# Competition policy enforcement experiences from Developing Countries and implications for investment

*OECD Global Forum on International Investment VII*
**'Best practices in promoting investment for development'**
***27-28 March 2008, Paris, France***

**Rijit Sengupta[1] & Cornelius Dube[2]**

***March 2008***

**CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER)**
**CUTS International**
**D-217 Bhaskar Marg, Bani Park,**
**Jaipur – 302016, India**
**Ph: +91 141 228 2821**
**Fx: +91 141 228 2485**
**Email: rsg@cuts.org, cuts@cuts.org**

[1] Rijit Sengupta is Centre Coordinator & Deputy Head, CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER), CUTS International based in Jaipur, India.
[2] Cornelius Dube works as an Economist with CUTS CCIER, CUTS International.

## ***Table of Contents***

***Page Nos.***

*I. Introduction* ........ 3

*II. Competition policy and investment promotion – the theoretical construct* ........ 3

*IV. The OECD PFI and Competition Policy* ........ 8

*V. Factors affecting competition enforcement and investment promotion* ........ 9

*VI. Addressing the challenges* ........ 13

*VII. Conclusion* ........ 15

*VIII. Bibliography* ........ 17

## I. Introduction

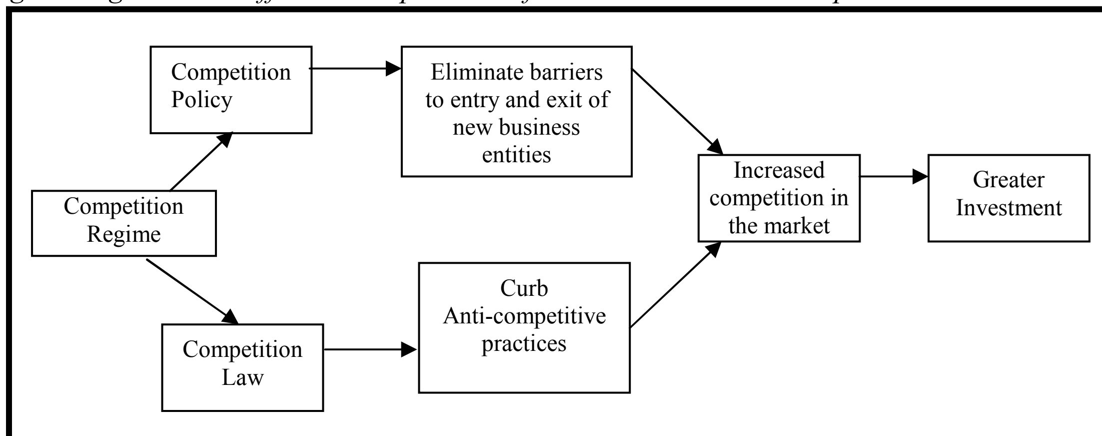
Over the last decade or so there has been a considerable interest in developing countries for adopting competition laws, either at the behest of external pressures or as a result of internal developments. It can be inferred from an analysis of motivations that in most of the cases, adoption of competition policy has been as a result of pressure from outside agencies (bilateral, multilateral, advisers, etc.) rather than internal policy reforms. Having employed such a *reactive* approach to evolving competition regimes, governments in the developing world have failed to support the process of competition law adoption through concurrent policy measures and practices that support competition in the market, contributing to economic growth and development.

The literature is replete with evidence that an effective competition regime contributes to investment and catalyses progress towards economic development. The World Development Report 2005 (*A Better Investment Climate for Everyone)*, suggests that removing barriers to competition should be one of the prime considerations for governments, while taking investment climate improvement decisions. The World Investment Report 2003 (*FDI policies for Development: National and International Perspectives*) had earlier asserted – *'How to ensure competition, including the control of restrictive trade practices, by foreign affiliates of TNCs'* – to be a 'key question' for national governments to address, while shaping policies in response to international investment scenario( Rewrite last sentence in indirect speech to make it sound less laboured).

CUTS experiences on competition policy and law issues across developing countries suggest the existence of various barriers to the implementation of competition policy and/or law which also hinder investments. Addressing these factors presents a challenge for many developing country governments, as is elaborated in one of the sections in this paper. Some of the possible ways of addressing these challenges have also been highlighted in this paper, drawing experiences collated from various developing countries. It is expected that such examples would help countries struggling to implement their competition regimes, thereby facilitating the evolution of a level playing field conducive to investment.

## II. Competition policy and investment promotion – the theoretical construct

*Fig: Linkage between effective competition enforcement and investment promotion - described*



A brief discussion of what an effective competition policy entails is necessary at the outset for a better understanding of how such a policy can influence investment. In some papers, competition policy is often used interchangeably with competition law. This paper would like to clarify this ambiguity at the outset.

Competition policy is essentially understood to refer to all governmental measures that can have an impact on competition, in local and national markets, by directly affecting the behaviour of enterprises and the structure of industry. Competition policy is an instrument for achieving an efficient allocation of resources, technical progress and consumer welfare. It also helps to regulate concentration of economic power detrimental to competition and promotes flexibility in adjusting to the changing international economic milieu[3].

With regard to such varied functions there are two components of a comprehensive competition policy. The first component refers to a set of government measures that enhance competition or competitive outcomes in the markets, such as relaxed industrial policies, liberalized trade policy, conducive entry and exit conditions, reduced controls in the economy and greater reliance on market forces. The other component of competition policy is a competition law and its effective implementation to prevent anti-competitive behaviour by businesses, to rule out abusive market conduct by dominant enterprise, to regulate potentially anticompetitive mergers and to minimize unwarranted government/ regulatory controls[4]. It is well-established that competition law can regulate markets best if it is part of a comprehensive competition policy rather than when it has been enacted in isolation. It is the enactment of a competition law without a complementary adoption of most of the other elements of competition policy that has resulted in some operational shortcomings in many developing countries. The following paragraphs elucidate the components of a competition policy that have bearing on investment decisions.

*i. <u>Trade policy</u>*

A country's trade policy can play an important part in shaping competition in its economy. The volume of goods available in the market depends on the extent to which the economy is open to the outside world. Having a tight trade policy restricts competition in the market, and can result in the manipulation of the market by dominant domestic firms. On the other hand, trade liberalisation results in an influx of goods into the economy, which could also have a huge impact on the nature and extent of competition in the market, and encourages domestic competition as well. In order to achieve an optimal level of competition in an economy the trade policy of a country should be formulated to stimulate private participation in the economy (both in terms of attracting new firms and also in strengthening the position of existing ones).

*ii. <u>Industrial openness</u>*

The level of competition in an economy reflects the country's attitude towards entry and growth of firms. Regulations focusing on entry and establishment of business in a

---

[3] CUTS (1999), 'Role of competition policy in Economic development and the Indian Experience'.

[4] Planning Commission of India (2007), 'Report of the Working Group on Competition Policy', Government of India.

country are important in shaping up competition. If a country has a restrictive industrial policy regime in which entry and growth of firms is subjected to stringent licensing conditions and monitoring, a low level of investment is guaranteed and the resulting level of competition is also low. An effective competition policy advocates for the removal of obstacles and facilitates investment flows by providing a predictable legal and regulatory environment that reduces the scope of arbitrary decision-making, thereby instilling transparency in the system.

*iii. Attitude towards privatisation*

Privatisation enhances the potential for competition by providing conditions conducive for entry of new players. Government involvement in the economy, particularly in direct competition with private companies, deters private participation and stifles competition. The intention of a country to improve competition in the market through privatisation can be handicapped if proper care is not taken in planning its privatisation programme.

*iv. Other critical policy considerations*

There are certain other policy considerations that can have an impact on competition by affecting the firms' decision to enter an industry. The formulation of competition policy should take into consideration implications of such policies as well:

a) *Labour policy:* Labour regulations impact production cost and convenience adversely and result in entry into the informal sector being preferred to significant investment in the formal sector.
b) *Exit Rules:* Certain regulations like bankruptcy laws, insolvency laws might make it difficult for companies to exit their business in a country, and thus negatively affect investment decisions by prospective investors.
c) *Consumer protection policy:* Although it is generally accepted that there is a convergence between the objectives of consumer protection policy and competition policy, there exists scope for conflict as well which works to the detriment of investment.

### III. Features of a Competition policy – some interesting cases

Though competition law has a history of more than 100 years, which has seen over 100 countries enacting competition laws, the adoption of a comprehensive competition policy by some countries is relatively a recent phenomenon. There are very few countries who have a comprehensive competition policy statement. Australia, Botswana, Malawi, Mexico, Hong Kong are some such examples.

#### ***Australia***

***Australia*** is a good example of a developed country in this regard, with the National Competition Policy articulating the following six elements into its competition policy: (i) limiting anti-competitive conduct of firms; (ii) reforming regulation which unjustifiably restricts competition; (iii) reforming the structure of public monopolies to facilitate competition; (iv) providing third-party access to certain facilities that are essential for competition; (v) restraining monopoly pricing behaviour; and (vi) fostering "competitive utrality" between government and private businesses, when they compete[5].The country's

[5] Hilmer, F. (1993), 'National Competition Policy'.

commitment to promote competition as one of the means to promote investment is evident from its present investment regime.

***Mexico***

The Federal Law of Economic Competition (LFCE) came into force in 1993 in ***Mexico***. A comprehensive policy on competition was adopted as a part of the National Programme of Economic Competition (PNCE) in 2001-2006, which operationalised the systematic implementation of a competition regime in the country. Mexico is a country that has done exceedingly well in recent times in terms of attracting investments. As indicated in the UNCTAD 2007 World Investment Report, together with Brazil, the country remains the leading recipient of FDI among Latin American countries.

The situation was not quite same before 1989, when Mexico embraced reform of regulations governing foreign investment. The Mexican administration believed that a regime conducive to foreign investment would stimulate competition and increase access to technology, thereby raising the productivity of investment. The 1989 reforms of the foreign investment regime in the country, coupled with the adoption of an effective competition legislation, has contributed to the strengthening of the investment regime in the country. The fact that the Federal Competition Commission (CFC) of Mexico has been quite effective in implementing the competition act (as a means to investment and growth[6]), underlines the linkage between the implementation of the competition act of the country and the ability of Mexico to attract investment.

*FDI flow in Mexico*[7]

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

***Malawi***

The competition policy for ***Malawi*** was approved in 1997. Its broad policy objective is to promote economic efficiency and protect consumer interests. It has three broad strategies : (i) lowering barriers to entry; (ii) reducing restrictive business practices; and (iii) protecting the consumer. The policy is aimed at four focus areas: anticompetitive business behaviour (fixing, collusive tendering or customer allocation, and tied sales) aimed at eliminating or reducing competition; unfair business practices aimed at taking unfair advantage of consumers; market structures that permit abuse by a dominant enterprise and government legislation that affect the freedom in the market.

The Government adopted the Competition and Fair Trading Act (CFTA) in 1998. The Malawi Competition and Fair Trade Commission, entrusted with the responsibility to implement the competition law of the country, however has only been operational since 2005 and the process of competition administration in the country has remained weak,with the competition agency struggling to establish itself institutionally. A parallel look at the investment regime in Malawi (one of the poorest countries in the world)

[6] 'Competition policy development in Mexico' – A report on economic competition in Mexico, 2005.
[7] UNCTAD (2006), 'Handbook of Statistics 2006', UNCTAD, Geneva, pp. 344 to 348.

demonstrates that the country has been able to attract very little FDI over the last three decades.

*FDI flow in Malawi*[8]

| Year | 1980 | 1990 | 2000 | 2005 |
|---|---|---|---|---|
| **FDI (US$ mn.)** | 9 | 23 | 26 | 3 |

*Key Observations*

Analysis of the above two cases, that of Mexico and Malawi, leads to certain observations. In the case of Mexico it is seen that the process of competition reforms was initiated with a goal of enhancing investment and growth and coincided with the broader economic reform programmes of the government (reforming the regulations to attract foreign investment). This was supplemented by the establishment of a strong and efficient institution (almost around the same time) – the Federal Competition Commission of Mexico (CFC), entrusted with the responsibility of implementing the competition act.

On the other hand, in the case of Malawi, it was noticed that in spite of a commitment to promotion of investment in the competition policy statement of the country (by lowering barriers to entry and curbing restrictive trade practices), private participation (investment, particularly foreign investment) in the economy has not been forthcoming in the absence of a strong agency to effectively implement the competition regime, coupled with the lack of a holistic approach to ushering in macroeconomic reforms for investment promotion and growth. The above learnings are especially significant for countries evolving and/or (initiating) the process of implementing their competition regimes.

Countries like ***India*** and ***Botswana*** have already demonstrated their commitment to incorporate elements of investment promotion and growth in their competition policies[9] and have been making strides to develop the (competition) institutions simultaneously to effectively implement their competition policies. Both these countries have also embarked on a process of economic reforms, and have been (of late) recognised as 'investment hotspots' in their respective regions. Therefore, one can safely anticipate that a strong institution to implement their competition policies would complement (above-mentioned) efforts already undertaken by the national governments and further strengthen their ability to attract investment.

***Box 1: Competition Policy of Botswana***

Botswana's National Competition Policy was adopted in August 2005. The Competition Policy provides a coherent framework that integrates privatisation, deregulation, and liberalisation of trade and investment into a strategy for promoting a dynamic market-led economy. The strategic policy considerations which are part of the competition policy include (i) establishment of the competition law and authority; (ii) ensuring consistency of the competition policy with other government policies; (iii) development of public awareness and support for competition enforcement; (iv) addressing the issue of interface between the competition authority and other sector specific regulatory bodies; (v) structural reforms of public monopolies; (vi) conduct of other professional services; (vii) consumer protection issues; etc. Huge strides have been made now towards implementation of the policy although many issues, including the development of the competition law, are still outstanding.

***Box 2: Principles of Competition Policy of India***

- The Competition Act, 2002 prohibits anti-competitive agreements and combinations which have or are likely to have appreciable adverse effect on Competition. It also seeks to prohibit abuse of dominant position by an enterprise. There should be effective control of anticompetitive conduct which causes or is likely to cause appreciable adverse effect on competition in the markets within India. The Act establishes the CCI as the sole national body to enforce the provisions of the Act;
- Competitive neutrality requires treatment of all alike; any discrimination or preferential treatment on the basis of ownership or otherwise goes against the spirit of fair competition. Every policy should be competitively neutral amongst all players, whether these be private enterprises, public sector enterprises or government departments engaged in non- sovereign commercial activity;
- Procedures should be rule bound, transparent, fair and nondiscriminatory;
- There should be institutional separation with respect to policy making, operations and regulation;
- Where a separate regulatory arrangement is set up the functioning of the regulator should be consistent with the principles of competition as far as possible;
- Control over essential facilities by dominant enterprises undermines competition by denying access to new entrants. Third party access to essential facilities on reasonable fair terms will ensure effective competition and, therefore, should be provided in law. However, what constitutes an essential facility may differ on a case to case basis.

It has been elucidated in the case of Malawi (above) that the absence of a strong institution (agency) endowed with the appropriate human and financial resources to implement the competition policy impedes the country's capacity to develop an environment conducive for attracting investment in the economy.

CUTS International has been working on understanding the process of evolution and implementation of competition policy and law issues in various countries across the world and has had first hand experiences of working in 19 countries across Asia and Africa on strengthening the process of implementation of competition regimes. An overall realisation is that across the developing world, there has not been much progress in the process of implementation of competition regimes (due to a host of reasons). Though many developing and least developed countries have embraced competition laws over the last decade or so, there has been little progress on implementation. Problems in implementing competition laws have had a negative effect on the ability of countries to develop an enabling environment for investment.

### *IV. The OECD PFI and Competition Policy*

The 'OECD Policy Framework for Investment'[10] (PFI) highlights the following elements of competition policy that are important from the point of development, as have been identified in various studies undertaken by the OECD, UNCTAD, the World Bank and the WTO, among others:

- The promotion of consumer welfare;

[10] Organisation for Economic Cooperation and Development (2006), "Policy Framework for Investment: Review of Good Practices", OECD, Paris, pp. 90 – 100.

- Preventing excessive concentration levels and resulting structural rigidities;
- Addressing anti-competitive practices of enterprises (including MNEs) that can negatively affect the trade performance and competitiveness, on both the import and export sides of developing countries;
- Reinforcing the benefits of privatization and regulatory reforms;
- Establishing the institutional focal point for the advocacy of pro-competitive policy reforms and a culture of competition; and
- *Increasing an economy's ability to attract and maximize the benefits of investment.*

For the purpose of this paper, we take a closer look at the *last element* in the above list. The PFI decomposes this further into certain key factors that are summarized below:

- Sound economic governance measures that ensures transparency and predictability in the process of competition policy implementation;
- Curbing the occurrence of anti-competitive practices that inhibit investment in a particular economy;
- Pruning out policy-induced barriers to promotion of competition in markets;
- Proper regulatory framework (including that of competition) enhancing the capacity of countries to derive the benefits of trade liberalization;
- Guarding against the adverse impact of Multinational Enterprises (MNEs) on domestic firms.

In the following section we take a look at anecdotes from countries across Asia and Africa, especially where CUTS has been engaged with competition policy work (research, advocacy and capacity building activities). These anecdotes explain how various factors have frustrated the potential of a competition regime towards stimulating investment and growth.

## *V. Factors affecting competition enforcement and investment promotion*

As explained above, CUTS experience with competition policy across the developing countries of Asia and Africa, demonstrates that certain factors frustrate the potential of a competition regime in enhancing investment and growth in an economy. These factors can be classified as below:

- Policy induced barriers (government regulations, policies affecting market processes and competition, protectionist approach)
- Absence of competitive neutrality
- Nexus between government and big firms
- Poorly evolved 'business environment'
- Effects of Multinational Enterprises (MNEs)
- In the guise of 'public interest'
- Inter-institution relationships.

### i. Policy induced barriers to competition

This factor has been treated under three subcategories on the basis of the available evidence as follows:

a) lack of political will

b) government regulations
c) policies affecting market processes and competition
d) 'protectionist' approach.

There are overlaps in the cases that cover these sub-categories which are however analytically different.

*a)* *Lack of political will*

In many countries, governments are seen not to have any plans or commitment to the promotion of competition in the market. Such apathy could be a result of a pre-determined approach to evolving the market, or merely a lack of awareness of the economic benefits of competition.

*b)* *Government regulations*

Most developing countries (particularly those in Africa) implemented the structural adjustment programmes (SAP) in the early 1990, prior to the enactment of their competition legislations. The SAPs required considerable changes in the economic approaches in these countries which many of them are yet to fully embrace. As a result there remain significant potential barriers to competition in many countries. These barriers include government regulations in product and factor markets which deter firm entry, exit and growth.

*E.g.:* ***Botswana*** adopted a competition policy in the year 2005, and is about to enact a competition law (a Draft Bill has already been developed in September 2007). Certain policies could impede the process of implementation of the competition regime - the reservation policy and the policy on protection of infant industries. There are also certain laws in Botswana that contain clauses that have been seen to be anti-competitive, viz. the Industrial Development Act of 1998, the Trade and Liquor Act of 1993 and the Botswana Meat Commission Act of 1965. All these have provisions that restrict the effective implementation of competition.[11]

*c)* *Policies affecting market processes and competition*

*E.g.:* In ***Vietnam***, though the Competition Law was passed in 2004, there still exist significant barriers to international trade, factor markets, entrepreneurship and innovation. Moreover, several sectoral policies and laws, with significant implications for the market structure in various industries, are at cross purposes. Such deficiencies are reinforced by other factors such as the low level of public awareness on competition issues and the weak legal compliance capacity of enterprises. Thus, building an effective competition regime in Vietnam is still a challenge[12].

*d)* *'Protectionist' approach*

The efforts of competition authorities to enable competitive markets can also hit brick walls due to the absence of enabling investment regulations. Observers opine that investment laws that open the industry to all players are the best suited for the promotion of competition. However, developing countries also need to protect their local companies

[11] CUTS (2007), 'From the Bottom Up'
[12] CUTS (2006), 'Fairplay Please!'

against foreign domination in critical sectors of the economy in line with national interest objectives. Such provisions can negatively affect foreign investment flows.

*E.g.:* As per Section 18 of the ***Ghana*** Investment Promotion Act, the sale of anything whatsoever in a market, petty trading, hawking or selling from a kiosk at any place, the operation of taxi service and car hire service (a non-Ghanaian may undertake this service only if s/he has a minimum fleet of ten new vehicles) and operation of beauty saloons and barber shops are wholly reserved for Ghanaians. In all other sectors where foreign participation is allowed, as per Section 19, enterprises may not be established or operated by a non-Ghanaian unless:

(i) in the case of a joint enterprise with a Ghanaian partner, there is investment by the non-Ghanaian of foreign capital of not less than US$10,000.00 or its equivalent worth in capital goods by way of equity participation; or

(ii) where the enterprise is wholly owned by a non-Ghanaian there is an investment of foreign capital of not less than US$50,000.00 or its equivalent worth in capital goods by way of equity capital[13].

Such conditions have a huge bearing on competition and investment promotion. This implies that even if a competition law has been enacted (a Bill is now at an advanced stage of preparation), investment may continue to be depressed.

**ii. Absence of competition neutrality**

*E.g.:* Institutional barriers exist in ***Lao PDR***, despite the country having passed the Decree on Trade Competition which came into effect in 2004. Many manufacturing as well as service and utility sectors that display high market concentration receive state protection in various forms, including state control and quantitative restrictions, stringent licensing conditions[14].

**iii. Nexus between Government and Big Firms**

Vested interests often cast an influence on the implementation of policies. Under such circumstances, lack of good governance and transparency compounds implementation problems. Governments are often alleged to provide extra benefits to certain companies or players at the cost of the others.

*E.g.:* In ***Mauritius***, taking of funds from business houses for political party funding is a normal practice. Concerns have often been raised that such proximity could influence the government while framing policies aimed at private sector development, like a competition policy or law. A Mauritian newspaper report suggested that some private players were responsible for delaying the adoption of the country's competition law.[15] The political and business relationships are such that the people in power make decisions based on their personal choice and connection, rather than on merit. Such action of the government leads to inefficiency and creates entry barriers for new players trying to enter the market, which act against efforts to attract new investments.

---

[13] Ghana Investment Promotion Centre Act, 1994 (Act 478).

[14] Supra note 12

[15] Sahebdin, M. (2007), 'Political Economy Constraints in implementing Competition Regimes: Experience from Mauritius'. (Available at http://www.cuts-international.org/Mauritius/doc/Paper-3.doc)

**iv. <u>Poorly evolved business environment</u>**

Despite significant progress made in terms of liberalising the business environment, several approvals are required to start a new business. These approvals often take substantial time and costs and thus constitute major obstacles to entry by a new business operator into the market, thus hampering private sector development.

<u>E.g.:</u> In ***Malawi*** and ***Uganda***, business registration itself costs more than the per capita income of the country. In ***Mozambique*** it takes 153 days to get a business registered. In many of these countries, the cost involved is more than that in the US even in absolute dollar terms.

**v. <u>Effects of Multinational Enterprises (MNEs)</u>**

There are situations where the MNEs misuse their position in the markets for their own benefits by way of predatory pricing or exclusive dealing arrangements.

<u>E.g.:</u> In ***Namibia***, reports suggest that local agencies are being compelled by South African firms to enter into contracts that prevent them from supplying Namibian products to chain stores as against products from South Africa. As a result of this unfair trade practice, many Namibian companies are losing their business and some are even on the verge of closure.[16]

**vi. <u>In the guise of 'public interest'</u>**

There is a general skepticism in developing countries about relying on the forces of supply and demand to give outcomes reflecting consumer interests. This results in several regulations and reactive laws being put in place as a way to safeguard "public interest". Price controls are a common feature in many developing countries, and in most instances they have a huge bias towards consumers than producers. Price controls work well in stable economies, given that cost structures are stable and can easily be predicted. However, economies in the developing world are far from stable and inflation rates are high. The price control mechanisms are administered under a bureaucratic process that results in reviews lagging behind inflation. Such mechanisms act against the promotion of competition and investment by lowering profit levels.

<u>E.g.:</u> An extreme case is ***Zimbabwe***, which is currently under a hyper-inflationary environment. The government fast tracked a National Incomes and Prices Commission (NIPC) Act - now considered a barrier to investment. The Commission forces businesses to undergo significant time periods of loss making due to controlled prices that are below the production costs as it does not act fast enough in adjusting prices. Thus, the presence and efforts of the Competition and Tariff Commission, which enforces the Competition Act [*Chapter 14:*28], in promoting competition in the economy are normally diluted by this practice.

**vii. <u>Inter-institution relationships</u>**

The overlap of functions between the competition authority and the sector regulator may also be responsible for failure to promote a healthy competition culture in many developing countries. It is important to point out that both competition authorities and sector regulators play important roles in promoting a competitive environment. What is lacking in most developing countries is a forum that allows the two groups to exercise

---

[16] www.allafrica.com, 12.07.06

their mandates in a manner that is not conflicting and confusing to the different economic agents.

_E.g.:_ In ***South Africa***, it was stipulated that the Competition Act would not apply to 'acts subject to or authorized by public regulation'. However, firms used this provision to argue in the High Court that the Competition Act did not apply to the agricultural and banking sectors as there are a series of other acts regulating the practices of these sectors. As a result, the stipulation was later removed from the Act.[17] Thus, this may not be an effective way around the problem.

In sum, the implications from this section is that countries from the developing world which have adopted competition policies and/or laws still have a long way to go as far as their effective implementation is concerned. In order for these countries to address challenges in the process of competition reforms (as a means for evolving the necessary business enabling environment/investment climate) it is required that various roles and responsibilities are handled by the relevant stakeholders. Measures in this direction have already been witnessed in some countries (see discussion in the following section) and should serve as lessons for national governments grappling with the challenge of evolving an effective competition regime.

## *VI. Addressing the challenges*

Countries in the developing world are gradually waking up to the reality that impediments to the development of an enabling environment for investment need to be addressed in order to usher in economic growth and development. Evolving an environment conducive for entry of new firms (and letting them compete on a level playing field) seems to be the focus of such measures. Some experiences from across developing countries are summarized in the section below and can be categorised as:.

- Reforming policies that deter free entry and exist of players (competition) in the market;
- Political will for promoting competition as a means to attract potential investors;
- Developing effective institutions;
- Stakeholder sensitisation for supporting the reforms agenda;
- Competition reforms integrated in investment climate improvement programmes;
- Coordination among agencies having convergent responsibilities.

### *i. Reforming policies*

***Botswana*** has envisaged a well thought out step-wise process for evolution and adoption of policies that intend to promote a level playing field in its economy. The country undertook a 'legal inventorisation' exercise in order to identify the policies and laws that would need to be refined in order to implement the competition policy of the country. This exercise preceded the process of developing the competition policy of Botswana (2005) and was able to provide the government with the information to develop a long-term vision for improving the competition regime in the country as a means to catalyse economic growth and development.

[17] CUTS (2003), "Pulling up our socks"

***ii. Political will***

There is a need for politicians to be aware of the potential gains from promoting competition measures. Politicians in some countries have realized this and have demonstrated a willingness to lay down a road-map for promoting competition in their jurisdictions.

<u>E.g.:</u> The ***Indian*** government has clearly demonstrated its willingness to promote competition in the economy. Clear cut measures backed by policy decisions were undertaken to develop the present competition regime in the country [Competition Act 2002, as amended by the Competition (Amendment) Act 2007]. A parallel process has also been envisaged by the policymakers (hosted by the Planning Commission, Government of india) to evolve the 'Competition Policy' for the country. To this effect, a Working Group of experts on National Competition Policy for India has also been constituted. This Working Group has in its report submitted the basis for developing the competition policy for India, which highlights the need for a barrier-free business environment that attracts new entrants and investments to the economy.

***iii. Effective Institutions***

Experience from across the world suggests that for institutions (implementing socio-economic policies) to be effective, they need to possess certain key characters. These are clarity of mandate, functional authority, necessary enforcement powers and the requisite resources. The same applies for competition agencies as well.

<u>E.g.:</u> Evidence suggests that the Fair Competition Commission of ***Tanzania***, the Vietnam Competition and Administration Department of ***Vietnam*** are two institutions that have been endowed with some of these elements.

***iv. Stakeholder Sensitisation***

For a competition culture to prevail in any economy there is need for its acceptance by the key stakeholders in the economy. For various reasons, market-oriented regulatory reforms are often viewed with apprehension by most constituencies in the developing countries. Even those who are expected to be the major beneficiaries of open markets and competition, particularly both consumers and business sectors, are reluctant towards reforms due to sheer misinformation and ignorance.[18]

CUTS has implemented competition policy and law projects based on a research based advocacy and capacity building approach in 19 countries across Asia and Africa. Engagement of multiple stakeholders in the process of implementing these projects, has been the core *mantra* of these projects. One of the main objectives of this engagement has been the need for these stakeholders (comprising the business community, civil society and the government) to appreciate the benefits from an effective competition regime for economic growth, consumer welfare and development.

***v. Investment Climate improvement***

In some countries competition reform has been ingrained as a part of a broader investment climate reform programme.

---

[18] Ibid

*E.g.:* In ***Ghana***, the process of competition reform has been incorporated as a part of the multi-donor supported Trade Sector Support Programme (TSSP). TSSP is a five-year comprehensive trade and development plan launched in 2005, which consists of a series of 27 multi-faceted private sector oriented projects developed around the prescriptions of the National Trade Policy of Ghana.

Incorporation of competition policy reforms as a part of broader trade, investment and economic development programmes ensures a better perspective on competition policy reform, especially while taking into consideration other (corollary) policy issues like trade policy, industrial policy, privatization, etc. during planning and execution of the competition reforms agenda.

### *vi. Inter-agency coordination*

For the effective implementation of competition policy, there is a need for recognising the differences in roles played by the competition authority and the sector regulators in the economy despite sharing a common objective of controlling market failure in market reforms. Regulatory authorities play an important part in sectors with universal service obligations, such as the utilities and infrastructural markets. In pursuing their mandates, regulatory authorities sets 'rules of the game', by determining entry conditions, technical details, tariff, safety standards, access, etc. They are also empowered to have a direct control on the market outcomes, particularly on prices, quality and sometimes quantity as well.

*E.g.:* There are some overlaps in the mandates of the two and it is only carefully drafted mandates that can ensure that such complementary responsibilities bear fruits. An attempt was done in ***Brazil***, where despite the fact that there still exist some overlapping of functions between the competition authority (CADE) and the telecommunications authority (ANATEL), the Telecommunications Act explicitly provided for the application of the competition law to that sector, and Article 19 provides that ANATEL: 'shall have the legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the powers vested in…[CADE]'[19].

## *VII. Conclusion*

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

Political willingness in promoting competition stands out as one of the primary requirements for promulgating a top-down approach to competition policy promotion. There is an urgent need to sensitise parliamentarians and other political leaders on the benefits of an effective competition policy from the point of national development goals.

---

[19] OECD (2000), 'Competition Policy and Regulatory Reform in Brazil'.

Adoption of a whole package of reforms towards ensuring a competitive economy underlines a government's commitment to the promotion of competition, as a means to economic development. Evidence suggests that integrating competition reforms into a broader trade policy reforms and/or investment climate improvement programme is one of the feasible policy measures. The other approach has been the adoption of a comprehensive competition policy statement as a precursor to competition law.

A methodology championed by CUTS in promoting competition as a part of the national economic development agenda has been to sensitise stakeholders of its benefits and mobilise public opinion (through the pro-active engagement of civil society) in favour of competition reforms[20]. This ensures that all the relevant stakeholders feel part the 'competition revolution' – especially since its outcomes would reflect on their lives and livelihoods.

A major challenge in developing countries towards effective implementation of competition laws and policies are institutional, administrative and policy arrangements that makes the elimination of 'uncertainties' (in the eyes of potential investors), difficult. These factors hinder countries' capacity to reap benefits from market reforms processes, due to failure to attract both domestic and international investors. Governments (and indeed other stakeholders) should envisage creation/development of an effective competition agency endowed with the requisite mandate, resources and authority to implement the competition law of the country for instilling transparency and predictability in the business environment.

A key role of the competition authorities and other regulatory authorities in building a competitive environment that can attract investors is also envisaged in this paper. The need for both regulators to co-exist should therefore see a proper delineation of mandate and functions, especially through specific roles (in areas where overlaps might occur), articulated properly in the legislation. The complementarity of objectives should also see a proper framework where there is a maximum level of cooperation between the two sets of regulators in place. This ensures that all unnecessary conflicts which may happen at the expense of the market participants are minimised or removed totally.

In a nutshell this paper presents relevant lessons for developing (and least developed) countries collated from measures already adopted in some of these countries to devise a competition enforcement regime that counters bottlenecks to evolve an environment conducive to investment, growth and economic development.

[20] Refer the section on the 7Up projects in the CUTS CCIER website (www.cuts-ccier.org)

***VIII. Bibliography***


- Kumar, Amitabh (2006) Relationship between Competition authority and sectoral regulator, Presentation for Competition Commission of India 25-26 March 2006 SAFIR WORKSHOP, LAHORE
- Chakravarthy, S (1999), "Role of competition policy in Economic development and the Indian Experience, CUTS International, Jaipur, India
- CUTS (2007), From the Bottom Up (Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa: 7Up3 project), CUTS International, Jaipur
- CUTS (2006), Fairplay Please (Advocacy and Capacity Building on Competition policy and law in Asia: The 7Up2 project), CUTS International, Jaipur, India.
- CUTS (2003), Pulling Up Our Socks (A study of competition regimes of seven developing countries of Africa and Asia: the 7Up Project), CUTS International, Jaipur, India
- Evenett Simon J (2003), Competition Law and the Investment Climate in Developing Countries**,** Case Study Commissioned by the United Kingdom's Department for International Development (DFID) as part of a series of Case Studies for the World Development Report 2005: Investment climate, Growth and Poverty.
- Lustig, N. (1998), "Mexico: Remaking of an economy", Brookings Institution Press, Washington, D.C., USA.
- Mehta, Pradeep S. (2006), Competition Regimes in the World - A Civil Society Report**,** Book LVIII+638, CUTS International, Jaipur, India
- OECD (2000), "Competition Policy And Regulatory Reform In Brazil" at website http://www.cade.gov.br/internacional/OECD_2000_Report.pdf
- The Planning Commission Government of India, (2007), Report of the working group on competition policy, available at website http://planningcommission.nic.in/aboutus/committee/wrkgrp11//wg11_cpolicy.pdf
- WTO (2003), Study on Issues Relating To A Possible Multilateral Framework on Competition Policy. WT/WGTCP/W/228. 19 May 2003.