing countries to reassess the competition policy and to institute policies that strike a balance between encouraging the domestic economy to compete internationally and reap the gains from globalisation and the predation of multinational enterprises. The main job of competition policy is to deter and/or provide remedies for specific abuses such as cartelisation, monopolisation or anti-competitive mergers. In fact, as developing and transitional economies implement structural and institutional reforms designed to stimulate economic growth through greater reliance on the market system, they have a unique opportunity to create new models of competition policy designed to promote competition (Rao, 1998 and Gogia, 2004).

Developing countries need competition law suited to their needs and stage of development. The most important factor is that the law should be realistic and implementable. Introducing a law that cannot be properly implemented is not only futile but may be counterproductive. If the competition authority is seen as being incapable of discharging its role, then people may lose faith in the effectiveness of competition law as a whole. The effectiveness of the competition law will depend on the extent to which it is coordinated with other policies. Competition advocacy should be given equal weight. A healthy competition culture is the hallmark of a good competition regime and competition advocacy is a basic prerequisite for this. The lackluster performance of competition policy and law in many countries in the Asian and Pacific region is primarily due to the failure to recognise the importance of competition advocacy. A properly designed advocacy programme plays an important role in discouraging and sometimes eliminating anti-competitive practices.

A development-oriented competition policy involving inter governmental cooperation and enterprise level discipline has a significant role to play in promoting a competitive and dynamic enterprise sector. Developing-country governments need to
calibrate competition policy to create the appropriate framework to enhance competitiveness and ensure both efficiency gains for the economy and welfare gains for the population (UNCTAD, 2004). In a competitive and deregulated open economic system, there is a need for a competition law and a competition commission to act as a watchdog for the introduction and maintenance of competition policy. The competition law should deal with anti-competitive practices, particularly: (a) abuse of dominance; (b) prevention of cartels, bid rigging, territory share etc. and (c) merger control (Singh, 2002).

After the transition to market economies, developing countries realised that the benefits of market-oriented reforms were likely to be fully realised only if enterprises acted under the spur of competition, to create a level playing field by reducing barriers to entry which originate from anti-competitive practices and that consumer wishes and opinions were reflected in market performance. It was further recognised that countries that had undertaken trade liberalisation measures had every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by firms. A well-functioning market mechanism is essential in this respect. For example, price liberalisation in the market dominated by monopolies, unless specific efforts are made to ensure the existence of competition, will end up with monopolistic price rises without corresponding competitive price equilibrium. For the least developed countries, the poor benefit directly from lower prices. It is now accepted that there is a link between measures to enhance competition in developing countries and economic growth. Competitive markets enhance the welfare of the general community by fostering efficiency in production. Competition offers the promise of lower prices and improved choice for consumers, higher economic growth, and increased employment opportunities. This is why almost all developing countries are giving their full support to the enactment and the establishment of a strong and effective competition policy in their countries.

The ultimate objective of competition is the promotion of economic efficiency. In developing countries, competition policy has greatly assisted in bringing about the desired economic growth by introducing competitive measures and policies, which
promote economic efficiency by eliminating business practices which harm economic efficiency.

Competition policy establishes broad principles that are designed to preserve an unrestricted interaction of competitive forces that yield the best allocation of resources, the lowest prices and high quality products. In other words, competitive markets will enhance the capability of enterprises in developing countries to produce goods that consumers need, in the quantities they need, applying the most efficient production methods and marketed and distributed in the most efficient manner.

Since free markets tend to concentrate and distribute resources unequally, there is a need to envisage a comprehensive competition policy. Ferguson & Ferguson (1994) suggest that competition policy should seek to break up or to regulate existing monopolies. It should also control firm’s attempts to acquire such positions by mergers. More generally, competition policy should try to prevent practices, which adversely affect competition. The policy should concentrate on removing obstacles to competition so as to allow the development of new products and processes. The barriers imposed by government that are the most effective obstacles to the operation of the competitive process should be removed such as elimination of import restrictions and the removal of licensing or statutory restrictions on entry into markets.

The effective implementation of competition policy is a very difficult task requiring a high level of knowledge and expertise. In addition, initial structural conditions prevailing in transition economies make implementation a much more challenging task than that in advanced countries. Entry barriers arising from high levels of market concentration, state ownership and control, rigidities and bottlenecks in the mobility of resources are all likely to be high in transition economies, and often can facilitate anti-competitive conduct by enterprises. Most transition economies still have a larger number of administrative and regulatory barriers to competition, including the discretionary granting of various forms of subsidies to loss making enterprises. In this connection it seems particularly important for competition authorities also to engage in competition advocacy to counter public policies that tend to impose entry barriers and prevent market access.
The economic rationale for competition policy remains of paramount importance for developing countries particularly, which are moving towards market-oriented reforms. The adoption of liberalisation policies, the rise of privatisation and the fact that most privatised entities in the utility sectors are natural monopolies underscore the importance of a solid competition regime to elicit the most favourable efficiency and welfare effects of liberalisation and privatisation.

The recent proliferation of massive international mergers, the existence of international cartels and their negative impact on consumers puts forward a case for competition policy to equip developing countries with the tools to deal with the increased market power of MNCs and their anti-competitive practices. There is a need of competition policy to make sure that foreign firm having inherent advantages in terms of size, technology etc., do not resort to practices that drive domestic firms in developing countries out of the arena. The worst outcome of liberalisation would be letting foreign firms to take advantage of it in ways that end up limiting competition in the domestic market (Evenett, 2002 and Chadha, 2004).

**Anticompetitive Practices in Developing Countries**

Anti-competitive agreements are agreements in respect of production, supply, distribution, shortage etc. which has harmful effects on competition. Such practices in developing countries affect the supply of intermediate products used as industrial inputs, thus impeding the development and the competitiveness of local production in developing countries (Bilal and Olarreaga, 1988; Motta, 2009). The anticompetitive practices in the developing countries can be categorised into two parts i.e. Horizontal Agreements and Vertical Agreements. Such agreements lead to unreasonable restrictions and have an appreciable adverse effect on competition.

**Anti-Competitive Practices at National Level**

**Horizontal Agreements**

These are the agreements between two or more competing enterprises that are at the same stage of the production chain and in the same market, which may result in reduced competition. These are mainly in the form of cartels. A cartel is a group of companies who agree to stop competing with each other. This usually involves agreed
market allocation/market sharing, price fixing, exclusionary practices, collusive tendering or bid-rigging and eliminating non-cartel competition. The objective of a cartel is to raise price above competitive levels resulting in higher prices, poor quality and less or no choice of goods and services.

**Market allocation** - Market allocation is form of cartel arrangement that divide markets by territory or by customers among competitors. It is one of the most anti-competitive practices as it eliminates competition in the relevant market.

**Price fixing** - It is a collusive agreement on prices by the competitors at any level in the production-distribution process to be charged on some or all customers.

**Output Restriction** - Under this agreement, enterprises producing or supplying the same products or services agree to limit their supplies to a lower proportion of their previous sales. It can be judged by a sudden fall in the supply for creating artificial crisis.

**Collusive tendering or bid-rigging** - Bid rigging is an agreement between enterprises engaged in identical or similar production or trading of goods or provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding. It takes place when bidders collude and keep the bid amount at a pre-determined level. Such practice contravenes the very purpose of inviting tenders and is anti-competitive.

**Boycott or Joint refusal to deal** - It is a joint action by competitors to use the combined market power to force a supplier, competitor or a customer to agree to an action that harms competition. It includes any agreement which restricts or is likely to restrict by any method the persons or classes of persons to whom goods are sold or from whom goods are purchased.

**Vertical Agreements**
These are the arrangements between enterprises that are at different stages or levels of the production chain and in different markets. They are usually motivated by the desire for vertical control; within a principal-agent relationship, where the principal i.e. manufacturerer imposes contractual obligations on the retailer while delegating responsibility for selling its products. This involves predatory pricing, transfer pricing, tied selling, exclusive dealing, refusal to deal, resale price maintenance, discriminatory
pricing, reciprocal exclusivity, full-line forcing etc. Vertical agreements are considered to have anti-competitive effects particularly when they result in market foreclosure, restrict price competition or result in the division of markets.

**Predatory pricing** - It occurs when a firm with market power sells its products below cost in order to drive competitors out of the market or create a barrier to entry into the market for new competitors. The predator suffers temporary losses during its low pricing policy with the intention of raising prices in the future to adjust the losses and gain further profits. The reduction in price does not provide benefit to the consumer for the short period. It is disadvantageous for consumers in the long run if the seller is able to maintain the price at a monopoly level.

**Transfer pricing** - It is a practice of either under-invoicing or over-invoicing taking place between a parent company and its subsidiaries. The aim of under-invoicing is to lower the costs of the subsidiary so that its prices are reduced and it can eliminate its competitors from the market (disguised predatory pricing). On the other hand, over-invoicing aims at increasing the costs artificially in order to reduce profits and avoid taxation.

**Tied selling** - It is an arrangement where the sale of one good to the customers is dependent on the conditions of the purchase of another good. It usually occurs where monopolistic dominance or general scarcity in the market for some goods or services prevails.

**Exclusive dealing** - It is a vertical agreement by which a retailer or a wholesaler is bound to purchase from a supplier on the condition that no other supplier will supply in a given area. Such agreements tend to have adverse effect on competition, since they restrict the access of other rivals to distributors.

**Refusal to deal** - it includes any agreement which restricts or is likely to restrict by any method from supplying and purchasing to the persons to whom goods are sold and from whom purchased. Such practices without reasonable justifications are prohibited as they are anti-competitive when they prevent third party firms from entering the markets.
Figure 4.3

ANTI-COMPETITIVE AGREEMENTS

National Level

Horizontal Agreements
  Cartels
    - Price Fixing.
    - Market Allocation.
    - Output Restriction.
    - Bid Rigging.
    - Joint Refusal to Deal

Vertical Agreements
  - Resale Price Maintenance.
  - Exclusive Dealing.
  - Tied Selling.
  - Abuse of Dominance
  - Price Discrimination
  - Predatory Pricing.

International Level

- Market Power in Global or Export Market.
- Barriers to Import Competition.
- Foreign Investment.
- Intellectual Property Rights (IPRs).
**Resale price maintenance** - It is the practice whereby a producer supplies distributors only on the condition that the distributor sells at a minimum price set by the supplier. One of the common areas of resale price maintenance is in case of branded products. Manufacturers wishing to maintain a certain brand image often pressurise retailers not to discount their goods to maintain the exclusive image of their goods. Such practice is unlawful only when it has adverse effect on competition.

**Differential or discriminatory pricing** - It refers to the practice of a supplier who charges different prices to different sellers on a basis other than quality or quantity. It also occurs when different customers are charged the same price in spite of the fact that the costs for supplying the product are different. Price discrimination can be justified when a higher price is charged to a customer for buying low volumes or lower price is charged to a customer for bulk purchase. However, it becomes anti-competitive when dominant firms lower prices in particular markets in order to eliminate local competitors.

**Anti-Competitive Practices at International Level**
Recent developments in the global economy have increased potential for international anti-competitive practices that have direct impact on developing countries’ growth and development. There are many barriers exist which preclude markets from being competitive and the use of anti-competitive practices by firms already in the market to expand their control over others or to stop others from entering the market. The entry of MNCs in developing economies may distort competition as their ability to deal with cross-border competition problems and lack of adequate regulation in developing countries. The types of cross-border anti-competitive practices are quite similar to the domestic enterprises. The only difference lies in the international dimensions of the anti-competitive behaviour. These are explained as follows:

**International Market Power**
This includes international cartels, export cartels, cross-border mergers and acquisitions and cross border predatory pricing.

**International and export cartels** - International cartels have attracted much attention in recent years. Such cartels function in secrecy and if there is effective competition in the
market then cartels would find it difficult to be formed and sustained. These are particularly formed by developed countries to take advantage of lack of competition related regulation in the developing economies. The Competition Act, 2002 exclude export cartels from its purview.

**Cross-border mergers and acquisitions** - Cross-border mergers and acquisitions can restrict competition by creating positions of dominance for merging firms leading to subsequent abuse. Moreover, developing countries may also be affected by mergers and acquisition activities that take place outside their territory without any local presence. Because these companies operate in multiple markets, they can also adversely affect developing country markets.

**Cross-border predatory pricing** - It is very often equated with dumping. However, the principle underlying competition law is that the former seeks to protect domestic competitors while the latter seeks to protect competition law. Predatory pricing can be suspected only if it deliberately prices its exports below costs and is assured of a monopoly if the domestic firms are forced to exit.

**Barriers to Import Competition**
Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopolistic dominance etc. fall under this category. Import cartels formed by domestic importers or buyers may be a threat to maintaining competition in a market. In principle, a national competition law may generally be able to tackle such market-access barriers to foreign suppliers. Import cartels whose function is solely to attempt to exercise monopoly power in order to get a better price from foreign suppliers may be viewed more favourably from a national efficiency and welfare perspective than cartels that also exercise market power domestically. But it may be difficult to make such a distinction or to separate the two types of activities. Another related concern in this regard is inadequate domestic enforcement of competition law against private practices that restrict another country’s exports.

**Foreign Investment**
Foreign direct investment has now become an important way for companies to supply foreign markets. FDI may increase competition in domestic markets. However, there is
a possibility that over time it may make the markets increasingly concentrated to the extent of having one or a small number of dominant players. Moreover, even though a single instance of cross-border acquisition may seem to have no effect on competition from a narrow national-market perspective, it may lead to lessening of effective competition in the market if the acquirer has been a major exporter to the country.

**Intellectual Property Rights**

IPRs may generate or contribute towards a position of market power. The IP holder typically engages in licensing arrangements with firms in different countries. The territorial nature of property rights in such arrangements means that frequently national law enables them to be used by right holders to prevent parallel imports. In many cases, it has also been observed that cartels were built around patent cross-licensing schemes and thereby foreclosed competition.

In the competition regime the existing market players can be tempted to distort or eliminate competition in order to acquire and abuse market power for huge profits. So, competition policy is necessary to maintain and encourage healthy competition, which includes laws and policies dealing with anti-competitive practices both at the national and international level for enhancing the competitiveness of firms in developing countries. Anti-competitive practices tend to be less prevalent in economies where the effective use of national competition law and policy acts as deterrent. Developing countries have realised the need to install a comprehensive legal framework to deal with anticompetitive practices in order to promote orderly market growth. Developing countries are powerless to challenge anticompetitive practices that may inhibit their economic development without any form of competition policy. In addition to promoting efficiency competition policy aims at controlling concentration of economic power, promoting the competitiveness of domestic industries, encouraging innovation, supporting small and medium-size enterprises and encouraging regional integration (Hope, 2000; Neumann, 2001; Dhall, 2008).

**Historical Evolution of Competition Policy in India**

The Indian economy had been subject to controls and regulations for several decades. The broad policy objectives of India’s planned model for industrialisation were the
development of a diversified industrial base with a view to achieving self-reliance, and
the promotion of social justice. Self-reliance, in the Indian context, came to mean,
broadly, import substitution. There was also the infant industry argument and there was
export pessimism, which underlay those policy objectives. Thus, the policies at that
time aimed at regulating the pattern of investment through the creation of a dominant
public sector, and through checks on the private sector. Major economic decisions were
in the hands of the government and there was little room in the system for competition
policy. The Indian business was shackled in a plethora of controls such as industrial
licensing, monopolies and restrictive trade practices, foreign exchange restrictions,
small scale industry protection, control on foreign investment and technologies, exit
barriers under the Industrial Disputes Act and the Sick Industrial Companies Act,
quantitative restrictions on imports, administered prices, control on capital issues etc.
(Bhattacharjea, 2000; Davesar, 2000; Aggarwal, 2002 and Bardhan, 2002). The
economic consequences of this policy regime, though initially beneficial, were
reflected, generally and ultimately, in the poor rate of economic growth, low levels of
productivity and efficiency, absence of international competitiveness, sub-optimal size
of businesses, and outdated and inefficient technologies in various sectors. Some firms
and business houses were particularly adept at exploiting the system of licenses and
controls and they built up and maintained monopolistic positions in the market to the

In the late 1980s and 1990s, the realisation began to dawn that this policy
regime had outlived its utility and the system was crying for reform. The Industrial
Policy Statement of July, 1991 recognised that,
“The attainment of technological dynamism and international competitiveness requires
that enterprises must be enabled to swiftly respond to fast changing external conditions
that have become characteristic of today’s industrial world. Government policy and
procedures must be geared to assisting entrepreneurs in their efforts. This can be done
only if the role played by the government were to be changed from that of only
exercising control to one of providing help and guidance by making essential
procedures fully transparent and by eliminating delays” (Government Of India, 1991).
In the pursuit of globalisation, India responded by opening its economy, removing controls and resorting to liberalisation. The natural corollary of this is that the Indian market should be geared to face competition (Viswanathan, 2003). Wide ranging policy and regulatory reforms were initiated, such as de-licensing of industry, shrinking the monopoly of the public sector industries other than those where strategic and security concerns dominated, reducing the purchase preferences in Government procurement, removal of quantitative restrictions on imports, market determined exchange rate, liberalisation of foreign direct investment, abolition of the office of Controller of Capital Issue and initiating capital market reforms, liberalising the financial markets, reduction in small scale industry reservations, and a much greater role for the private sector in infrastructure areas such as power, transport, and communications. Sectoral regulators were set up in key infrastructure and utility industries which were hitherto dominated by public sector and were now being opened up.

The Monopolies and Restrictive Trade Practices (MRTP) Act, which came into being 1969, was designed for a different era to serve the socio-economic objectives of that time. In 1991, one of the first measures in the reforms package was to delete the provisions in the MRTP Act, which related to controls on larger business houses in setting up new ventures or expanding existing operations. However, it was soon realised that the Act needed extensive review. The focus of the MRTP Act was on controlling monopolies whereas, now, the focus needed to be on promoting and protecting competition. Another factor underlying the desire for a new competition policy stemmed from the changes in the international economic environment, in particular from the establishment of WTO. The Ministry of Commerce, Government of India set up an Expert Group on interaction between trade and competition policy, subsequent to the establishment of a similar group at the WTO, following Singapore Ministerial Declaration of 1996. The Expert Group recommended that there is a need for an appropriate competition law to protect fair competition and to check anti-competitive practices, many of which could surface during the implementation of WTO agreements. A sound and effective competition law was considered the need of the hour (Agarwal, 2005 and Mehta, 2006b).
In view of the above, the government appointed a High Level Committee on competition policy and law under the chairmanship of SVS Raghavan, which is known as the Raghavan Committee, in October 1999 to advise a modern competition law for the country in line with international developments. The committee recommended a new competition law, which was enacted, and it came into force in January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. The new legislation aims to promote and sustain competition in markets by preventing anti-competitive practices and maintaining competitive environment (Dhall, 2008).

**Competition Act, 2002**

Since the adoption of the economic reforms programme in 1991, corporates had been pressing for the scrapping of the MRTP Act arguing that the MRTP Act has lost its relevance in the new liberalised and global competitive scenario. The MRTP Act was unable to deliver as expected due to the weaknesses in its own structures and composition of the MRTP Commission as well as because it was created at a time when the process attributes of competition such as entry, price, scale, location etc. was regulated. A key reason for the ineffectiveness of the MRTPC was that it was poorly resourced. Another drawback of the commission was its inadequacy in dealing effectively with anti-competitive practices. There was a need to shift focus from curbing monopolies to promoting competition (Peter, 2009).

Thus, in the context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act, 2002. The new law is designed to repeal the MRTP Act. The Competition Act, enacted in December 2002, is a landmark legislation that aims at promoting competition through prohibition of anti-competitive practices, abuse of dominance and regulation of combinations (Chakravarthy, 2006 and Dhall, 2008). With the coming into effect of the Competition Act, 2002, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, was repealed and the MRTP Commission was dissolved. The Competition Act, 2002 extends to the whole of India except the State of Jammu and Kashmir. The Competition Act, 2002 improves upon its predecessor in many ways. While formulating it, most of the inadequacies of MRTP Act have been taken into account. For example, MRTPA did not necessarily consider restrictive trade practices bad unless they caused injury to the public interest. The new Act presumes the restrictive trade practices as anticompetitive. It avoids unfair trade
practices (UTPs). It also defines crucial terms that were left undefined in the MRTPA, for example, cartel, predatory pricing, consumer etc. Several criteria have been listed for determining the effects of business conduct on competition. The Competition Act also includes clauses specifically related to cross border competition issues. Unlike in the MRTPA where the competition authority could only issue cease-and-desist orders without penalising for the damage caused by the anti-competitive practices, the competition authority can impose heavy penalties under the new Act.

In view of the policy shift from curbing monopolies to promoting competition, there was a need to repeal the Monopolies and Restrictive Trade Practices Act. Hence, the Competition Act aims at doing away with the rigidly structured MRTP Act. The Competition Act is flexible and behaviour oriented. The difference between the old law (the MRTP Act, 1969) and the new law (the Competition Act, 2002) is presented in table 4.1.

**Components of Competition Act**

The Competition Act, 2002 has four components:

- Anti-competition Agreements.
- Abuse of Dominance.
- Regulation of Combinations.
- Competition Advocacy.

**Anti-competition Agreements**

Section 3 of the Act makes provision for prohibition of anti-competitive agreements. According to Section 3(1) of the Act, ‘no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse affect on competition within India’. Section 3(2) states that any agreement entered into in contravention of the provisions contained in section 3(1) shall be void.

Firms enter into agreements, which may have the potential of restricting competition, through horizontal and vertical agreements. The horizontal agreements are
those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser-seller relationship. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are per se illegal. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect (Ramappa, 2006).

**Abuse of Dominance**

Section 4(1) of the Act states that ‘no enterprise shall abuse its dominant position’. It may be noted that ‘dominant position’ itself is not prohibited. What is prohibited is its misuse. Dominant Position has been appropriately defined in the Act in terms of the position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favour. Section 4 enjoins that no enterprise shall abuse its dominant position. Dominant position is the position of strength enjoyed by an enterprise in the relevant market which enables it to operate independently of competitive forces prevailing in the market or affects its competitors or consumers or the relevant market in its favour.

Dominant position is abused when an enterprise imposes unfair or discriminatory conditions in purchase or sale of goods or services or in the price in purchase or sale of

**Table 4.1: MRTP Act, 1969 VS. Competition Act, 2002**
<table>
<thead>
<tr>
<th><strong>MRTP Act, 1969</strong></th>
<th><strong>Competition Act, 2002</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Based on the pre-reforms scenario.</td>
<td>Based on the post-reforms scenario.</td>
</tr>
<tr>
<td>Based on size as a factor.</td>
<td>Based on structure as a factor.</td>
</tr>
<tr>
<td>Competition offences implicit or not defined.</td>
<td>Competition offences are explicit and defined.</td>
</tr>
<tr>
<td>Complex in arrangement and language.</td>
<td>Simple in arrangement and language.</td>
</tr>
<tr>
<td>Frowns upon dominance.</td>
<td>Frowns upon abuse of dominance.</td>
</tr>
<tr>
<td>Registration of agreements compulsory.</td>
<td>No requirement of registration of agreements.</td>
</tr>
<tr>
<td>No combinations regulation.</td>
<td>Combinations regulated beyond a high threshold limit.</td>
</tr>
<tr>
<td>CCI appointed by the government</td>
<td>TRCCI selected by a collegium</td>
</tr>
<tr>
<td>No competition advocacy role for the CCI</td>
<td>TRCCI has competition advocacy role</td>
</tr>
<tr>
<td>No penalties for offences</td>
<td>Penalties for offences</td>
</tr>
<tr>
<td>Unfair trade practices covered</td>
<td>Unfair trade practices omitted</td>
</tr>
<tr>
<td>Very little autonomy for CCI</td>
<td>Relatively more autonomy for the TRCCI</td>
</tr>
</tbody>
</table>

goods or services. Again, the philosophy of the Competition Act is reflected in this provision, where it is clarified that a situation of monopoly per se is not against public policy but, rather, the use of the monopoly status such that it operates to the detriment of potential and actual competitors.

At this point it is worth mentioning that the Act does not prohibit or restrict enterprises from coming into dominance. There is no control whatsoever to prevent enterprises from coming into or acquiring position of dominance. All that the Act
prohibits is the abuse of that dominant position. The Act therefore targets the abuse of
dominance and not dominance per se. This is indeed a welcome step, a step towards a
truly global and liberal economy (Mittal, 2003).

**Regulation of Combinations**

Section 5 of the Act defines combination while section 6 is concerned with
regulation of combinations. According to section 5, the acquisition of one or more
enterprises by one or more persons or merger or amalgamation of enterprises shall be
treated as combination of such enterprises and persons or enterprises in the following
cases:

- a) Acquisition by large enterprises;
- b) Acquisition by group;
- c) Acquisition of enterprises having similar goods/services;
- d) Acquiring enterprises having similar goods/services by a group;
- e) Mergers of enterprises; and
- f) Merger in group Company.

Section 6 of the Act relates to regulation of combinations. According to Section
6(1), no person or enterprise shall enter into a combination, which causes or is likely to
cause an appreciable adverse affect on competition within the relevant market in India
and such a combination shall be void.

The Competition Act is designed to regulate the operation and activities of
combinations, a term, which contemplates acquisitions, mergers or amalgamations.
Thus, the operation of the Competition Act is not confined to transactions strictly within
the boundaries of India but also such transactions involving entities existing and/or
established overseas. Herein again lies the key to understanding the Competition Act.
The intent of the legislation is not to prevent the existence of a monopoly across the
board. There is a realisation in policy-making circles that in certain industries, the
nature of their operations and economies of scale indeed dictate the creation of a
monopoly in order to be able to operate and remain viable and profitable. This is in
significant contrast to the philosophy, which propelled the operation and application of
the MRTP Act, the trigger for which was the existence or impending creation of a
monopoly situation in a sector of industry. The Act has made the pre-notification of combinations voluntary for the parties concerned. However, if the parties to the combination choose not to notify the Competition Commission of India (CCI), as it is not mandatory to notify, they run the risk of a post-combination action by the CCI, if it is discovered subsequently, that the combination has an appreciable adverse effect on competition. There is a rider that the CCI shall not initiate an inquiry into a combination after the expiry of one year from the date on which the combination has taken effect (Dhall, 2008).

**Competition Advocacy**

In line with the High Level Committee's recommendations, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law. Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. The regulatory authority under the Act, namely, Competition Commission of India (CCI), in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The Commission will therefore be assuming the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, that promote deregulation and trade liberalisation and that promote competition in the market place. Perhaps one of the most crucial components of the Competition Act is contained in a single section under the chapter entitled competition advocacy (Lowe and Emberger, 2008 and Dhall, 2008).

**Competition Commission of India (CCI)**

The Competition Act provides that the Central Government shall establish a commission called the Competition Commission of India, consisting of a chairperson and not less than two and not more than ten members. The chairperson and other members shall be whole-time members and every one of them shall be a person of
ability, integrity and standing, has been, or is qualified to be, a judge of a High court; or, has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government, may be useful to the Commission. The Act also provides that the Central Government may appoint a Director General and as many Additional, Joint, Deputy or Assistant Directors General or such other advisors, consultants or officers, as it may think fit, for the purpose of assisting the Commissioner in conducting inquiry into contravention of any of the provisions of the Act and for the conduct of cases before the commission and for performing such other functions of the Act (Dhall, 2008).

For the purpose of discharging its duties or performing its functions, the Commission is authorised by the Act to enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country. In exercise of its powers or the performance of its functions, the Commission shall be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central government may be given an opportunity to express its views before any such direction is given. The Central Government is also empowered to supersede the Commission, for any period not exceeding six months, in certain situations such as Commission is unable, on account of circumstances beyond its control, to discharge its functions or perform is duties; or the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of its functions or performance of the duties etc. Before issuing any notification superseding the Commission, the Central government shall give a reasonable opportunity to the Commission to make representations against the proposed suppression and shall consider representations, if any, of the Commission (Ramappa, 2006).

**Present Functional Status of Competition Commission of India (CCI)**

The Competition Commission of India which was established in October 2003 but not become fully operational due to a writ petition filed before the Supreme Court of
India challenging certain provisions of the Act. After the disposal of the petition by the Supreme Court of India, the government undertook steps to carry out certain amendments to the Competition Act, 2002 with a view to address the various legal issues and make the CCI fully operational on sustainable basis. Accordingly, the government introduced the Competition (Amendment) Bill, 2006 in Parliament during March, 2006. This Bill was referred to the Parliamentary Standing Committee on finance for examination and report thereon. The Committee presented its report in December, 2006 in which it has made a number of important observations and recommendations. It was subsequently amended by the Competition (Amendment) Act, 2007. In accordance with the provisions of the Amendment Act, the Competition Commission of India and the Competition Appellate Tribunal have been established. The Competition Commission of India is now fully functional with a Chairperson and six members. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009 (Dhall, 2008 and Peter, 2010).

The CCI has been undertaking work relating to competition advocacy and institution-building since its establishment. The Commission has undertaken awareness programmes with industry and other bodies and interacted with the government authorities both at central and state level to discuss issues relating to competition in government’s policies and laws. The Commission has also published literature for wider distribution and available on its website. It has been interacting with academic institutions for inclusion of study of competition policy and law in the curriculum of law, economics and management courses. It has initiated a number of competition assessment studies through reputed institutions in the various areas of the economy. The Commission also arranged training programmes for its staff and other stakeholders within and outside the country. The Commission’s vision is to be a highly professional competition authority with the view to adequately discharge its responsibilities assigned in the Competition Act. The Competition Act also provides for extra-territorial reach for the CCI. There is also provision that the Commission may enter into MoU with foreign authorities to make such extra-territorial reach effective.

In the wake of the role of trade associations in conduct of business increasingly bordering on cartelisation, the CCI has taken initiatives to issues advisories
to these associations and to inform that they can be hauled up under the Competition Act for such anti-competitive practices. Earlier the Commission has advised these associations against other anti-competitive practices such as price fixing; market sharing; restriction or control of production; exchange information with competitors regarding current and future prices; general terms of sale and purchase quantities produced and sold or exported; bid-rigging and predatory pricing. Over the past two years, CCI has settled 40 cases of the 150 received by the Commission. These cases have been settled with far-reaching implications for business, industry and the film world. The maximum number of complaints received by CCI relate to the film/entertainment industry (18), followed by real estate (17), banking/financial institutions (12), civil aviation (7), besides complaints against steel and cement manufacturers (Kumar, 2011).

Recently, the CCI pronounced the National Stock Exchange (NSE) guilty of abusing its dominant market position by adopting unfair trade practices in connection with currency derivatives trading under Section 4 of the Competition Act. Similarly, the Commission imposed a penalty of Rs. 1 lakh each on 27 film producers on charge of colluding through a cartel to exploit theatre owners. The CCI imposed the fine on film-markets after having found them guilty of entering into anti-competitive agreement under section 3 and 4 of the competition Act 2002, which pertains to anti-competitive agreement and abuse of dominant position (The Tribune, 2011).

**Competition Policy and WTO**

Competition policy has emerged as a major issue on the global trade agenda in the liberalised environment. The new economic reforms particularly necessitated by WTO steered global competition, require a remodeled competition policy to streamline global competition and at the same time to make economy more competitive. There are two broad facets to competition policy in the globalised world of today. One is the prevention of abuse of market power by giant companies, and the other is removal of impediments to efficient operations and competition of firms. A number of countries
have adopted national competition laws, including developing countries. However, such agreements are less common in the case of developing countries. In any case, bilateral agreements with developed countries may not be appropriate for developing countries given the wide differences in objectives and stage of development between the developed and developing countries. Nevertheless, many recognise the importance of issues such as international market access, international export cartels and cross-border M&As which arguably give rise to the need for some sort of multilateral competition policy compact.

**The WTO and Competition – Historical Evolution**

International cooperation in competition law has been under discussion ever since the Havana Charter envisaged international trade. After World War II, the first effort for an arrangement to monitor international trade was the Havana Charter, which called for the setting up of the International Trade Organisation (ITO). Though over 50 countries adopted the Charter, the ITO never came into existence. The General Agreement on Tariffs and Trade (GATT), which was agreed upon by the international community later on, was however largely based on the Havana Charter. Importantly, a whole chapter i.e. Chapter V, titled Restrictive Business Practices in the Charter was devoted to curb Restrictive Business Practices (RBPs) with respect to international trade. The Havane Charter did not become a reality due to the reluctance of some of the members to endorse it. The GATT that emerged in 1947 was much less ambitious and did not cover any direct competition related provisions. Based on the report of a group of experts which was created in 1958 to study the feasibility of including trade related competition provisions in the GATT framework a “Decision on Arrangements for consultations on Restrictive Business Practices” was adopted in 1960 under GATT. The decision was soft as it merely recommended consultation between contracting parties on restrictive business practices on a bilateral or multilateral basis. The issues pertaining to RBPs and possibilities of measures to deal with the same was then raised in the preparatory work for the Uruguay Round negotiations. However, no consensus was reached during the Round. As the Uruguay Round negotiations progressed and as the GATS and The Agreement on Trade Related Investment Measures (TRIMS) and Trade
Related Aspects of Intellectual Property Rights (TRIPs) emerged, competition policy started showing signs of resurfacing on the multilateral scene. The TRIMs Agreement in Article 9 envisaged that at the time of its review consideration shall be given as to whether investment policy provisions and competition policy provisions should be incorporated in the agreement. This paved the way for the Working Group process that announced at the Singapore Ministerial Conference of WTO in 1996. The efforts to graduate the Working Group process to negotiations as part of the Doha round were abandoned at the Cancun Ministerial, though it was formalised on 1st August, 2004. The major concern of low income and least developed countries was that many of them did not have a competition law and they had not been able to understand the need for and implications of having provisions in WTO. India’s concerns were mainly as regards the proposed provisions related to non-discrimination while WTO envisaged non-discrimination subject to commitments undertaken in WTO. Moreover, the proposals related to non-building dispute settlement mechanism for competition policy in the form of voluntary peer review did not arouse any confidence (Scherer, 2000; Anderson and Holmes, 2002 and Peter, 2010).

The main arguments for binding multilateral competition rules are:-

**Market Access** - Trade concerns have arisen in the past due to domestic anticompetitive activities like import cartels or certain kinds of vertical restraints. It is argued that these negate the basic objective of free trade as envisaged by the Uruguay Round outcome. Developed countries generally adopt this view and this is why they want a multilateral arrangement on competition.

**International Cartels** - Cartels operating at the international level are very hard to detect and break these cartels by invoking domestic competition laws, though majority of such laws have jurisdiction to deal with the same. It is argued that an international watchdog with appropriate mandate could be the way forward to deal with international cartels.

**M&As with International Spillovers** - When there is a merger between two or more worldwide dominant firms in global market, competition concern may arise in all the markets where these firms conduct business and the effects of possible dominance may
occur in all these countries. Similarly, the regulation of such merger has international spillovers, as different regimes view mergers with different approaches and also gives rise to multiplicity of jurisdiction according to the effects doctrine. This again is one of the main issues in international economic relations and is being pushed forward as one of the principal arguments for a multilateral arrangement.

**Export Cartels** - Last but not the least, there are certain anticompetitive practices that are not covered by domestic competition laws. In contrast, governments generally support such activities. For instance export cartels or cross subsidisation policies. These policies distort competition in world trade and are against interest of consumers.

**Competition Policy in the Framework of WTO**

The implementation of a transparent and effective competition policy is an important factor both in enhancing the attractiveness of an economy to foreign investment and in maximising the benefits of such investment. Competition policy makes an economy attractive to foreign investors by providing a transparent dispute-mechanism that is consistent with international norms. Competition in markets, reinforced by competition policy, encourages foreign firms to construct modern production facilities in host countries, transfer modern technology and undertake training programs, and also prevents the exploitation of consumers. These effects may be particularly important in developing countries, in view of the crucial importance of technology transfer to economic development. Competition policy reinforces and essential to realising the potential benefits of privatisation programs and initiatives. Privatisation and deregulation in the developing world have failed to deliver benefits due precisely to a failure to engage in pro-competitive restructuring and related market reforms (WTO, 1997).

Moreover, the rising incidence of cross-border mergers and acquisitions raise problems of jurisdictional authority in dealing with industry concentration in multiple markets. These problems and related issues have prompted a number of policymakers and analysts to call for the negotiation of a limited agreement on multilateral principles and disciplines in competition policy within the WTO (Tharakan and Llyod, 1998 and Woolcock, 2001).
The presumption underlying active competition law enforcement is that vigorous competition between firms in an industry will foster efficiency and thus economic welfare. For any WTO antitrust agreement to be pro-development it will need to focus on the international dimensions of competition law enforcement that are most detrimental to developing countries, and recognise the capacity constraints and differences in priorities that prevail in many developing countries. The WTO arguably has a role to play in dealing with international competition law spillovers that affect countries’ terms of trade. Any such role should imply asymmetric obligations in that rich countries undertake to alter their legislation regarding export cartels and commit to devote their enforcement resources to pursuing anticompetitive practices by their firms that have effects on developing country markets.

The compact on competition policy under the aegis of the WTO has to be pragmatic and take into consideration development objectives where relevant and feasible. It should be borne in mind that efficiency considerations should be paramount and efficiency should not be sacrificed for the sake of short term gains. Chadha (2004) observes that the new rules of the game empowered by WTO have thrown up new challenges for scrutinising and invigilating more subtle ways of the MNCs. While at the same time protecting small domestic industries against the cost of capital; advertising and skilled management advantages of the MNCs. The invocation of WTO rules has stimulated multi-lateral trading and commodity, factors and capital flows due to crumbling tariff and non-tariff structures all across the globe which has augmented global competition. In the emerging perspective of globalised and liberalised markets, MNCs are accentuating merger and acquisition activity to consolidate and entrench themselves in developing markets, steered by their easy access to cheaper capital finance.

Bilal and Olarreaga (1998) emphasises that in many cases failures of trade liberalisation to generate sustained development and growth can be traced to a failure to introduce complementary domestic policy reforms. In most cases, countries will not be well poised to take advantage of the potential benefits of trade liberalisation unless they simultaneously take steps to promote flexibility by eliminating artificial restrictions on
entry, exit and pricing in manufacturing and other industries. There is also need to establish and strengthen incentives for investment, innovation, the creation of efficient management structures and productivity improvement. Competition policy has a role to play in all of these areas.

Alternatively, to have a greater coordinating role in multilateral competition policy in WTO, it would need to promote non-confidential information sharing agreements between national competition authorities. This might ensure that competition policy abuses with international dimensions could be properly investigated by the relevant national and regional competition bodies. If the WTO’s competition policy role were to be extended beyond a coordinating and advisory role, its ability to decide and enforce punishments would also need to be considered carefully. An extension of its dispute settlement mechanism has been considered as a potential way of extending the WTO’s role (Hoekman, 1997 and Singh, 2002). However, it has been argued that the dispute settlement mechanism is ill-equipped to deal with deciding and enforcing competition policy. There may be more radical proposals for the form of any greater WTO multilateral competition policy intervention need to be investigated. Such proposals should ensure that the WTO has sufficient power and resources to be able to impose appropriate punishments. Further, threats that it could make to intervene in an international competition policy dispute should be credible. The current prominent role of the WTO in multilateral trade suggests that it is likely to be an appropriate body to take responsibility for future multilateral competition policy developments (Woolcock, 2006).

However, there are some reasons for the non adoption of multilateral arrangement on competition policy as follows:-

1. The most crucial reason is the uncertainty of the developing countries, which is mainly because of their unsatisfactory experience with the functioning of the present multilateral trading system under the WTO. Developing countries fear that, big transnational corporations will dominate their economies due to their huge market power.
2. Many countries have reservations about the application of WTO dispute settlement mechanism vis-à-vis competition rules. There is widespread recognition that WTO dispute settlement mechanism is not well suited to the review of decisions taken in individual cases because of the intensive nature of competition issues.

3. Developing countries feel that any more obligations at the multilateral level means more expenditure in their national budgets to meet such obligations. They think the costs of adopting such measures may turn out to be larger than the expected benefits. Thus it is a question of costs and benefits.

4. Many believe that the problems, for which a multilateral arrangement is required, can be solved by developing bilateral and plurilateral cooperation agreements. It is true that such agreements are very helpful, but there are inherent limitations with such arrangements. Even if such an arrangement is arrived at, it may not be sufficient to provide solutions to every problem (Dutz, 2002).

5. There are powerful lobbies that support the maintenance of antidumping. They may oppose any effort to reach at multilateral competition rules, as it is said that such an arrangement could prove successful in disciplining the vigorous use of antidumping provisions (WTO, 2001).

Key Issues of Concerns for Developing Countries

Competition and international trade laws have evolved in a different context and different scope of application and different goals to achieve. The countries without a domestic competition law will be the prime victims of transnational anticompetitive practices. The economic welfare gains expected to materialise from the reduction of government-imposed barriers to trade can be undercut by the operation of international anticompetitive practices. A failure to implement competition policy and related reforms will prevent countries from realising the potential gains from external liberalisation.

Without a comprehensive legislation to prohibit or control RBPs, one cannot ensure fair competition and efficiency since dominant firms especially MNCs may indulge in unfair trade practices prohibited in other countries with competition legislation. Entry strategies of MNCs into a liberalising economy with a potentially larger market could
turn predatory and work to the elimination or destruction of competition from domestic firms. Capabilities of domestic firms and the conditions under which they compete need to be upscaled and possibly even strengthened through active policy in order to ensure the permanency of competition. The WTO agreements on TRIPs, TRIMs, subsidies and countervailing measures and anti-dumping measures have been used in the interest of developed countries but these can be applied just as well to the question of competition policy from the perspective of developing countries (WTO, 1997 and Singh, 2002). There is though continued opposition to a multilateral compact on FDI principally from the developing countries and they are not contented with the agreements on TRIPS and TRIMS. These measures are designed with the sole intent of limiting their anti-competitive effects on trade. However, ironically TRIPs may encourage monopolistic behaviour on the part of firms and prove detrimental to consumer interests. The Doha Ministerial meetings of the WTO took on board this dilemma and recognised the right of nation states to deny protection of intellectual property to firms in cases where such protection was harmful to consumer interests as in the case of drugs, which were essential for public health. Under the invocation of WTO norms, IPRs may have the effect to stimulate FDI flows, but if such IP protection is escalating monopoly power and market dominance, adversely affecting cumulative innovation and its diffusion, then the competition policy must lean to curb such tendencies. With the signing of the TRIPs agreement, IP protection in all the WTO member countries will be enhanced. It is expected that stronger IPRs will increase FDI flows and the transfer of technology. However, it is also feared that IPR holders may increase prices and act in ways that deter mental to competition. Therefore, countries like India should explicitly recognise the interplay between IPRs and competition policies (Cook, 2002 and Chadha, 2004).

Competition policy was originally understood as a means to help developing countries not to be overwhelmed by the developed countries. But it is now sought to be used by the rich countries to help their giant corporations compete with the local firms in the developing countries. Policy-makers in major developed countries are advocating the introduction of a new agreement on competition policy in the World Trade Organisation so that their big corporations will be better able to take over a larger share
of the markets of developing countries. By bringing the issue into the WTO, the rich countries plan to make use of the principle of non-discrimination to argue that local firms cannot be treated more favourably than foreign firms. For developed countries, fair competition is possible only when national treatment is given to their enterprises in the developing countries. Such an approach would of course be a threat to many local firms, as they are smaller and have fewer resources to compete with the giants. To developing countries, therefore, non-discrimination towards MNCs would in reality be discriminating against locals who would not be able to compete on equal terms ((Gal, 2003; Mehta and Evenett, 2006).

Several developing countries have voiced opposition to the proposal for the negotiation of multilateral rules or a framework on competition policy in the WTO. They argue that the issue is too complex and understanding on it by WTO members is far from agreement, and that instead of developing multilateral rules, the WTO's Working Group on trade and competition policy should continue to study the issue. The WTO principles of non-discrimination, national treatment and transparency should be applied to a national competition law that WTO members would be required to adopt under a WTO agreement on competition policy. Competition law would then combat practices which deny foreign products and foreign firms, that are established in the host country, equal competitive opportunities in the local market (Nicolaides, 2001 and Evenett, 2005).

Foreign firms can insist on getting equal opportunities as locals in the host country's market, and government measures or private sector practices that favour the competitiveness of local enterprises would be considered impermissible. Thus, the proposed WTO agreement on competition would place obligations on developing countries to establish a competition law that would very significantly increase the market access that foreign firms would have to their markets, through trade or investment. Moreover, the WTO's enforcement system, which includes trade sanctions against products of non-complying countries, would ensure that the pressures on members to comply would be immense. There can be greater international cooperation
between national competition agencies without having legally-binding multilateral rules.

It should be ensured that developing countries benefit from international cooperation and capacity-building on competition law. For the development of national competition policy regimes, there is a need to consider (i) the different levels of development; (ii) the different cultural context in which these regimes will be implemented; (iii) the difference in availability of resources for this purpose; and (iv) the different levels of institutional development. These issues are much too complex and not as easily amenable to a multilateral solution. Governments, businessmen and the public in developing countries should pay attention to how the talks evolve and indeed their diplomats in the WTO should be directed to oppose the moves to make competition policy the subject of WTO rules and agreement (Graham and Richardson, 1997 and Dube, 2008).

In the context of competition policy, international experience proves that it is not possible to formulate precise rules based on a single interpretation of transparency and procedural fairness. It has said that there is very little agreement among theorists on many competition issues, and legally the same competition principle is interpreted in different ways in different jurisdictions. There is also a lack of consensus about the efficiency properties of vertical restrictions and mergers. The developing countries have much less experience with competition policy, there will be a learning-by-doing process in which some amount of inconsistency and evolution is inevitable. The assistance should be provided to the developing countries for capacity-building which can help in formulating administrative guidelines which are appropriate to their policy objectives, data availability and institutional framework. Since these will differ from one country to another, there cannot be a simple transfer of a blueprint which can be used in countries at a different stage of economic and institutional development. If such guidelines are made available to competition agencies and firms, it can go a long way in reducing uncertainty and the costs of litigation (Hoekman and Mavroidis, 2003).

As most of the developing countries have now liberalised their economy, the next step they should take is to come up with a suitable competition regime. This can be
done by consulting other developing countries, which have some experience with competition law and policy. This will enable them to go up the learning curve faster. But any opposition to it from vested interests within the country must be dealt with firmly. This opposition will continue to operate in such countries where there is no competition regime or where the proper application of the regime can be influenced. Markets cannot be left to themselves. They need to be regulated, though not excessively. Furthermore, developing countries should develop cooperation agreements among themselves and with other developed countries. Then they should group together and prepare an agenda for a multilateral competition arrangement, which will take care of their concerns in a manner that their interests are not compromised in any way. Any multilateral agreement can be a double-edged sword, and the experience gained so far will be quite helpful for crafting an agreement that will not threaten their interests.