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Competition Safeguards

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CONTEXT OF COMPETITION

- Competition – A market force that punishes the inefficient laggards and rewards the efficient/enterprising
- Competitiveness – Ability to acquire/retain/gain market share
- Market – A place where buyers meet sellers
- Competitive Market – No limitations on entry



CONTEXT OF COMPETITION POLICY (1)

In a competitive market, bottom line of a competing firm is market share

- How does a competing firm gain/retain/acquire market share
- Competitive strategy is what ensures above
- Competitive market influences competitive strategy



CONTEXT OF COMPETITION POLICY (2)

Competitive strategy –

- Fair – Fair competition
- Unfair – Unfair competition
- Role of government in a competitive free market economy is to intervene in the market for fair competition by curbing unfair competition



WHAT IS COMPETITION ?

- A broad definition of competition is “a situation in a market in which firms or sellers independently try for the buyers’ patronage in order to achieve a particular business objective e.g. profits, sales or market share”
- Competition is “the process by which economic agents acting independently in a market limit each other’s ability to control the conditions prevailing in that market”.



COMPETITION POLICY : NEED & OBJECTIVES (1)

- Need for competition policy is well – established and no need for debate
- Particularly crucial for a developing market economy with limited resources
- Broad objective of a competition policy is to protect and promote competition through fair means
- Competitive economy cannot be allowed to be ruled by the law of the Jungle or what the witches fancy i.e. ‘fair is foul and foul is fair’ competition policy ensures that it is not so



COMPETITION POLICY : NEED & OBJECTIVES (2)

- Objectives of a competition policy should be country – specific
- Subserve broad national economic goals/objectives
- Preferable, not to burden it with too many and everything. It must be focused. No unnecessary intervention.



ELEMENTS OF COMPETITON POLICY

- Putting in place a set of policies that enhance competition in local and national markets - would include a liberalised trade policy, relaxed foreign investment & ownership requirements & economic deregulation
- Legislation designed to prevent anti competitive business practices and unnecessary government intervention - Competition Law.



SCOPE OF A COMPETITION POLICY

- It must be focused and in the form of guidelines
- Clear distinction to be maintained between public policy and competition policy
- Concern of a competition policy is anti-competitive practices of a firm
- Restrictive Trade Practices (RTPs)
- Unfair Trade Practice (UTPs)



DESIRABLE CHARACTERISTICS OF A MODERN COMPETITION POLICY

- Competition Policy should be **Flexible** / Responsive
- Competition Policy should be **Dynamic**
- Competition Policy should **not** be **Over-bearing** on the market players
- Competition Policy should be perceived more as a **guideline** than as an instrument of regulation
- Competition Policy should be **free from ideological** hang ups.



BASIC PREMISES OF COMPETITION POLICY (1)

- The ultimate raison d'être of competition is the interest of the consumer
- Competition policy is an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power
- The positive objective of competition policy is promoting consumer welfare

BASIC PREMISES OF COMPETITION POLICY (2)

- Domestic competition law should be a **precursor** to the international competition law
- Competitive environment needs **logical conclusion of the process of liberalization**
- State monopolies must end, @ privatization, @ Exit Policy, @ De-reservation, @ rapid bankruptcy procedure
- Firm behavior and conduct, rather than market structure, should be focus of the policy
- Government enterprises should be brought within the ambit of the law



Anti Competitive Practices as per the Reference Paper

- Engaging in anti competitive cross - subsidization
- Using information with anti competitive results
- With holding technical information that is necessary for an entrant to compete.



COMPETITION SAFEGUARDS (1)

- Preparation of transparent accounting policy. Code of conduct and merger guidelines.
- Transparency in dealings with other service providers
- The Competition Law to provide a system of checks and balances
- Separation of various lines of business of a major or dominant supplier like fully separate subsidiaries.



COMPETITION SAFEGUARDS (2)

- Interconnection policies must force the dominant carrier to negotiate in an open, economical and cost based manner.
- Price, quantity, bidding, and territorial agreements, cartels etc. should be presumed to be illegal
- Interconnection must be on MFN principle, technical standards and specifications must be transparent & reasonable and must also regard to economic feasibility.



COMPETITION SAFEGUARDS (3)

- Predatory pricing will be treated as abuse only if it is indulged in by a dominant undertaking.
- Mergers beyond a threshold limit in terms of assets will require pre-notification
- Anti-dumping measures



NEED FOR A COMPETITION LAW (1)

- Implementation of competition policy requires a legal backing and hence need for a competition law
- Competition policy covers a whole array of executive policies and approaches, the competition law has a more specific focus as a piece of legislative enactment having the character of enforceability in a court of law



NEED FOR A COMPETITION LAW (2)

- The focus of the law will be providing safeguards against anti-competitive behavior and protect the process of competition from abuse
- Existence of competition law will lead to maximisation of economic welfare



DEVELOPMENT OF COMPETITION LAW(1)

- About 80 countries today have competition law
- USA – 1860s and 1870s – anti-trust laws of various States; Sherman Act of 1890, Clayton Act, Federal Trade Commission Act, 1915, Robinson-Patman Act, 1936, Celler-Kefauver Act, 1950.
- Europe – Articles 85 and 86 of the 1957 Treaty of Rome (now Articles 81 and 82) served as the principal competition law of the European Commission/European Union



DEVELOPMENT OF COMPETITION LAW (2)

- UK – Competition Act of 1998
- East Asian Economies – Japanese Anti-Monopoly Law, 1947. Indonesia is in the process of making a competition law. Malaysia has 38 laws regulating business and consumer protection. Philippines is planning to enact a comprehensive anti-trust law and establish a fair trade commission to enforce Competition Laws. Thailand is enacting a Business Competition Act.



DEVELOPMENT OF COMPETITION LAW (3)

- China – the Laws and Regulations that deal with competition issues are 1980 Regulations on Development and Protection of Competition, the 1993 Law of Peoples Republic of China for Countering Unfair Competition and 1993 Law for Protecting Customer Rights and Interests. China is in the process of drafting of its first Anti-Trust Law and Commercial Secrets Protection Law.
- India – Competition Bill 2001 is already before the Parliament. At present Monopolies and Restrictive Trade Practices Act, 1969 and Consumer Protection Act, 1986 deal with anti-competitive practices.



MULTI-LATERAL COMPETITION LAW (1)

- Case for —

- The importance of cross-border competition for the International Trade
- Recommended by Group of Academics and Practitioners who, during the negotiations of Uruguay Round proposed an International Anti-Trust Code
- Recommended by Group of Experts commissioned by the European Commission in the lead upto the Singapore Ministerial Conference of the WTO



MULTI-LATERAL COMPETITION LAW (2)

- It is in the interest of developing countries who are the victims of restrictive business practices by large dominant multinational corporations such as transport pricing and export cartel.
- Addressing the concerns with regard to frequent use and abuse of anti-dumping action.



MULTI-LATERAL COMPETITION LAW (3)

- Case against -

- The multi-lateral competition law would require agreement among the members on the rules, the objectives, the basis for analysis of competition cases and the remedies.
- Majority of members who still do not have any comprehensive national competition laws and among the countries which are having competition laws, there is a great diversity in all aspects of these laws.



MULTI-LATERAL COMPETITION LAW (4)

- Given these divergences in all aspects of competition law, it would be enormously difficult to settle on a single law which will bound all members of the WTO.
- Objections of national sovereignty
- WTO regulates government measures affecting international trade and not private conduct. It has no powers to investigate private producers and no remedies that could be imposed on them.



NEED FOR WTO AGREEMENT

- Should Target anti - competitive practices
- Should focus on cross - border effects at various forms of restrictive trade practices.
- Should encompass the following elements: e.g.,
 - ✓ clear identification of the main objectives of the agreement
 - ✓ some core principles related to transparency and non-discrimination
 - ✓ general common approach to competition
 - ✓ a setting for international competition



Thank you

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COMPETITION SAFEGUARDS IN TELECOMMUNICATION SECTOR

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INTRODUCTION

The paper has been drafted with the focus on Basic Telecommunications Agreements and the implications of Reference Paper produced by the Negotiating Group on Basic Telecommunications (NGBT) containing a regulatory roadmap to curb anti-competitive behaviours of dominant suppliers. The paper first describes the historical perspective and the genesis of commitments on Basic Telecommunications. Next, the definition of competition and its broad scope and extent is described and lastly the challenges of the competition safeguard alongwith development of Competition Law in various countries is dealt with.

NEED FOR A COMPETITION POLICY

Competition policy is defined as “those Government measures that directly affect the behaviour of enterprises and the structure of industry”. The objective of competition policy is to promote efficiency and maximize welfare.

There are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. These would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation designed to prevent anti-competitive business practices and unnecessary Government intervention- Competition Law. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, Competition Law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate Competition Policy.

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GENERAL OVERVIEW

The telecommunication sector has always been captured by natural monopolies but it has now been opened for competition. In an attempt to foster International telecommunication the Agreements on Telecommunications were negotiated under the auspices of General Agreement on Trade in Services (GATS) and it reached significant commitments on 15th February 1998. The genesis of this agreement could be traced back to Marrakesh Ministerial Decision in 1994, which established the Negotiating Group On Basic Telecommunications (NGBT) to carry out the negotiations. At its final meeting on 30 April 1996, the NGBT agreed to refer the report along with the list of Schedule of Commitments, list of Article II exemptions, draft Fourth Protocol to the GATS, and draft decision on Commitments in Basic Telecommunications. The date for implementation of these negotiations was 1 January 1998. Delays by few participants postponed the effective date to February 5, 1998. Those signatories whose law is not in accord with the fourth protocol were given July 31, 1998 to comply with it.

The Results of the Negotiating Group on Basic Telecommunications

Any basic telecommunication service encompasses local, long distance and international services for both public and private use. These services may be provided on a facilities-basis or by resale and can be provided by any means of technology.

The NGBT was charged with running the negotiations to get commitments from WTO members in the telecommunications sector. They began their work by issuing a questionnaire on Basic Telecommunications to WTO members. Thirty-seven countries responded to this questionnaire. The NGBT also discussed regulatory principles and produced a draft Reference Paper. They collected draft commitments from countries to serve as the basis for negotiations. Two years after the NGBT began, it submitted to the GATT Council for Trade in Services: Schedules from forty-eight countries, a draft decision on commitments, and a draft Fourth Protocol to General Agreement on Trade in Services. They also set January 1, 1998 as the implementation date for the Protocol.

The Council on Trade in Services adopted the decision on commitments and gave countries until February 15, 1997 to supplement or modify their schedules. They also established a Group on Basic Telecommunications (GBT) to oversee the process of modifying Schedules. The extension in negotiations over Schedules resulted in improvements in commitments and increased the number of WTO members involved. The Report of the GBT attached the Schedules of fifty-five members.

A note was attached to the report concerning spectrum availability. Many countries indicated that their commitments were subject to the availability of spectrum. The GBT realised that countries have the right to exercise spectrum management because it is a

scarce resource, but said that such references should be removed from Members' Schedules.

The GBT also reported that fifty-five countries had committed to the regulatory principles of the NGBT's Reference Paper. The Reference Paper first identifies anti-competitive practices used by monopoly suppliers which should be prevented as: (1) engaging in anti-competitive cross-subsidisation; (2) using information obtained from competitors with anti-competitive results; and (3) withholding technical information about essential facilities and commercially relevant information from other service suppliers to provide service. Next, the Paper discusses Interconnection. The Paper provides "interconnection with a major supplier will be ensured at any technically feasible point in the network." This interconnection must be provided under non-discriminatory terms and rates. Quality must be no less than provided for its own service and must be provided in a timely fashion. The rates must be unbundled so that the new supplier does not have to pay for facilities that it does not require for its service.

The Fourth Protocol on Telecommunications, extended the member's obligations to telecommunications sectors subject to commitments undertaken by the individual members. Keeping in view the character of this service sector where before the negotiations, natural monopolies were in existence and had absolute control over infrastructure and telecommunication transport network, the safeguards for competition were inevitable to ensure sustainable competition in place. This was tried to be achieved by way of issuing a Reference Paper on anti-competitive practices. Reference Paper containing the principles on competition with an objective to create a common regulatory system among WTO members. It suggests the form of basic telecommunication regulations and highlighted the conduct that would warrant regulation. Despite the unofficial status of the document, the Reference Paper has critical importance as it has been adopted by the fifty five nations as a part of Fourth Protocol. The Protocol was a negotiation on the telecommunication services thereby agreed to grant Most Favoured Nation (MFN) treatment to all participants on a non-discriminatory basis and also provided the exceptions. The participants were required to meet their obligations subject to their exceptions thus it varied from country to country.

The Reference Paper provides for the public availability of interconnection procedure, interconnection arrangements, with a provision of effective settlement of disputes by an independent regulatory body. It further provides for the allocation and use of scarce resources and for transparent licensing arrangements. The Reference Paper allows Members to define the kind of universal service obligation it wants to maintain. These obligations will not be considered anti-competitive as long as they are done in a neutral manner that is not burdensome or discriminatory. Finally, the Paper separates the regulatory body from any supplier of basic telecommunications service.

WTO COMPETITION AGREEMENT

An international agreement on competition, in particular if it takes place within the WTO framework should target anti-competitive practices that impact international trade. This is in particular the case for anti-competitive arrangements intended to operate a substitute for government imposed barriers following trade liberalisation. To be meaningful, a WTO agreement on competition focusing on the cross-border effects of various forms of restrictive practices should encompass the following elements:

- a) clear identification of the main objectives of the Agreement;
- b) some core principles related to transparency and non-discrimination;
- c) an agreement on a general common approach to competition; and
- d) a setting for international cooperation.

The core objectives to be pursued under the agreement are the promotion of economic efficiency and/or the consumer welfare. The principles related to transparency, non-discrimination and fairness should be an essential feature of any international agreement on competition. Crucial for the effectiveness of a competition regime is that the rules of the game be known by all the actors. Non-discrimination, including on ground of nationality, should be strictly enforced. A competition regime intended to prevent unfair business practices should itself be fair. Cooperation between countries on competition issues can take place at various levels.

COMPETITION DEFINED

A broad definition of competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share” (World Bank, 1999). A requisite for good competition is trade. In the 19th century, Phillip Harwood, the journalist theologian defined trade as “the mutual relief of wants by the exchange of superfluities”. He added that free trade as opposed just to trade is “the unrestricted liberty of every man to buy, sell and barter, when, where and how, of whom and to whom he pleases”. “To buy in the cheapest market he can find and sell in the dearest market he can find” he said was the very essence of free trade.

The purchase of goods and services in the cheapest market is no guarantee that they will be sold where they are most needed. In poor countries particularly, those most needing the relevant goods and services may not have the necessary income to purchase them. So the first handicap of free markets is that for a given distribution of income those who can pay the highest price will most be able to purchase the goods and services regardless of their relative means. Another drawback with unregulated free markets is that in certain circumstances it could be of greater benefit to the owner of superfluities temporarily to withhold goods and services from markets in order to extract a higher price. In the past to overcome these difficulties, regulating the prices was tried but without much success. The answer to these problems is to foster the competition. The greater and simpler the

access to markets of superfluities the more likely it is that some commercial agents will be able to seek out cheap prices and satisfy wants. Competition therefore becomes an essential handmaiden to efficient trade.

SCOPE

The Reference Paper is wider in scope and aggressive in pursuit, it binds member nations to ensure fair competition in telecommunication services by way of including the regulatory guidelines in the paper. But at the same time allows derogation in the name of universal services and scarce resources. The members may deviate from their general obligations in case of reasonable excuse but they would certainly be put on test by the aggrieved party in Dispute Settlement Undertaking.

The most affected part may be universal service obligations of the members where they are free to define them. The incumbent has to provide as a part of the scheme, which may include basic voice telephony, leased lines, transmission capacity, services to disabled persons, public pay phone etc. and at the same time may have to suffer on the count of scarcity of frequencies, radio spectrum etc. Despite the fact that members are allowed to lodge exceptions to Article II MFN treatment, but still they are time bound and are required to be reviewed in 5 years and within 10 years of time span to be eliminated. The policy of Reference Paper is to provide flexibility to the governments in their policy making for public welfare. Since commitments under Reference Paper form part of commitments under Fourth Protocol, and thus become an integral part of the GATS commitments. The expansion of GATS obligations on Basic Telecommunications would bring all the principles of GATS such as MFN (Article II), NT (Article XVII), Market Access (Article XVI) supported by strong Dispute Settlement Mechanism (Article XXIII) in to play for Basic Telecommunication sector as well. The Reference Paper has welfare enhancing effects which if enforced away from the hitherto developed jurisprudence in Dispute Settlement Undertaking would help consumers to a greater extent.

CHALLENGES

The commitments on regulations were agreed multilaterally and adopted on voluntary basis. These were set out in Reference Paper, which addressed the specific domestic barriers to the market access. Reasons for adopting the Reference Paper could be summarised below-

- due to the high fixed cost it is not feasible for the incumbent to build its own network and so new entrant must be allowed to interconnect to the network of the dominant service provider. To bring in place the competition based principles in order to regulate the relationship of dominant provider and new entrant the Reference Paper sets out the regulatory principles with the hope to be adopted by the members as their commitments and surprisingly they met with great success, and
- Market oriented economies need regulatory framework to break up monopolies, to decrease the burden of new entrant.

Licensing and interconnection to public network, transparency, and independence of regulators are essentials of Competition Law on which Reference Paper focuses. The commitments on safeguard and guidelines given in Reference Paper itself challenge the credibility of principles in terms and in intention as well. The lack of explanatory notes, their relations with other WTO agreements and inter-linkages are not clarified by the Negotiating Group. These challenges are discussed below:

(a)Anti-competitive practices

The Reference Paper clearly prohibits the anti-competitive practices by major suppliers and appropriate measures are required to be taken for the same. To avoid anti-competitive effects, the Members are to ensure competitive safeguards, by preventing the dominant supplier from

- (1) engaging in anti-competitive cross-subsidisation;
- (2) using information with anti competitive results; and
- (3) withholding technical information that is necessary for an entrant to compete

Safeguards are rules that prevent the dominant carrier from abusing its market power against potential entrants. Abusive actions would include: the cross-subsidisation of competitive service with revenues from non-competitive public network services; the overcharging of competitors for access to the Public Telecommunications Network (PTN); and discrimination in giving access to or information about the PTN.

Cross-sector subsidisation is a significant barrier to full and fair competition. In many countries, service providers use a certain clientele to subsidise another long-distance and international services to subsidise local services, urban customers to subsidise rural customers, and businesses to subsidise residential consumers. Usage revenue can also be used to subsidise network upgrades, and revenue from one sector, such as cellular, can be used to subsidise another, like wire-line. Finally, telecommunications service fees can be used by a PTT to subsidise unrelated telecommunications infrastructure costs, or even non-telecommunications obligations of the government. The Reference Paper sets out the general prohibition on cross-sector subsidisation, but it does not set the specific initiatives that have to be taken in order to ensure competition. However, a full competition policy would require service providers to keep separate accounts and would allow tariff re-balancing.

The cross subsidisation has far reaching implications for Universal Service Obligation of the members, as in most of the nations under this obligation telecommunication services are to be provided to every one without discriminatory basis on affordable prices. This obligation of the government induces it to subsidise by the revenue of other sectors. The resource poor countries particularly have to resort to these tactics, as hardly any

comprehensive funding is available from international organisations. An illustrative not exhaustive list of anti-competitive behaviour has been given in the Reference Paper.

The para 1.1 requires a member to have in place measures that prevent joint or collusive behaviour, which may requires that a WTO member have laws or regulations to prohibit joint refusal to engage in resale or provide interconnection. It does not require members to pursue anti-competitive conduct or to ensure a particular result. Thus they required no guaranty but only to have the measures in place, which will have far reaching effect for dispute settlement. The failure to prevent anti-competitive behaviour by way of enforcement will not be a cause for dispute settlement but failure to have them in place. The Reference Paper do not define specific measures to carry out the provisions of para 1 but adequate measures were intended to be in place to stop the behaviours in para 1.2. , e.g. prevention of Cross-Subsidisation may mean structural separation of various lines of business of a major or dominant supplier like fully separate subsidies.

(b) Interconnection

Interconnection regulations control the access to the network for the origination or termination of telecommunications services. Interconnection may be network-to-network or network-to-service provider. If the terms of interconnection are subject to private party negotiations, the interconnection policies must force the dominant carrier to negotiate in an open, economical, and cost-based manner.

With regard to the interconnection facilities competition comes in to picture at the advent of new entrant after meeting the required standards. In order to ensure the effective competition with the existing public telecommunication operators the new entrants must be given right to access to public network that too on multiple options like —

- Interconnecting to private and public network
- Leasing available circuits
- Sharing leased circuits
- Interconnecting between leased and switched networks
- Reselling transmission capacity

And the terms of interconnection must provide –

- Adequate technical interface
- Adequate usage and supply conditions on competitive tariffs

As per the commitments undertaken by the members the interconnection must be on MFN principle, technical standards and specifications must be transparent and reasonable and must also regard to economic feasibility.

The negotiating group preferred to use linking with supplier that ensures the access to the net work or services necessary to provide the service. This is a form of a guarantee for the interconnection that too on non-discriminatory basis. The scope of this para is wide

which covers all types of services subject to commitments. The para 2 is a replication of para 5 of Annex on Telecommunications, which uses the same language.

The para 2.2 of Reference Paper provides standards to be met by the major suppliers in an absolute form in providing interconnection. The introductory sentence is written as an absolute obligation: "interconnection . . . will be ensured" but only with the caveat that interconnection need only be provided at "technically feasible points" in the network. A major supplier has three sets of obligations regarding interconnection:

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates.

It requires the major supplier to treat other telecommunication services and suppliers as it treats its own services and affiliated service suppliers, as well as treating all nonaffiliated telecommunication services and service suppliers equally and without discrimination. The obligation prohibits a major supplier from favouring its own subsidiaries or affiliates over other suppliers. Paragraph 2.2(a), thus, requires a major supplier not to discriminate in location, information, billing arrangements, maintenance and testing, characteristics of interconnection, credit terms, and warranties or guarantees.

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the services to be provided.

This one sentence encompasses many requirements. Interconnection must be timely. The terms and conditions under which interconnection is provided must be transparent and reasonable. The technical standards and specifications for interconnection must be transparent. Rates for interconnection must be cost-oriented, transparent, and reasonable. Reasonableness in this respect will be judged in economic terms. Interconnection elements must be "unbundled."

The negotiators did not try to define the scope of the many obligations contained in this paragraph. Thus the meaning of "timely," "cost-oriented," "sufficiently unbundled," "reasonable," "unbundled," and "economic feasibility" will only be determined in dispute settlement. The most crucial qualifying test of technical feasibility has been ignored instead economic feasibility has been adopted. Thus an explanation must be appended to the para to avoid any confusion in interpretation.

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities

This para shows that there was an assumption that standard interconnection points were normally available, and as long as a service supplier was willing to pay the additional cost, it could obtain interconnection at other points in the network.

Next, the Reference Paper imposes additional obligations with respect to interconnection to make sure that new entrants seeking it will have the information necessary to obtain interconnection.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available

This paragraph requires that procedures for obtaining interconnection must be publicly available so that all parties know their rights and obligations. Though this para does not provide for the strict time frame but it circumscribed the ability of a major supplier to delay interconnection indefinitely by inserting the word "timely" in para 2.2(b).

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer

This para adds transparency to the interconnection process and prevents a major supplier from negotiating completely different interconnection arrangements with different new entrants. It makes more concrete the requirements in para 2.2(a) and (b) that terms, conditions, and rates be transparent and nondiscriminatory.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

- (a) at any time or
- (b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

The members are given the right to recourse independent domestic body, and this facility would be separate from WTO dispute settlement. In determining the timing in which a dispute can be brought, each Member can decide whether a service supplier seeking interconnection can resort to the domestic body at any time or only after a reasonable period of time that has been established and made known.

The domestic body is charged with resolving disputes regarding terms, conditions, and rates and dispute has to be decided within a reasonable time. The term reasonable period of time has not been defined not only in this para but definition clause is also blank on the point, which certainly brings in the discretion of the members.

(c) Transparency in Licensing

The commitment of transparency is higher compared to GATT and GATS, it not only provides for the transparency for the term of interconnection but also for the concluded interconnection contracts. It also includes the public availability of regulations and tariff schedules that govern the provision and utilisation of services.

The new entrants generally face both technical and procedural barriers though they are already addressed in the GATS by way of including article VII on recognition. The article VII of GATS prohibits the licensing authority from using technical or non technical criteria as disguised restrictions. The Reference Paper requires in para four “Public availability of licensing criteria”—terms and conditions, time required criteria and lastly the reasons of denial of application to be informed to the applicant. This adds to article III of GATS, which itself provides for transparency but limited in scope. The para four provides for the public availability of terms, condition, licensing criteria and also of the individual licenses. This will desist the dominant provider or the national governments from using discriminatory criteria in a disguised way.

(d) The Deviation Mechanism

The Reference Paper provides for the deviation mechanism from the obligation in Reference Paper in para 3 and 6, universal service obligation and allocation and use of scarce resources respectively.

In para 3 the members are given the discretion to define the universal service obligation it would maintain which would not be considered anti-competitive per se provided they are administered in a transparent, non-discriminatory and competitively neutral manner. It further provides for the necessity requirement.

This is the problem area of the Reference Paper where governments are allowed pursue their universal service policies, which in turn gives them discretion to take governmental measures like imposition of performance requirements or additional conditions on the foreign services or service providers. The Reference Paper does not clarify the scope of universal service and the mechanism to achieve it so the definition may be need based. In the second para of Reference Paper, NGBT fell in line with US proposal that universal service be provided in a transparent, non discriminatory manner and that it be as little of a burden as possible to provide the required service. On the insistence of India there was included a clause that such obligations will not be regarded anti-competitive per se, so as to save the measures from attacks. These measures could be related to the areas of pricing, mandatory establishments in rural areas and low-income areas with a view to

providing the services to the targeted group at lower prices, the additional taxation etc. All these measures may run counter to the general obligations under the Reference Paper because they may effect the licensing, interconnection, allocation of spectrum and independence of regulatory body. The obligations of universal service are complementary to the general obligations of GATS Article VI, which give space for domestic regulations, subject to the objectivity and transparency (Article VI.4.a). The flexibility in defining universal service obligations (USO), would prompt the race to expand the scope of USO and if no reasonable test or international standard to define the USO, according to the economic status of the nation is adopted, it would lead to the spate of non-violation nullification impairment complaints under article XXIII of GATS.

There arises a conflict between preferable business plan and the governmental policy of providing universal service. Most often the solution by adopting universal access programme is suggested. The concept of universal access programme is that telecommunication equipment may be shared by several people so as to effect the service to all. The foreign firms may be allowed the access to telecommunication market on the condition that they would have to spend some money on universal service programme. This mechanism would also fall in cross-subsidisation and would run against the obligations of Reference Paper. The varying terms with different firms from different countries, may be negotiated only when they are offering dissimilar services or similar services via different modes.

Though the general exceptions in article XIV GATS may be resorted in the name of maintaining public order, to protect human health or life, safety etc. and members may be able take those extra ordinary measures purporting to serve the purposes given under article XIV of GATS. The members may adopt these measures with a oblique motive of desisting foreign firms from competing with the dominant provider and may result in anti-competitive practises.

The commitments undertaken by the members would cover all the sectors including spectrum management, frequencies, numbers and rights of way etc. This provision will allow the parties to take their initial decisions about allocations apart from GATS principles and specific obligations under Reference Paper. But this discrimination will not be allowed in the procedures for allocations. It further imposes the obligation of objective, timely, transparent and non discriminatory manner for allocation procedure. This may have implication of quality and quantity of services. Since this para also does not append any explanations, the regulations incorporating these principles have to pass the test of non-discrimination. With regard to spectrum, there are technical limitations and unlimited use of the same cant be allowed. This has to be marked for the government usage and technological advancement, and in later stage with the advancement more efficient use may be allowed. The spectrum management decision would be judged by the standards of article VI GATS and para 6 of Reference Paper and would have to pass the test of National Treatment and MFN , transparency and objectivity.

The deviations in the para 3 and 6 are illusory in nature, and in place to induce the members to sign the fourth protocol. In view of the past experience of Dispute Settlement

Undertaking, the members may be inclined to lodge their broad exception or may not make positive commitments in the larger areas. As exceptions are subject to review at every five year and would be liable to be eliminated after 10 year, so this would encourage the potential signatory like China to make narrower commitments.

But these governmental measures can not stand the scrutiny of the Dispute Settlement Undertaking, if the jurisprudence developed on article XX of GATT is to be taken in to account. Even milder obligations of MFN, National Treatment and market access under GATS, will not allow the existence of these deviations in case no exception to article II GATS is lodged by the members. These reasons have been causes for the developing and emerging economies hesitancy in signing the agreement. These economies are characterised by the lack of comprehensive infrastructure facility, so they were government owned and now other modes of addressing these problems have emerged such as promoting the idea of financing infrastructure projects by multinational conglomerates, get the finance from World Tel which works in collaboration with private investors or deregulate the market domestically while negotiating market access and non discrimination internationally.

COMPETITION LAW

To the extent the implementation of competition policy requires a legal backing there is need for a Competition Law. Competition Law, therefore, has a more specific focus and is, as a result necessarily more limited in scope. Thus, whereas the competition policy covers a whole array of executive policies and approaches, the Competition Law is a piece of legislative enactment having the character of enforceability in a court of law. The focus of the law will be on preventing anti-competitive behaviour i.e. welfare reducing. The underline premise is that free markets worth to provide the desired economic outcomes, but that markets can do this, only if the process of competition in these markets is protected from abuse. It follows that the only legitimate goal of Competition Law is the maximization of economic welfare.

About eighty countries today have Competition Laws. The history of Competition Laws dates back to the 1860's and 1870's when American States enacted "anti-trust" laws. These culminated in the Sherman Act of 1890. This was followed by the enactment of the Clayton Act and the Federal Trade Commission Act in 1915. Subsequent to this, the Robinson-Patman Act, 1936 and the Celler-Kefauver Act, 1950 were enacted. These statutes, together with subsequent amendments, judicial interpretations and the priorities and interpretations of enforcement agencies, form the body of the Competition Law as it is practiced in the US today. Although U.S. antitrust law has multiple goals, an important objective in the maximization of consumers' surplus plus producers' surplus (economic welfare). Articles 85 and 86 of the 1957 Treaty of Rome (now Articles 81 and 82) serve as the principal Competition Law of the European Commission\European Union. Article 85 (now Article 81) deals with the joint exercise of market power by one or more firms, and Article 86 (now Article 82) deals with the exercise of market power by a single firm. More recently, since 1990, a number of new Competition Laws have come into force with the conversion of the socialist economies of Central and Eastern Europe (CEE) to

market-based economies. These laws are largely based on the relevant Articles of the Treaty of Rome and have been enacted to create the legal infrastructure required for supporting a market economy in these countries. One of the most recent enactments is the UK law – the Competition Act, 1998 – which came into force on 1 March, 2000. The new Act is more closely in tune with the Competition Law of the European Commission. The Act has prohibitions that are in line with Articles 85 and 86 (now Articles 81 and 82) of the Treaty of Rome. One key difference is that mergers are required to be compulsorily notified under the European Commission law but not under the new U.K. law. Although there are differences, the Japanese Antimonopoly Law, 1947 is similar in formal structure to the European and U.S. laws. In practice, however, the implementation of Japanese Competition Policy is quite different from the U.S. and European Commission. The Japanese experience has been one of the centralised and hierarchical Government orchestrating the actions of a centralised and hierarchical business sector. India is in the process of enacting a Competition Law. The present Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and Consumer Protection Act, 1986 (CPA) deal with anti-competitive practices at present. The present MRTP Act is limited in its sweep and hence fails to fulfil the need of a Competition Law in an age of growing liberalisation and globalisation.

In East Asian economies, Indonesia does not have a specific law on competition. Prevention of Unfair Competition is achieved through rules embodied in the law governing the creation and operation of companies, which prohibits mergers and acquisition that results in monopolistic or monopsonistic practices. Indonesia is also in the process of preparing a law on competition. There are 38 laws regulating business and providing consumer protection in Malaysia. Malaysia is also studying the need for a Competition Law. The Philippines currently has laws that deal with unfair trade practices, monopolies and combinations in restraint of trade. The Philippines does not have a centralised enforcement mechanism and is planning to enact a comprehensive anti-trust law and establish a Fair Trade Commission to enforce Competition Laws. Singapore does not have a specific Competition Law. Thailand is enacting a Business Competition Act which will replace the widely recognised as outdated, The Price Fixing and Anti-Monopoly Act of 1979. Vietnam has rules embodied in its Commercial Law that deal with unfair trade practices, prohibited promotion activities, misleading advertisement and passing off. Vietnam is also planning to have a separate Competition Code.

The laws and regulations in the Peoples Republic of China that deal with competition issues are 1980 Regulations on Development and Protection of Competition, The 1993 Law of Peoples Republic of China for Countering Unfair Competition and the 1993 Law for Protecting Consumer Rights and Interests. China is in the process of drafting its first Anti-Trust Law and Commercial Secrets Protection Law.

MULTILATERAL COMPETITION LAW

The importance of the cross border competition for the international trade has made it necessary to explore the potential of the WTO to contribute to competition promoting policies for enlarging markets. One method of dealing with cross border competition problems is development of Multilateral Competition Law within the WTO. This was recommended by group of academics and practitioners who, during the negotiations of Uruguay Round, proposed an International Anti-Trust Code and by Group of Experts commissioned by the European Commission in the lead up to the Singapore Ministerial Conference of the WTO.

Some of the developed countries formed the interest group who want a Multilateral Competition Law. But it could be in the interest of the developing countries as a group to have a Multilateral Law in this area. It is the developing countries who are the victims of restrictive business practices by large dominant multinationals corporations, such as transfer pricing and export cartels. Also, one of the main concerns is the frequent use and abuse as they see it, of anti-dumping action.

Some of the governments like Hong Kong and Singapore don't see the requirement of a National Competition Law as they pursue policy of free trade. They feel that if all border restrictions on trade in goods, services, and FDI are removed and economies are deregulated, there will be no need for a multilateral law. There are other governments who see weakening of national sovereign powers in any proposals for multilateral competition law. The dominant among these is the US Government.

The multilateral competition law in the WTO would require agreement among the members of the WTO on the rules, the objectives, the basis for analysis of competition cases and the remedies. Further, there is a majority of members of WTO who still do not have any comprehensive Competition Laws and among the countries which are having Competition Laws there is a great diversity in all aspect of these laws. Given these divergences in all aspects of Competition Law it would be enormously difficult to settle on a single law which will bound all members of the WTO.

The objections of national sovereignty and other problems relating to establishing a single multilateral law may be overcome but there are number of practical objections to having the WTO act as multilateral competition authority. The WTO regulates government measures affecting international trade and not private conduct. It has no powers to investigate private producers and no remedies that could be imposed on them.

The objective of the WTO relates to liberalisation of trade and the elimination of geographic discrimination in trade in goods and services, not to the promotion of competition. There is also a basic difference in approach between international trade laws and Competition Law. International trade law lays down rules as to what is

permitted or not whereas Competition Law has moved away from the per se prohibition of certain practices towards the rule of reason approach.

In view of the above reasons, it may not be feasible to have a binding multilateral competition law at the present time in the WTO.

CONCLUSION

The implementing the WTO, Reference Paper will be no less challenging than negotiating it was. Effective competition needs more than simple regulation compatible with market opening contained in WTO Member Schedules of Commitments. It will be some time before the result could be gauged but the negotiations showed the inevitability of market opening.