

NEGOTIATIONS ON A TRADE AND COMPETITION POLICY UNDER THE AUSPICES OF THE WORLD TRADE ORGANIZATION: AN INDIAN PERSPECTIVE OF EMERGING ISSUES

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1 Introduction

The adoption of protectionist policies by countries is nothing new. The existence of protectionist economic policies and the quota-type restrictions in the inter-war period (1920-1940) were the primary causes of the Second World War, deeply impeding international trade; consequently making it imperative for policies to be developed with the co-operation of various States forming part of the international community. Therefore, it was desired that trade policies between nations must be liberalised; thereby sowing the seeds of a more globalised world. Hence, while Organizations like the OECD,¹ the UNCITRAL,² the WTO³ and conferences like UNCTAD⁴ came into being in order to regulate matters concerning international trade, it was in turn important that these efforts at the international level are complemented and supplemented at the domestic level as well. This marked the beginning of competition law regulation at the domestic level.

Approximately a hundred nations across the globe have legislated to regulate and promote competition in their respective domestic spheres. These laws are more or less modelled on the United States'

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¹ The OECD was established in the year 1961 with its headquarters in Paris, France. The Organization endeavours to achieve enhanced social and economic welfare of the people of its Member States (which are mostly developed nations). For a detailed discussion on the OECD, visit www.oecd.org.

² UNCITRAL was established by the General Assembly Resolution in 1966; and serves as an important body for the reasons of aiming to bring about harmonisation and unification of the disparities between the various national laws with regard to governance of international trade. For a detailed perusal of the work of UNCITRAL, visit <http://www.uncitral.org/uncitral/en/about/origin.html>.

³ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) (hereinafter Marrakesh Agreement or WTO Agreement).

⁴ UNCTAD was established in the year 1954, and for the very first time incorporated the active participation of developing countries. It endeavours to bring about coherence between domestic and international policies for sustained development. For a detailed discussion on the work of UNCTAD, see Final Act and Related Documents on the United Nations Conference on Trade and Employment, UN Doc E/CONF2/78 (1948) (hereinafter referred to as the UNCTAD).

Sherman Act⁵ or the European Union's principles on competition (particularly Articles 81 and 82 of the Reform Treaty).^{6 7} Some nations, like the US⁸ and the EU⁹ also have provisions in their respective laws to tackle anti-competitive conduct across their national borders; in other words, anti-competitive conduct which takes place outside the border but nevertheless *impacts or has an effect* on the territory of their state. However, over time it has been realised that these provisions may not be sufficient by themselves and that the problem must be tackled on a multilateral basis.¹⁰

While several efforts have been made by the OECD and UNCTAD on a multilateral level, these efforts have somewhat failed to serve the purpose because they are recommendatory and non-binding in nature. At the same time, it is considered that the WTO would be a more suitable option to regulate matters pertaining to cross-border anti-competitive conduct because the rulings of the Panel and Appellate Body of the WTO are binding by nature. Not merely this, but the goals of the WTO seem to be more in keeping with that of competition policy. In other words, when both the WTO and competition policy endeavour to promote competition, improve the economy and the standard of living,¹¹ it would only be more appropriate that the WTO regulates and checks anti-competitive conduct that takes place across the border. In addition, with the WTO liberalising trade policy, nations have not merely had better access to each other's markets, but have also been in a better position to engage in anti-competitive practices. Thus, while international trade policy as regulated by the WTO has provided an impetus to

⁵ The Sherman Antitrust Act (Sherman Act, July 2, 1890, ch 647, 26 Stat 209, 15USC §§ 1-7).

⁶ The origins of the Reform Treaty may be traced to the Treaty of Rome. The Treaty of Rome was created by the then European Economic Community (now known as the European Union) in 1958; with Article 85 addressing concerted practices in the form of cartels to hamper competition and Article 86 prohibiting abuse of dominant position. It is important to note that Articles 85 and 86 are currently renumbered as Articles 81 and 82 by the Amsterdam Treaty of 1997. As time progressed, independent member states began adopting their own competition laws with Articles 81 and 82 serving as a model for these laws.

⁷ For a detailed discussion on the EC law, see, Craig & De Burca *EU Law: texts, cases and materials* (4th ed 2007); Watt & Dashwood *European Union law* (5th ed 2006); H Ullrich 'Harmonization within the European Union' (1996) 17 *European Competition Law Review* 178.

⁸ *United States v Aluminium Co of America* 148 F2d 416, 433 (2d Cir 1945).

⁹ *A Ahlstrom Osakeyhtiö v Commission* (1988) ECR 5242-43, (1988) CMLR 901 (commonly referred to as the Wood Pulp Case); See Commission Decision, *Raymond/Nogoya*, June 9, 1972, (1972) OJ L143/39, 41; Commission Decision *Dyestuffs*, 24 July 1969, (1969) OJ Spec Ed L195/11, 14; *Gencor v Commission*, judgment of 25 March 1999, 1999 ECR II-753.

¹⁰ This is primarily due to the fact that negotiations on a bilateral basis involve merely the interests of the parties to such a (bilateral) Agreement. Hence when competition law violations involve the concerns of the larger community, such bilateral agreements may not serve the purpose at all times.

¹¹ 'Working Group Report on interaction between trade and competition policy submitted to the General Council', WT/WGTCP/W/127/7, 22 (7 June 1999).

privatisation and liberalisation, it has also acted as a vehicle for anti-competitive practices in various forms; and despite there being several laws to effectively combat such practices, these laws seem to be redundant so long as these practices take place across borders. In such scenarios, it is imperative for governments to think of ways and means to combat such behaviour effectively at an international level.

It was against this backdrop that it was decided during the Singapore Ministerial Conference that an Agreement on Trade and Competition Policy be negotiated under the scope and ambit of the WTO, popularly referred to as one of the 'Singapore issues'.¹² This led to the birth of the Working Group on the Interaction between Trade and Competition Policy in the year 1996 and was spearheaded by Professor Federic Jenny. In particular, the work of the WGTCPC underlined the contribution of trade and competition policy in achieving further development,¹³ and also threw light on the needs of developing nations for technical assistance and capacity building in these areas.¹⁴ A series of impasses later, the work of the WGTCPC was halted as a result of the decision of the General Council in 2004,¹⁵ due to disagreements among the Members of the WTO, particularly from the developing nations and the United States. India was one such nation to have vehemently opposed an Agreement on Trade and Competition policy owing to India's 'level of development'.

Against this backdrop, the purpose of this paper is to develop an understanding of the Indian perspectives concerning the regulation of competition policy by the WTO, which would in turn require understanding the country's perspectives at various Ministerial Conferences and its experience with competition policy in the first place.

2 Indian perspectives

2.1 The Indian perspective at the Singapore Ministerial Conference

To begin with, during the time the subject came to be initially discussed during the Singapore Rounds, India did not seem to have adopted a very optimistic view on the negotiation of a trade and

¹² World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, 36 ILM 218 (1997) para 20 (hereinafter Singapore Ministerial Conference).

¹³ As above.

¹⁴ World Trade Organization, Ministerial Declaration of 14 November 2001 WT/MIN(01)/DEC/1, 41 ILM 746 (2002) para 24 (hereinafter referred to as the Doha Ministerial Conference).

¹⁵ WTO, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, 3 WT/L/579 (2 August 2004).

competition policy. Instead, India as represented by the then Minister of Commerce, Dr BB Ramaiah, preferred to observe the work of the UNCTAD on competition policy.¹⁶ It was stated that UNCTAD had also drawn up a Code of Conduct for Transnational Corporations in this regard which remained moribund.¹⁷ Hence, some form of distrust in holding further negotiations in the area of competition policy was seen. The Code of Conduct first began with the efforts of the Ad Hoc Inter-Governmental Working Group, which was set up by the UNCTAD Commission on Trans-national Corporations. In addition, Dr BB Ramaiah in representing the country on the matter was of the view that competition policy being closely linked with that of investment policy should only be included within the agenda of the TRIMS; and until that can be done, should be taken care of by the UNCTAD.¹⁸ To this end, it was believed that while investment policy as regulated by the Agreements on TRIMS strives to create a more favourable investment climate amongst Member-states, in the form of more liberal FDI regulations, the same in turn creates competitive opportunities among nations.

2.2 The Indian perspective at the Doha Ministerial Conference

The situation did not seem to improve in the next Ministerial Conference either, with India continuing to oppose the inclusion of competition policy.¹⁹ In particular, it viewed the inclusion as something which could be deliberated exclusively after scrutinising

¹⁶ Final Act and Related Documents on the United Nations Conference on Trade and Employment, UN Doc E/CONF2/78 (1948) (hereinafter referred to as the UNCTAD), reprinted in Clair A Wilcox *A Charter for World Trade* (1949) 231 (Clair A Wilcox represented the US during the ITO and GATT negotiations).

¹⁷ United Nations Conference on Trade and Development, Draft United Nations Code of Conduct on Transnational Corporations (1974) <http://www.unctad.org/sections/dite/ia/docs/.../en/13%20volume%201.pdf> (hereinafter known as the Code of Conduct).

¹⁸ Speech by BB Ramaiah, Minister of Commerce, India, Singapore Ministerial Conference, WT/MIN(96)/ST/27(Dec 9, 1996), http://www.wto.org/english/thewto_e/minist_e/min96_e/st27.htm. In particular, Ramaiah stated, 'In respect of competition policy also, we would like to see the work to be initially undertaken in UNCTAD. I recall at this juncture, that UNCTAD had drawn up a Code of Conduct for Transnational Corporations. However, because of lack of enthusiasm on the part of major delegations for the concept of supervision over transnational corporations the Code of Conduct was not approved. Just as in respect of investment policy, in the case of competition policy also, the subject has to be looked into as part of the TRIMS review in 1999-2000. In the meanwhile, UNCTAD should examine all the aspects of competition policy as already decided at Midrand.'

¹⁹ Speech by Murasoli Maran, Minister of Commerce, India, Doha Ministerial Conference, WT/MIN(01)/ST/10 10th November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_statements_e.htm. In particular, it was stated: 'In the areas of ... Competition ... basic questions remain even on the need for a multilateral agreement. Most importantly, do the developing countries have the capacity to deal with them? Will we be able to say that they do not impinge strongly on domestic policies that are well removed from trade? Are the basic trade principles like non-discrimination or market access appropriate for

firstly whether developing countries indeed have the capacity to deal with such an inclusion; secondly whether the core principles of the international trade regime are appropriate for competition policy and thirdly whether competition policy is capable of being regulated by the WTO, which essentially regulates international trade between nations and is multilateral in nature.²⁰ These issues that were raised in the Doha Ministerial Conference by Mr Murasoli Maran, the then Minister of Commerce did not permit a *prima facie* inclusion of competition policy within the WTO until the same were 'carefully studied' and an 'explicit consensus' on the same could be obtained.²¹

2.3 The Indian perspective at the Cancun Ministerial Conference

India seemed to have a growing skepticism about the inclusion of competition policy with the framework of the multilateral trading system. This skepticism reappeared in the discussions that formed part of the Cancun Ministerial Conference before which the decision to 'drop-out' deliberations about including competition policy within the framework, were made. It was argued on behalf of India that the country could not be expected to be ready for such an inclusion, given the fact of the diverse economic culture that forms part of the WTO Membership and that a uniform competition policy between developed and developing nations would be hard to imagine.²² Prior to anticipating whether such an inclusion is desirable or not, it was argued that it would be preferable to analyse the core principles of international trade policy, the cooperation mechanisms and the ways and means by which hardcore cartels can be prohibited.²³

Therefore, albeit that the fact that the decision to include competition policy within the ambit of the WTO was rejected finally

dealing with issues like Investment and Competition? Would the Marrakesh remit for WTO which talks only of multilateral trade relations permit these other issues to be covered? We are very doubtful if we can give affirmative replies to all these questions. It is our considered view that we need to carefully study them further before rushing to decisions. In any case, the Singapore Declaration requires an explicit consensus for any decision to move to negotiations. Let us therefore wait till an explicit consensus emerges on these issues.'

²⁰ As above.

²¹ As above.

²² Speech made by Arun Jaitley, Minister of Commerce and Industry and Law and Justice, India, Cancun Ministerial Conference, WT/MIN(03)/ST/7 (10 September 2003), http://wto.org/english/thewto_e/minist_e/min03_e/min03_statements_e.htm. It was stated that: 'Countries at different stages of development have viewed competition issues differently based on the effects they have on their economies. Convergence in views can arise only between countries at similar stages of development. The WTO membership is too diverse to admit a framework that suits all. Further work needs to be done on understanding elements in competition such as core principles, cooperation mechanisms and the coverage and prohibition of hardcore cartels through appropriate mechanisms before we can start comprehending the implications of any multilateral discipline.'

²³ As above.

as part of what is commonly known as the 'July Decision' in 2004, India's response to such deliberations and negotiations remained lukewarm.

To this end, it was seen that India's main objection with regard to the negotiations on trade and competition policy pertained to the fact that it considered it dangerous for its economic development, to blindly transplant the competition policy suggested by its developed counterparts. For this reason, India did not desire to commit itself to the sort of negotiations the WTO would conduct on the subject matter.

In answer to the doubts and inhibitions mentioned above, it must be noted that competition policy and trade policy, albeit possessing certain differences, are policies which complement and supplement one another. Hence, despite the fact that international trade policy does not *per se* seek to address the conduct of private individuals, its main aim remains that of improving competitive opportunities.²⁴ For this reason, the one policy would find it difficult to sustain without the other. Where international trade policy operates and regulates market access at the international level, competition policy is mainly at the domestic level.²⁵ In addition, both trade and competition policies go hand in hand in achieving economic development.²⁶ With the reduction of trade barriers, it has been seen that international trade policy has improved the standard of living of the people around the world, due to a substantial reduction in world commodity prices. At the same time, competition policy too has created competitive opportunities in the market and sought to bring about economic development and consumer welfare.

²⁴ The Preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) (hereinafter Marrakesh Agreement or WTO Agreement). The WTO aims at improving competitive opportunities in the markets of its respective Members. For this reason, the preamble of the WTO addresses the Organization's mandate of improving the standard of living, increasing employment and the production of trade in goods and services.

²⁵ It is said that competition policy is mainly at the domestic level, because, apart from the recent growth in international competition policies in the form of bilateral, regional and multilateral agreements, competition policy mostly operates exclusively at the domestic level in most jurisdictions.

²⁶ United Nations Conference on Trade and Competition Policy, *The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy*, in The Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive business practices, td/rbp/conf.7/3, New York, Geneva (8-10 Nov. 2010); United Nations Conference on Trade and Development, *Trade and Development Report*, United Nations, New York, Geneva (1995); Working Group Report, Working Group Report on interaction between Trade and Competition Policy submitted to the General Council, WT/WGTCP/W/127/7, 22 (June 7, 1999).

2.4 The Indian experience with competition policy

The Indian experience with competition policy may be traced back to the year 1950. The yearning to create competitive opportunities and shun monopolistic practices which thwart economic development was seen in provisions of the Directive Principles of State Policy (DPSP) of the Indian Constitution, which came into force in the year 1950. In particular, Articles 38 and 39 of the Indian Constitution sought to bring about distributive justice. To this end, Article 38 aims at achieving economic justice, among other things.²⁷ Article 39 on the other hand is more direct in its aim of reducing monopolistic power. Thus, it seeks to prevent the concentration of wealth in the hands of a select few.²⁸ In addition, it also desires the distribution of ownership of wealth in such a manner that it brings about the common good of the people.²⁹ These constitutional aims of bringing about distributive justice with the reduction of monopolistic power were however crystallised via the various industrial policy statements from time to time.

2.5 The Indian industrial policy statements

It is important to appreciate that a country's industrial policy goes a long way in determining the ability of the country to create conditions of competition. Basically, industrial policies are the 'government efforts to alter industrial structure to promote productivity based growth.'³⁰ Therefore, in general the industrial policy includes the rules, regulations and policies that governments adopt in order to achieve industrial growth.

Prior to 1991, industrial policy statements included government participation in the development of the country in a large manner.³¹ In other words, industries were more or less government controlled. This situation changed immensely after 1991, with the policy statements now preferring more of private participation as against

²⁷ The Indian Constitution, Art 38. Art 38 provides: 'State to secure a social order for the promotion of welfare of the people – (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'

²⁸ As above. Article 39(c), which provides: 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women.'

²⁹ As above. Article 39(b) which provides: 'that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.'

³⁰ Definition provided by the World Bank (1992) available at www.worldbank.org/research/trade (last visited 11 December 2012).

³¹ B Thakur, R Gupta & R Singh 'Changing face of India's industrial policies: A look' (1972) 2(12) *International Journal of Scientific and Research Publications*.

industries being controlled by the government. This would help one comprehend *the extent to which* the country's industrial policy has in fact played a role in achieving economic growth, making India the third largest economy.³²

3 India's industrial policy statements

3.1 India's Industrial Policy Statements prior to 1991

India's industrial policy can be traced back to the year 1948. They have a longer history than the Indian Constitution, which came into force in the year 1950. However, the coming into force of the Indian Constitution changed people's perception; creating more focus on economic acceleration, raising the standards of living for its citizens and forming a socialist pattern of society.³³ Given that India had newly achieved independence from the shackles of British rule, the State was responsible for the development of all the industries.³⁴ Consequently, the private sector played a modest role in economic acceleration as part of the Industrial Resolution of 1956.³⁵

The subsequent years sowed the seeds for the creation of greater competitive opportunities in India and increased her potential to be part of the world economy. Against this backdrop, the government decided to set up a Monopolies Inquiry Commission to review issues pertaining to concentration of power, given how that unduly restricts economic growth.³⁶ This in turn led to the setting up of the Monopolies and Restrictive Trade Practices Act in the year 1969.

The subsequent policy statements in addition saw an increasing trend towards the country's realisation about how concentration of economic power in the hands of a select few could dampen the aspirations of raising the standards of living for the people and the rate at which her economy would be as strong as that of her Western counterparts. This in turn led to the government's preference for

³² Banerji & Rishi Shah 'India overtakes Japan to become third-largest economy in purchasing power parity' *The Economic Times* (April 19, 2012), http://articles.economicstimes.indiatimes.com/2012-04-19/news/31367838_1_ppp-terms-india-s-gdp-power-parity.

³³ Industrial Policy Resolutions, available at <http://eaindstry.nic.in/handbk/chap001.pdf>

³⁴ As above.

³⁵ As part of the Industrial Resolution of 1956, the administration of industries was played into three broad categories, namely: 17 industries placed under the exclusive domain of the State; 12 industries placed into the domain of the State, albeit with the private sector permitted to supplement the efforts of the State; and the remaining industries wherein it was the sole responsibility of the private sector to initiate development and with the State permitted to take part in the administration as well.

³⁶ The Industrial Policy Measure, 1964.

small and medium enterprises especially when the same concerned mass consumption by the people.³⁷

Decolonisation further provided an impetus for India to slowly but steadily introduce conditions of competition in the nation; i.e. to say that as compared to the previous years, when the State held the exclusive responsibility for growth, there was a growing concern towards technological upgrading and modernisation apart from the creation of higher employment levels, promoting exports and the protection of consumers from unfair trade practices.³⁸ In addition to the respective industrial policies that helped the nation respond to the emerging and pressing needs requisite for economic development, specific agendas for growth were also seen in the successive five-year plans that were responsible for the initiation of various measures to achieve these targets.³⁹ There was also a shift in focus towards greater deregulation of market forces.⁴⁰ Thus, while the (industrial) policy statements of the previous years focused more on the role played by the State and its responsibility in the administration of most industries, the same was believed to be largely inappropriate in the later years. This consecutively called for greater autonomy in the regulation of industries which could be achieved by giving away the licensing requirements.⁴¹

3.2 India's industrial policy statement post 1991

India has remarkably transformed itself in terms of economic growth that has led to greater integration into world markets as a result of its policy initiatives since 1991. In general, the policy statement of 1991 proved to be promising so far as entrepreneurship, indigenous technology, research and development, creation of new technology and the development of capital markets essential for increasing competitiveness and raising the standards of living went.⁴² This in

³⁷ The Industrial Policy Statement, 1973.

³⁸ In order to encourage technological innovation and modernisation, the State provided special incentives to industries that were engaged in doing so by raising the investment limits and thus providing greater opportunities to participate in the expansion of the economy; the Industrial Policy Statement, 1980.

³⁹ Therefore, while the respective Industrial Policy Statements were largely concerned with 'what is to be done' in order to achieve accelerated growth, it may be said that the successive five-year plans were largely concerned with 'how it is to be achieved' thereby calling for the laying down of various measures that must be taken if growth is to be achieved.

⁴⁰ Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

⁴¹ It must be noted that the initial phases of deregulation of the Indian markets permitted doing away with the licensing requirements of all but 26 industries, as part of the Industrial Policy Statement of the 1980's.

⁴² Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

turn reflected upon India's ideals to become an industrialised nation.⁴³

As globalisation became an increasing trend with almost all countries focusing on molding policies to accommodate these changes in trends and increase competitive possibilities with a view to answer the increasing demands of the citizens, the Industrial Policy Resolution of 1991 did away with the compulsory licensing of an additional number of industries. Thus, compulsory licensing was now required for merely 18 industries.⁴⁴ Furthermore the government eased the procedure for the recruitment of specialised expertise; and also concentrated more on the control of restrictive business practices that unduly hamper trade and efficiency in the way markets function.⁴⁵ However, policies cannot function in a vacuum and must be largely supplementary and complementary in nature. While thus recognising the need to constantly upgrade technology, given the bearing the same has on the economic development and consequently on consumer welfare, it became incumbent to shift focus from inward looking policies that rely exclusively on domestic goods and inputs.⁴⁶ This consequently led to a shift from a strictly regulated environment to a deregulated one; it became incumbent to now focus on outward looking strategies in the light of the new international economic scenario and the requirements of the global agenda.⁴⁷ This led to the encouragement of foreign direct investment, especially in industries relying on high investment required to upgrade the existing technology and the one's relying on the exports of their merchandise; albeit with a ceiling limit of 51%⁴⁸ which was subsequently increased to 100% in sectors revolving around those in Special Economic Zones, petroleum products, natural gas pipelines and magazines, and periodicals and journals promoting scientific and technical knowledge.⁴⁹

The period post 1991 saw landmark changes in the governance of the country, marking a shift from 'government' to 'governance.'

⁴³ To this end, seen in a holistic manner, the Industrial Policy Resolution aimed at increasing competitiveness in India with a view to achieve international competitiveness.

⁴⁴ Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

⁴⁵ As above. The Industrial Policy Statement of 1991 included the mandate of enacting the Monopolies and Restrictive Trade Practices Act (MRTP Act), in order to effectively combat restrictive trade practices that deter competition in India.

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ This reflects a change from the past industrial policies on foreign direct investment that permitted fully owned foreign companies in areas that require sophisticated technology or are purely export oriented. In the remaining industries, it was considered unnecessary to permit foreign collaboration in financial and technical matters, considering that indigenous knowledge over the same was already available. See Industrial Policy Resolution, 1977.

⁴⁹ The Industrial Policy Statement, 1991.

The Monopolies and Restrictive Business Practices Act passed as a result of the Policy Statement in 1969 was considered to be largely irrelevant in the light of new reforms.⁵⁰ This made the passing of the Competition Act, 2002 important given the nature of the new transnational movement that made illegal the entering into anti-competitive agreements with regards to production, supply, storage, distribution, acquisition and more broadly any act that causes or is likely to cause an adverse impact on competition in India. In addition, the Competition Act of 2002 called for the setting up of the Competition Commission of India: a much needed forum to hear disputes and enforce the provisions of the Act. Considering that the promotion of competition was relatively new to an orthodox Indian regime the Competition Commission of India is also imposed with the duty of increasing awareness of the importance of competition in increasing consumer welfare and economic efficiency.

4 The role of India's Industrial Policy in achieving economic development

Apart from taking important initiatives in reforming India's economy by means of increasing its ability to compete in world markets, the policy initiatives post 1991 went a long way in transforming the Indian image by opening up to the private sector those sectors that were once the monopoly of the State.⁵¹

India now became increasingly aware of the significance of the interdependence with the progressive introduction of new policies and strategies on international trade and foreign direct investment. This new approach facilitated India to achieve high growth rates in terms of GDP that accelerated manifestly from 5.5% in the period between 1989-1998 to 7.2% from 1999-2010⁵² and then to an

⁵⁰ This primarily refers to reforms in the form of de-regulation of industries and enhanced inclusion of the private sector in the economic development of India.

⁵¹ For instance, there were some sectors that were the exclusive responsibility of the State by means of a State monopoly in the same; these included telecommunications, electricity, post and transport. In addition, the Government also permitted foreign direct investment up to 100% in matters such as the maintenance and construction of roads and ports; considering the bearing of the same on the up gradation of technology and innovation in the means of manufacture. In addition, the private sector is largely responsible for meeting India's global needs and in particular the problem concerning inadequate infrastructure, electricity, roads, power, telecommunication, sanitation and irrigation to name a few; in which public administration over the above-mentioned matters was considered to be insufficient. It was thus seen that investments by the private sector in augmenting the growth that is necessary to achieve India's goal. Also See, World Trade Organization, *Trade policy review - India*, WT/TPR/S/249 (14-15 September 2011), http://www.wto.org/english/tratop_e/tpr_e/s249_sum_e.pdf.

⁵² As per the Indian Ministry of Finance, *Economic survey*, 2010-11.

astounding 9% (approximately) in the year 2011.⁵³ Consequently India began to be considered as one of the ninth largest traders after the US, EU and Japan.⁵⁴

The new approach that India had adopted was a major achievement as far as investment and the innovation of new technologies was concerned. Hence, small and inefficient undertakings were under constant pressure to reform. Industrial restructuring was a priority.⁵⁵ By introducing the new policy statements post 1991, especially those relating to permitting foreign direct investment, inefficient undertakings were motivated to reform due to enhanced competition which was now international in scope.⁵⁶ With this, it was incumbent to fashion new policies to accommodate these changes. Apart from that, India incorporated significant changes in the five-year plans to introduce new policies from time to time; and thus create an environment in which the economy grows rapidly to create livelihood for its people.

5 The significance of competition policy in achieving the goals of the Indian Industrial Policy Statement

In the event that goods are trans-nationalised not only due to globalisation and the subsequent liberalisation of tariffs, but also due to the progressive changes in the industrial policies of a nation; which increase the exports and the imports of the nation, it is important to protect the same from anti-competitive practices.

The mere incorporation of changes in the industrial policy of any nation in general, and in this case, with reference to India is not

⁵³ This meant that India's per capita income had increased from US \$204 in the year 1978 to \$208 in the year 1991 and to \$1,202 in the year 2008.

⁵⁴ World Trade Organization – Economic Research and Statistics Division *Evolution of Asia's outward-looking economic policies: Some lessons from trade policy reviews* (14 September 2011) http://www.wto.org/english/res_e/reser_e/wpa_ps_e.htm.

⁵⁵ Industrial Policy Statement, July 24, 1991, Government of India, Ministry of Industry, New Delhi; For a detailed discussion on industrial restructuring in India, see Thakur, Gupta & Singh (n 31 above); and J Ghosh, 'Trade liberalization and economic restructuring: Can India skip the industrial phase?' IDEAs Conference on Post Liberalization Constraints on Macroeconomic Policies Muttukadu, http://www.networkideas.org/feathm/mar2006/trade_liberalisation.pdf.

⁵⁶ Indian Industrial Policy, 1991. Primarily, the Industrial policy statement of 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.'

adequate, and must be accompanied by changes that are more holistic in nature. To this extent, it may be stated that albeit the fact that India definitely has achieved potentials for high growth since the post-independence era, the same cannot be sustained unless and until it has *supportive policies* in place. These may be time-consuming but are nevertheless vital in the event any real place in the world is to be achieved.

In the light of the changes brought about by the economic reforms providing undertakings with a greater autonomy in their management, the same impacted competitiveness in the market to a large degree. Thus in the year 2000-01 where exports of goods and services formed merely 14% of the GDP, exports were able to form 22% of the GDP in the year 2010-11.⁵⁷

The lofty economic reforms that 'push forward' a robust private sector must not only ensure that the interests of the private sector are protected but must also assure *all* competitors that any anti-competitive activity will not be tolerated. Furthermore, an effective competition policy also seems to be the need of the day in view of other policies that target economic growth. For instance, in light of India's current objective of accelerating its exports to 25% p.a. accompanied by various policies such as tax incentives and export promotion, it only appears practical that the promotion of a robust competition policy would be extremely beneficial, especially since the same would not only increase the GDP with technological innovations but would in addition decrease the cost of inputs that are used in the manufacturing of these exports.⁵⁸ Thus, increasing competition would substantially decrease the cost; but there is an increasing risk that the inputs might be eventually 'hit' by anti-competitive practices that are trans-national in nature, so as to make all the above mentioned policies redundant.⁵⁹

There is thus an urgent need to lay the foundations for the same given the increased role played by the private sector that may eventually be in a position to monopolise and abuse their market

⁵⁷ Planning Commission, Government of India, *Draft: A faster, sustainable and more inclusive growth: an approach* http://planningcommission.nic.in/plans/planrel/12appdrft/approach_12plan.pdf.

⁵⁸ It must be noted that India seeks to double her share in global trade by 2020 by accelerating the export growth to 25% as part of her Foreign Trade Policy (FTP): 2004-09 and 2009-14; See, Trade Policy Review Body, World Trade Organization, *Trade Policy Review: Report by the Secretariat: India*, WT/TPR/S/249 (10 August 2011) http://www.wto.org/english/tratop_e/tpr_e/s249_sum_e.pdf (14 September 2011).

⁵⁹ This once again refers to the need for policy objectives to be more holistic in nature. The exclusive concentration on increasing exports and the share of the same does not seem to be practical; nor does the 'neutralization' of the costs of the inputs seem holistic. Therefore, policy makers must in all cases have their eyes set on an effective competition policy *in the absence of which* or for that matter *with the failure of which* the goals mentioned above appear to be highly unrealistic.

power. This in turn calls for a greater cooperation and the consolidation of many policies in the event the economy is perceived to be at a higher growth level.

6 The significance of the differences in ‘levels of development’ in arriving at a consensus for negotiations on a trade and competition policy

Despite the fact that India does possess a competition law to tackle anti-competitive conduct on its territory, it is well known that problems are bound to arise and impact the economic development of the country, when such conduct is at the trans-national level. However, India’s stand has been that negotiations on a trade and competition policy would be difficult given the differences in the development levels.⁶⁰ For this reason, it becomes important to analyse the significance of these differences in order to ascertain whether or not India would be a beneficiary to such negotiations.

Traditionally, the legal order has been driven by a large variety of developments that have in turn led to a large variety of changes in the society. Subjects that exist today need not have existed in the past. With respect to international trade, the development of the same has been driven largely to prevent the communal and in turn economic tensions that caused the Second World War.⁶¹ Hence, international relations that in the past governed only a limited variety of subject-matters today encompass almost all the subject-matters that govern human life. The growth of competition law and policy also as seen, was compelled by an increase in trade; and no longer remained to be the exclusive priority of the US, EU or Japan. Motivated by its welfare enhancing objectives and the escalation in the number of cartels, about 100 nations were compelled to enact this law; India being one such country. In addition, it has also been seen that competition

⁶⁰ Speech made by Arun Jaitley, Minister of Commerce and Industry and Law and Justice, India, Cancun Ministerial Conference, WT/MIN(03)/ST/7 (10 September 2003), http://wto.org/english/thewto_e/minist_e/min03_e/min03_statements_e.htm. It was stated that: ‘Countries at different stages of development have viewed competition issues differently based on the effects they have on their economies. Convergence in views can arise only between countries at similar stages of development. The WTO membership is too diverse to admit a framework that suits all. Further work needs to be done on understanding elements in competition such as core principles, cooperation mechanisms and the coverage and prohibition of hardcore cartels through appropriate mechanisms before we can start comprehending the implications of any multilateral discipline.’

⁶¹ Terborgh ‘The post-war rise of world trade: Does the Bretton Woods system deserve credit?’ Department of Economic History London School of Economics: working paper series no 78/03, September 2003, <http://www.lse.ac.uk/economichistory/pdf/wp7803.pdf>; L Briscoe ‘The growth and structure of international trade since the Second World War’ (1975) 1 *British Journal of International Studies* 209-225.

policy and trade policy are differing in certain aspects, making it incumbent to consider an enlargement of the current scope of the new international economic order.

By and large, the development and growth of the new international economic order has been prompted by the vast inclusion of countries which did not earlier form part of the same.⁶² This has in turn necessitated the inclusion of new subjects, in keeping with the interests of the new members of the international community. These new members of the international community are none but the members of the third world,⁶³ making the membership of the new international economic order extremely diverse. This diversity in the membership of the new international economic order therefore calls for compelling changes in the administration of the same. However, it has been argued that these changes brought about in the new international economic order have been more or less based on the Western culture and philosophy.⁶⁴

The inclusion of the subject matter of 'competition policy' in the legal order has largely been the result of decolonisation; and the increasing need for the members of the third world to model their economic development on the path followed by their Western counterparts. As a result of decolonisation or in other words, the emancipation from the bondage of British Colonies, the transformation of India's economy can be seen as the direct result of its wishes to mimic the western economic structure; and is aptly recognised by ben Salah (1957) to be the 'profound revolution of mental, moral, social and economic structures.'⁶⁵ To this end, competition law and policy are merely means to an end and not ends in themselves.

Hence, where the subject matters of international law have traditionally been the creation and a vision of developed nations, will it be right to imply that the subsequent inclusion of developing nations into the family of international law would mean a structural change in the international economic order?⁶⁶ In a related vein, Freidman observes that:

⁶² ben Salah 'Significations et perspectives de la decolonization' (1957) 25 *L'Esprit* 891; W Friedman 'The position of underdeveloped countries and the universality of international law' (1963) 2 *Columbia Society of International Law Bulletin* 5-12; W Friedman 'The changing dimensions of international law' (1962) *Columbia Law Review* 1150-53.

⁶³ A third world country is one that is markedly different from the developed nations of the United States, European Union, and the Soviet Bloc in respect of their economic development, differences in culture, tradition and turbulences in the political regime, and involves largely countries in the South: Asia, Latin American and Africa.

⁶⁴ Verizijl 'Western European influence on the foundation of international law' (1955) *International Relations* 137.

⁶⁵ ben Salah (n 62 above) 891.

Despite all the difference in religious, cultural, and historical background, the traditional attitude of the major centers Asian civilization with regard to international politics and law has not been markedly different from that of their Middle Eastern or European counterparts. Further, whether the differences may have been in the past, the facts of modern state organization and international life has completely overshadowed any traditional difference of outlook and philosophy. The representatives of Asian values have become modern nation states, of greater or lesser power, organized on the lines developed by the European nations in previous centuries, and seeking to realize national aspiration. In doing so, they are subjected to the same tensions between international community interests, reflected in international law, and national aspirations, reflected in the power politics of States.⁶⁷

Primarily, the models of growth of nations of the third world, or in other words, newly decolonised nations, have been on the lines of mostly European nations. To further enunciate, it may be stated that due to the reason that cultural values cannot be seen in a flux and seem to be the driving force to influence the values and political and economic regime, the latter is largely based on Western values.⁶⁸ However, the inclusion of new members in the international community means and involves the understanding of new realities of the international life. Hence, where the international trade regime once generally concentrated on tariff barriers and trade concessions, non-tariff barriers are now coming to the forefront. Anti-competitive practices are one such type of non-tariff barrier. Consequently, every time a new international rule is sought to be fashioned, differences in the economic development cannot be ignored. The inclusion of the third-world countries calls for greater changes, and 'changes the number and intensity of the differences of conflicts and interests among the members of the world society.'⁶⁹

Referring to the defunct talks on negotiations of a trade and competition policy within the ambit of the WTO, it would be totally incorrect to state that the levels of economic development must not be taken note of. Therefore, such negotiations would not only bring

⁶⁶ This position can be succinctly elaborated with reference to the international trade policy. The birth of the GATT in 1947 witnessed developed nations form the majority of the Membership, with merely 10 out of 23 of its Members being developing nations. Further, it was only in the 1960's and the 70's that a transformation in the economic scenario that provided an impetus for a change in the existing circumstances and the developing country Membership was on a 2:1 ratio. Therefore, there was a shift in traditional international law that was mostly if not exclusively ruled by developed nations; as a result of developing countries constantly striving for change in the economic, driven by the political and cultural regimes felt in the West. See also Hudec *Developing countries in the Gatt system* (1st ed 1987) 117.

⁶⁷ Friedman (1963) (n 62 above) 5; Friedman (1962) (n 62 above) 1150-1153.

⁶⁸ Fatouros 'International law and the Third World' (1964) *Virginia Law Review* 783 822.

⁶⁹ As above.

about enhanced economic development, but also strengthen the rules of the current the international trade regime. It is on this basis that a nation like India would have the most to gain from the new international economic order. This is because such consensus necessary for negotiations may not always be there among members of the international community. Rather, such consensus should, like most norms of the international legal order, be reached after having due regard to the *interest* these negotiations (on trade and competition policy) *seeks to serve*. Consequently, a norm that is generally domestic in nature may be substituted for an international norm, given the large scale developments in the international economy. In a related vein, Fatouros rightly points out that:

In the first decade after the Second World War, the international legal order was being threatened by the struggle between two powerful blocs whose conceptions of the international order were different but were claimed to be incompatible. The emergence of the third world did not eliminate the conflict, but it has changed its character by introducing new powerful elements of diversity. The role of universal international law and organization has now become more important, since these provide a degree of cohesiveness, *the need for which is more evident in a pluralistic than in a bipolar society.*⁷⁰

Given the nature of the changes in the new international economic order, the interest of developing countries has completely changed the face of older conflicts in the international community. This complete transformation of the international order in general and in India's development policies meant that problems are no longer domestic but transnational in nature. However, is the international legal order well equipped to deal with the new transnational problems? Thus it must be noted that despite the fact that there is a large number of treaties and international organisations to govern a large variety of these transnational problems, there seems to be a vacuum in addressing certain problems. With respect to competition law and policy also, the situation has been the same. The changes in the international sphere have necessitated that countries like India act as creators and catalysts of change.

In the discussions pertaining to the India's industrial policy statements, it was seen that post-independence years called for an enhanced change in the way the international community perceived the country. The nation's keenness to mimic the model of development of the Western countries (and in particular Western Europe) may be seen by the establishment of parliamentary democracy modelled on the West. Further, the desire to form part of the international life with the setting up of various ministries should also be noted. India is a party to many conventions and takes part in

⁷⁰ As above.

international conferences.⁷¹ Decolonisation therefore led to the large scale inclusion of India as a nation in the global scenario.⁷² Further, ignorance of such interests would only lead to legal and political chaos.⁷³

7 A favourable resolution to the new problems in trans-national activity

The path towards liberalisation and its consequent increase in competitive opportunities is only one side of the story. In reality, increased liberalisation only means that anti-competitive practices are on the rise.⁷⁴ To enunciate, it may be stated that as a result of this increased globalisation and the opening up of world markets, market players are only more able to interact with each other. Not only did market players interact with the birth of the new international economic order but they also compelled the State to delegate its functions, given the increasing role of the private sector. Picciotto describes such delegation as one of the drivers for transnational government networks, given how international trade has changed to include the operations of multinational enterprises, in turn mirroring this trend towards a regulated state that is compelled to delegate its authority to specialist agencies.⁷⁵

Secondly, it becomes important to consider the deliberations regarding the negotiations of a trade and competition policy within the ambit of the WTO in the light of a country's industrial policy. A reasons for this is the fact that competition policy at the domestic level in most countries has primarily been to achieve the goals and

⁷¹ Friedman underscored that the desire by the developing countries in general to form part of the international life relates to the fact that non-participation works as a sanction. That is to say, the significance of international law lies in the fact that it endeavours to enforce certain rules and standards of international life. To this extent, non-participation would only work to the detriment of such nation states. See generally W Friedmann 'National sovereignty, international co-operation, and the reality of international law' (1963) 10 *UCLA Law Review* 739-753; W Friedman *Law in a changing society* (1959).

⁷² The inclusion of India in the global scenario has been discussed in some detail in the previous part of this paper. In brief, it was highlighted, that India vide its industrial policy, and especially that post 1991 made some structural changes for further economic development in the country. Hence, regulations on foreign direct investment were liberated further; permitting up to 100% in certain sectors. These changes further increased India's participation in international life.

⁷³ This is for the reason that given the current changes in the international scenario, i.e. with the inclusion of the members of the third world; it has become obvious that such countries strive for economic and political development. Ignorance of such wishes on the part of developed nations would lead to instability in the international life due to enhanced rivalry among nations.

⁷⁴ Stigler 'A theory of oligopoly' (1964) 72 *Journal of Politics and Economics* 43.

⁷⁵ S Picciotto 'Networks in international economic integration: Fragmented states and the dilemmas of neo-liberalism' (1996-7) 17 *Northwestern Journal of International Law and Business* 1014 1018.

objectives of the industrial policy, namely that of accelerated economic development.⁷⁶ In a related vein, it would also be vital to consider whether international competition policy would in fact complement the industrial policy of India; and to what extent would such negotiations serve India's vital economic interests.

In the words of Union Corporate Affairs Minister Dr M Veerappa Moily, the competition policy of India would be the second best reform after the 1991 economic reforms⁷⁷ that led to stabilisation and structural adjustment with the aid of the World Bank and the IMF, industrial deregulation, trade liberalisation and in particular foreign direct investment as an impetus to globalisation. These structural reforms also led to a shift in policy from economic liberalisation to what is termed as neo-liberalism:⁷⁸ in turn leading to the maximisation of the role played by the private sector in the economy of the country. Thus, while on one hand the global integration into the world markets has assured India a place in the world economy and a sound growth in the GDP, on the other hand, this growth does not seem to come free of uncertainties. Hence, where India has secured the place of being the fourth largest economy in the world and a GDP of \$4.06 trillion, growing at 8% in the year 2011, how far can it be stated that this is sans tribulations?

Globalisation marked by an increase in the interaction between market players has certain trade-offs in the form of anti-competitive activities that stagnate the process of development. Anti-competitive practices occur in almost all the industries and may last from a certain amount of days to a number of years; the most common of them being cartelised agreements or arrangements and agreements governing price fixing activities. However, where these cartelised activities impact developing countries, the impact is overwhelming for the reason that developing countries may not always be well equipped to deal with such activities by reason of lack of sound laws. Where countries like India do possess a sound law on competition to thwart such activities, the motivation to enforce it may be missing. To add

⁷⁶ For a detailed discussion on how Competition Policy is promoted to achieve economic development, see, Roberts 'The role for competition policy in economic development: The South African experience' Trade and Industrial Policy Strategies, Working Paper Series: 8-2004, <http://www.idrc.ca/EN/Documents/The-Role-of-Competition-Policy-in-Economic-Development.pdf>; Teo 'Competition policy and economic growth' ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area, Bali 2003, http://www.jftc.go.jp/eacpf/04/singapore_p.pdf.

⁷⁷ V Moily 'Competition distortions in India- A dossier, July-Sept 2011' (10 February 2012) <http://www.cuts-ccier.org/pdf/CDIDossier-July-Sep11.pdf>.

⁷⁸ For a detailed discussion on economic liberalisation and neoliberalism, see Scholte 'The sources of neoliberal globalization' United Nations Research Institute For Social Development, Overarching Concerns Programme [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/9E1C54CEE19A314C12570B4004D0881/\\$file/scholte.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/9E1C54CEE19A314C12570B4004D0881/$file/scholte.pdf); DM Kotz *Globalization and neoliberalism* (2002) 12(2) *Rethinking Marxism* 64-79.

to the injury, such activities hamper consumer welfare for reason that even though they have been shown to exist, consumers lack the ability to tackle them by reason of the peculiar legal, political and economic circumstances that prevail here.⁷⁹ Lack of antitrust complaints by consumers does not entail that these impacts are lesser in the jurisdictions of developing countries. For example, the Vitamin cartel badly affected the consumers of India with a loss of approximately \$25.71 million to the economy due to the rise in prices of an essential commodity like vitamins.⁸⁰ This cartel operated in the form of price fixing and division of market agreements; involving the collusion of leading producers such as BASF and Roche AG: Germany, Rhone-Poulenc: France, Takeda Chemical: Japan.⁸¹ This entails that an absence in the ability to effectively tackle such cartels on the part of a country like India would create a large gap between the Constitutional goals and the operation of the enforcement mechanisms with respect to competition laws and policies. This means that where on one end, the country seems to strive hard to ensure a higher standard of living for its citizens, ensure consumer welfare and economic development, these goals are highly watered-down with the existence of transnational cartels and the inability of the country to tackle them. The influence of transnational cartels on the economy had therefore directly increased the prices of such an essential commodity, directly impacting the power of the poor to be able to purchase the same.

In addition to rising prices, restricted output and the lack of capability of India to tackle the same given the discrepancies in the legal and administrative system, the Indian economy seems to be at a greater disadvantage due to the capability of anti-competitive activities to limit the access to important information: information that determines the economic future of India. Restriction of and limits to access to information is the usual mode to freeze out new competitors. By doing so, barriers to entry are raised to a level where entry is already difficult for reason that in order to be competent to acquire entry into a market where entry norms are significantly high,

⁷⁹ This appears to be in contrast to situations prevailing in the developed countries like the US and the EU which encourage antitrust actions by affected consumers.

⁸⁰ JL Clarke & SJ Evenett 'A multilateral framework for competition policy' in Evenett, SJ (ed) *The Singapore issues and the world trading system: The road to Cancun and beyond* (2007) 14; Levenstein & Suslow 'What determines cartel success?' University of Michigan Business School, Working Paper No 02-001, (Jan 2002); Centre of Competition Law, Inv and Econ Regulation, Consumer Unit and Trust Society *Pulling up our socks: A study of competition regimes of seven developing countries of Africa and Asia: the Seven-Up project* (2003) <http://cuts.org/pulling.pdf>.

⁸¹ Europa, *Commission Imposes Fines on Vitamins Cartel*, IP/01/1625, Brussels, (21 November 2001), available at europa.eu/rapid/press-release_IP-01-1625_en.pdf.

it is imperative to possess the relevant technical know-how.⁸² The buck does not seem to stop here. Colluders and participants of anti-competitive activities often use other forms of non-tariff measures to harm non-participants.⁸³ So, while the international trade policy seems to be concentrated largely on tariff barriers by reducing tariffs and eliminating barriers to trade, and condemning non-tariff measures in the form of quotas, or regulations or lack of transparency; it seems to be currently missing the bull's eye as far as anti-competitive practices are concerned. This is so because even non-participants in anti-competitive practices tend to 'free-ride' and thereby sell under the price fixing umbrella. In addition, there are other significant losses to our economy.⁸⁴ Even in the event that Indian undertakings may not be a part of the anti-competitive arrangements and agreements, there is an probability that besides making the economy vulnerable to the rising costs, lack of information and hence restriction on the outputs, the entry of Indian undertakings may be blocked artificially by means of false anti-dumping investigations and tariff barriers.⁸⁵ Hence where anti-competitive practices tend to raise costs artificially, every time a product is sold into the territory of another Member which is not a party to such an anti-competitive practice, it will only mean that the price of the latter product will be compared to the *artificial* price of the former by reason of a certain cartel or price fixing arrangement or an agreement to restrict the output.⁸⁶ So, each time the price of such a product is high, other products in comparison only have a lower cost (and therefore appear to be an act of predatory pricing); and are susceptible to enormous damages by means of authorised WTO remedies. Such problems may be overwhelming to the Indian economy given the fact that she relies tremendously on international trade as one of the major goals to increase the growth rate; and is only one side of the coin. Competitors that are a part of anti-competitive practices also tend to retaliate by means of indulging in predatory pricing in the territory of the country that attempts to compete with the undertakings indulging in anti-competitive practices. For example, at the time Indian undertakings tried to take advantage of

⁸² For example, the laminated plastic tubes cartel that was a result of the collusion between American National Can and the KMK Maschinen AG, wherein the latter licensed the former tube making and exclusive rights to purchase the same and also agreed to exit the American market and not sell or license to any other company for fifteen years, made entry extremely difficult for any other company: raising barriers where they were already high. Such agreements hamper development enormously, especially when developing countries greatly rely on such entry to accelerate their economic development; *United States v Am Nat'l Can Co* No 96 Civ 0145, 1996 WL 760292, 7-9.

⁸³ Levenstein & Suslow 'Contemporary international cartels and developing countries: Economic effects and implications for competition policy' (2004) 71 *Anti-trust Law Journal* 801-852.

⁸⁴ Levenstein & Suslow (n 83 above) 820.

⁸⁵ As above.

⁸⁶ Levenstein & Suslow (n 83 above) 822.

the Graphite electrode cartel⁸⁷ that ‘vandalized’ the market for the same by selling under the cartel price ‘umbrella’ and increased its world market share by 25% as against 14%,⁸⁸ there was a huge retaliation by the cartel operators and the Indian graphite producers ‘claimed that the graphite electrodes are being dumped into India at the price of \$2,200 per ton as against the international price of \$ 3,200 per ton.’⁸⁹ The retaliation by the US, EU and Japanese producers was in the form of restrictions on import of graphite electrodes from India;⁹⁰ which thus directly impacted India’s share in the world market.⁹¹ The cartel therefore had significant negative impacts on the Indian economy. Not only did it limit the access to the technology, but completely curbed the entry into any of the markets it operated in by means of dumping or alleging dumping on the part of the Indian graphite electrode producers each time they attempted access to the territory the cartel operated. After the crack-down of the graphite electrode cartel mentioned above, the market for the same experienced an increase in the price by 45-90%; and it was in fact an extremely harsh lesson learnt by India, given the fact that graphite electrodes were a vital input in the manufacturing of steel products.⁹² Hence, not only did this increase cause momentous losses to the competitors, distorting competitive opportunities in the steel market, but also to the dealers and suppliers and final consumers of steel. In addition to India’s injury, she was not even in a position to calculate the quantitative damages caused to the exchequer, given the lack of prosecutions in the Indian jurisdiction in turn leading to lack of information on the subject matter.⁹³

It is for these reasons that the rationale of the sort adopted by India that it may not be urgent for India to consent to negotiations on trade and competition policy because she is not developed enough and hence neither are her markets large enough nor is she an active participant of global mergers, could be extremely detrimental to the

⁸⁷ ‘Japanese subsidiary charged with international conspiracy to fix prices for graphite electrodes in the US’ US Department Of Justice Press Release 23 February 1998.

⁸⁸ ‘CVD on graphite electrodes imports likely’ Fin Express, 20 April 1997, 2.

⁸⁹ As above.

⁹⁰ It was alleged that ‘the growth of Indian exports is not being liked by the American/European and Japanese producers. In order to counter India’s growth in exports, they are resorting to large scale dumping in India, and have cornered more than 30 per cent of the domestic market.’

⁹¹ Shirsat & Samata Dhawade ‘Graphite electrode sector: Huge export potential waiting to be tapped’ (1997) Business Standard.

⁹² The Wall Street Journal in its report stated that the demand for graphite electrodes accounts for approximately 85% of the demand. It was not clear whether the figure represented merely the demand in the European market or the global demand; but was expected to mean the global demand; See ‘Canadian Subsidiary of UCAR Pleads Guilty of Price Fixing’ *Wall Street Journal* 19 March 1999.

⁹³ For a detailed discussion on the Graphite electrode cartel, see Commission Decision of 18 July 2001 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

achievement of other economic policy objectives. The developing countries and in particular India are no longer vulnerable to the demands of her developed counterparts.

8 What is so notable about India's presence?

In the year 2010, India saw an unprecedented growth rate and was one of the largest growing economies among the developing countries, showing a 19.9% change in the export earnings and an 11.2% change in the import earnings.⁹⁴ The WTO's Press Release noted that the rises in import earning were 'driven to a large extent by rising import demand on the part of fast-growing developing economies like India'.⁹⁵ Against this backdrop, India witnessed a 25% growth rate in the year 2010, constituting 40% of the European Union's imports; thereby making imports worth \$598 billion from India.⁹⁶

India thus constitutes an important part of the international trading system with its trade in goods constituting \$216 billion out of the world's \$14,855 billion; thereby accounting for 31% and 25% of the world's exports and imports respectively. This makes India rank 20th in terms of export performance and rank 13th for import performance.⁹⁷

On the other hand, India's performance in terms of commercial services is also accelerating and cannot be left unnoticed. In the year 2010, India exported services worth \$110 billion out of the world's \$3,665 billion and imported commercial services worth \$177 billion; thereby ranking 10th and 7th in terms of its export and import performance respectively.⁹⁸ However, in the event that intra-EU trade is excluded, India ranked 6th and 5th respectively for exports and import performance.⁹⁹

India's trade policies and its unprecedented growth rate have therefore made it one of the leading developing countries in the world. Being part of the international trading system seems to have benefited India enormously. Despite the financial crisis faced by the world in the year 2008, India still seems to have done comparatively well in the later years; and thus now constitutes a major source of the developed countries' imports and also one of the major markets for their exports.

⁹⁴ World Trade 2010, Prospects For 2011, Press Release, PRESS/628,7 April 2011 (11-1714) 5.

⁹⁵ World Trade 2010 (n 94 above) 6.

⁹⁶ World Trade 2010 (n 94 above) 16 & 18.

⁹⁷ World Trade 2010 (n 94 above) 19 & 21.

⁹⁸ World Trade 2010 (n 94 above) 23.

⁹⁹ World Trade 2010 (n 94 above) 24.

Given the rate at which India seems to be experiencing growth, the existence of anti-competitive practices cannot be disregarded. Hence, as the majority or even a portion of her exports and imports are lured by anti-competitive practices, the rate of her growth will largely be eclipsed. In addition, the fact that she is one of the major markets of the developed nations' exports and also makes them dependent for a large number of their imports, only makes her comparable to no other. It is for this reason that the arguments that India at *this stage of development* is not prepared to negotiate a multilateral competition policy lack substance, arise. The question that therefore must be posed before such arguments are raised is whether India is in fact ready if anti-competitive practices overshadow the rate at which the country is growing in terms of the economy. On the other hand, can she at this stage of development afford to miss such an opportunity? In the light of her past experience and her lack of ability to tackle such international cartels and other anti-competitive practices, the answer appears to be in the negative. This is especially so when the current international trade regime appears to be insufficient to tackle anti-competitive practices of all sorts. A large variety of anti-competitive practices thus appear to be out of the reach of the current WTO system; for instance, the WTO is not well equipped to deal with anti-competitive practices such as bid-rigging,¹⁰⁰ tying and bundling,¹⁰¹ resale price maintenance¹⁰² and most importantly cartelisation, which are regarded as 'cancers on the open market economy'¹⁰³ or even 'the supreme evil of antitrust.'¹⁰⁴

Secondly, apart from requiring an international trade policy that is holistic in its approach to facilitate trade globally and secures her economy from the ill-effects of international anti-competitive practices, India lacks the legal and the political regime that can tackle such practices itself, since it is not currently well equipped to

¹⁰⁰ Bid rigging is a *per se* illegal agreement wherein different bidders pre decide amount of money they will bid for, even if the amount is for a low bid.

¹⁰¹ Tying agreements have been declared as *per se* illegal agreements as it persuade the buyer to buy a product he desires on the pre-condition that the said product shall be sold only when another product of the manufacturer is also bought by him. It may also include not buying a product from any other supplier. In doing so, the seller uses his market power to restrain free competition. In order to prove that the tying agreement is *per se* illegal, the seller should agree to sell the desired product only on the pre-condition that the buyer buys a second product; the seller wants to sell the second product that is distinct in character in the sense that it has no relation to the product the buyer wants to purchase, and lastly, the seller in doing so is abusing his market power.

¹⁰² In case the producer not merely maintains his retail price but enters into an agreement with the consumer where the later will charge a certain price in case s/he wants to resell the product, such agreements are illegal *per se*. Such agreements are considered as resale price maintenance agreements. This means that the buyer is induced or coerced to resell at not below a certain price.

¹⁰³ See Speech by Mario Monti, Former European Competition Commissioner, (11 September 2000) <http://www.ec.europa.eu/comm/competition/speeches>.

¹⁰⁴ *Verizon communications Inc v Law Offices of Curtis* (02-682) 540 US 398 (2004) 305 F3d 89.

gather information needed to prove such anti-competitive practices independently. Apart from this, the impetus to enforce its own Competition law also seems to be weak. Hence, even where the country does have its own Competition law, the plea that provisions in the same would be sufficient to handle anti-competitive conduct that is extraterritorial in nature,¹⁰⁵ does not seem to be sound. This is because a large percentage of the population in this country is illiterate or poor, and unable to understand the benefits of competition. Hence, information about what constitutes anti-competitive conduct in most cases is not even present.¹⁰⁶ For this reason, the underlying problem in a country like India is not the mere presence of a competition law, but rather the lack of enforcement of the law.

These gaps can be significantly filled in with negotiations on competition policy at the WTO level, which will enhance cooperation between Members in order to obtain requisite information; in the light of the fact that information sharing is one of the most crucial steps in the enforcement of competition policy. Hence, despite the fact that India may be witnessing economic growth, she does not possess the requisite legal and political resources to prosecute international cartels. In addition, as precisely stated in the CUTS report on competition policy,

[t]he inadequacy or lack of legal clarity in dealing with cases, though prevalent in all countries, was most prominent in the case of India. The lack of research and investigative capacity makes it very difficult for the competition authorities to deal with cases judiciously.¹⁰⁷

In addition to being unable to deal with anti-competitive practices, given the inefficiencies in the legal and political regime, there exist other significant reasons as well to internationalise competition policy: what the researcher would call in brief the 're-evaluation of policies in the light of globalization'. Re-evaluation of policies in the light of globalisation entails the fact that globalisation has compelled such changes in the society that Snyder (1999) elucidates skillfully as a 'multifaceted, uneven and contradictory economic, political and social process'.¹⁰⁸ Given the nature of this uneven and contradictory nature of globalisation, the birth of new policies cannot be ignored and the existing policies that govern the system may no longer be relevant. Hence, with the increasing sphere of international trade,

¹⁰⁵ Indian Competition Act, No 13 of 2003, § 32.

¹⁰⁶ The researcher mentions 'anti-competitive conduct in most cases' due to the fact that apart from certain obvious cases of anti-competitive practices such as cartelisation and price fixing, about which information is widely dispersed by way of newspapers, etc; information about certain other practices such as tying, bundling and rebating is lesser or maybe not known at all.

¹⁰⁷ Centre of Competition Law (n 80 above) ix.

¹⁰⁸ Francis & Snyder 'Governing economic globalization: Global legal pluralism and European law' (1999) 5 *European Law Journal* 334.

the economy calls for a change in the way one perceives globalisation by re-evaluating the structures that govern the society. The change in the economic and the structural nature of the society makes the internationalisation of the other policies that drive globalisation inexorable, compelling one to perceive the latter in a holistic manner.^{109 110}

Speaking about international trade relations that are driven by increasing globalisation and consequent liberalisation in an extensive array of subject-matters, *Hay and Rosamond* are of the view that in the arena of trade relations, policy makers are bound to act in a manner that is consistent with the global trade rules, for the reason that trade policy and its liberalisation tactics are such a 'powerful rhetorical device' and are the driving forces that legitimate and prompt states to take certain courses of action.¹¹¹

9 Concluding Remarks

Globalisation is such that, firstly it calls for a great interaction between states and secondly globalisation is by itself a great motivating factor for change, for the way it induces and obligates change in the society. The increasing nature and occurrence of international problems calls for a fresh look at the way India perceives a solution for the same.

At the same time, while it may be true that traditional rules of international law encompass the behaviour of the governments of the Member-states, a certain amount of change may be desired to accommodate these new changes in the international sphere. To this extent, while private conduct may not be the subject of international trade law, it must be appreciated that neo-liberalism has facilitated and increased the participation of private persons in international trade. For this reason, despite the fact that international trade law merely regulates government actions of the Member-states, it is

¹⁰⁹ By this the researcher means that globalisation began with the liberalisation of trade policies. This in turn meant that if trade policies were liberalised by the removal and reduction of tariff and non tariff barriers and measures, the same would also influence the way the entire society functions. Hence, liberalisation that once merely began and concentrated on trade policies came to include a wide array of subjects in its agenda: ie to say for instance, services, intellectual property, environmental issues and the like; they once being the sole agenda of the individual Member states.

¹¹⁰ Sylvia & Ostry 'Beyond the border: The new international policy arena in competition policy in an interdependent world economy' in Katzenbach *et al* (eds) *Competition policy in an inter-dependent world economy* (1993) 261; Mortensen 'The institutional requirements of the WTO in an era of globalization: Imperfections in the global economic polity' (2000) 6 *European Law Journal* 176.

¹¹¹ C Hay & B Rosamond 'Globalization, European integration and the discursive construction of economic imperatives' (2002) *Journal Of European Public Policy* 147.

desirable that private actions be brought within the ambit of the GATT-WTO to a certain extent. Hence, it may be suggested that as far as trans-national anti-competitive conduct is concerned, States take stringent action against the same. This may be in the form of limited regulation of private persons (i.e. individuals and corporations) in the arena of international trade relations. Such form of regulation may ideally be by making governments of the Members-states responsible for the acts of the private persons. Hence, while the current responsibility of the government for such acts is limited, it must be enlarged to include private anti-competitive conduct.¹¹² In other words, governments of Member-states must be responsible for both toleration of any anti-competitive conduct in their territory and failure to enforce the provisions of the competition law. Thus, while the current rule with regard to government responsibility is the co-operation and co-ordination of the government or the provision of incentives by the same; it must be widened to include even that conduct which is not penalised in the territory of the respective Member-state.

For the reasons mentioned above, it becomes imperative that competition policy is regulated at the international level to discipline the domestic market, given the low level enforcement of the competition law.

¹¹² See R Jennings & A Watts (eds) *Oppenheim's International Law* (9th ed 2008) for a detailed discussion on principles of international law.