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PAKISTAN

PAKISTAN EXPERIENCE IN THE ENFORCEMENT OF MONOPOLIES LAW AND CAPACITY BUILDING REQUIREMENTS

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This paper describes in section I, salient features of Pakistan's competition law, administrative setup, experience and problems in the enforcement. Section II provides view on emerging scenario after Doha ministerial, and capacity building requirements are worked out in Section III.

Section I. Pakistan's Experience Relating to Competition Law

In Pakistan, the need for anti-Monopoly law was felt in the late sixties when government was pursuing policies of free market economy through encouragement of private sector.. Consequently, an absolutely unregulated private sector with concentration of wealth and formation of monopolies emerged. This situation could not last for a long time as it affected both the consumers and the entrepreneurs. It was, therefore, necessary to take appropriate steps to remedy this situation¹. Government promulgated the Monopolies and Restrictive Trade Practices Ordinance (control and Prevention), 1970 (MRTPO). Monopoly Control Authority (MCA) was constituted to administer this law in 1971.

MCA is quasi-judicial and autonomous organization to control and prevent undue concentration of economic power, unreasonable monopoly power; and unreasonably restrictive trade practices. Staffed with 128 employees, it is organized into four section vis-a-vis research and investigation, registration/legal, management information system, and administration. These sections are supervised by the member(research and investigation) and member (registration & administration).

MCA started enforcement of the law in 1971 just after that the policy decision leading to widespread nationalization of major private industries in 1972, somewhat limited the scope of MRTPO, therefore, during the 1970s and 1980s, MCA's emphasis was on diversification of capital resources of undertakings. In 90s however, the need to shift

from asset based investigation to market based investigation was felt in view of the changing economic scenario. The elaborate privatization plans of government required a comprehensive monitoring of any possible tendencies of unreasonable monopoly power and unreasonably restrictive trade practices.

MCA faced several difficulties - both on policy and operational aspects in the enforcement of the law. The foremost issue is the lack of general awareness about the law. Consumers' societies are almost non-existent or have a low profile. Therefore, MCA does not have the sources within the general public to come forward with evidence about the violation of the Law. Consequently, in almost all the cases, it had to move *sou-moto* and collect the evidence from the information supplied by the accused party. Presently, MRTPO, 1970 only applies to private monopolies, state monopolies are not covered. Single firm monopolies are also not covered in the substantive provisions of the law. It has also been realized that the penalties which MCA can impose in case of non-compliance with its orders are very low i.e., a one time penalty of upto Rs. 100,000 (about US\$ 2000) and Rs. 10,000 (About US\$ 200) per day in case of continuous default, With the result that business find it easier to pay the low penalties and to continue with their abusive practices .

Section II. Competition Policy and the WTO Doha Ministerial conference

The deliberations of the WTO Working Group on the Interaction Between Trade and competition Policy (WGTCP) as well as the Doha declaration indicates that this subject will assume even greater importance in the global trade relations. The Doha Declaration (DMD), while recognizing the developing and least developed countries' need for enhanced technical assistance and capacity -building mandates a focused work on the clarification of the following elements:

- a) core principles including transparency non-discrimination, and procedural fairness and provisions on hardcore cartels;
- b) modalities for voluntary cooperation; and
- c) support for progressive reinforcement of competition institutions in developing countries (through capacity-building), including policy analysis and development.

Aim of this focused exercise, until the Fifth Ministerial is to clarify these elements so that Members, specially the developing and least developed countries, can better understand and evaluate the implications of a possible multilateral framework for their development policies and objectives, human and institutional development. The Declaration also makes it obligatory to take account [full account shall be taken.....] of the needs of developing and least developed countries and provisions of appropriate flexibility in this regard.

Intense future work in the Working Group is therefore, foreseen. Issues that need careful consideration include: ability to put in place the adequate institutional structure, specifying needs for technical assistance and capacity-building; nature and scope of cooperative modalities alongwith information sharing; built-in flexibilities/safeguards for developing countries; scope of DSU procedures; and scope of applications of core principles with respect to subject matter and enforceability issues;

We feel that the interface of trade and competition policies and their relationship with economic growth give rise to two sets of issues for developing countries- related to domestic and export markets, respectively. Issues related to domestic market are the market power that foreign exporters can translate into dominant market position; collusion among foreign exporters; and collusion among foreign exporters and local firms. This relates to institutions, infrastructure and a conducive environment for the development of Small and Medium Sized Enterprises. Related to export markets it is important that trading partners implement their liberalization commitment and should not use the instruments of trade policy to impair the benefits of liberalization. Also there is a great need to enhance international cooperation especially among competition authorities. In cases of multi-jurisdictional cases and actions having cross-border affects.

Section III. Technical Assistance/Capacity Building Requirements

The experience of working with the law showed the desirability of modifications: firstly, the need to review the Ordinance to bring it more in line with the current economic realities and international norms. Secondly, strengthening of human and other resources of the MCA for effective enforcement. These are briefly covered in paragraphs to follow:

1. Review of the Ordinance, 1970:The present Monopolies Ordinance is substantively the same that was enacted in 1970. Since then the economic conditions have substantially changed. Also, the government set-up various committees/commissions from time to time to review corporate laws. The amendments proposed by these were basically some deletion/improvement in the existing text of the ordinance. MCA feels that a complete review of the Ordinance is required to give it the shape of a competition law, since, globalization and liberalization is adding newer and complex aspects to the definition of market structure, concentration, etc. Awareness is growing at the international level to develop rules for controlling anti-competitive conduct of firms and measures by government that could adversely affect competition. Consequently, elements of competition policy are introduced in the multilateral and bilateral trade negotiations.

2. Technical assistance from international organizations: Keeping in view the above MCA has drafted a new competition law, for this purpose the UNCTAD, is model law was being used as guideline document. Major changes have been introduced in the draft law. The required expertise

to assess the amendments with reference to overall economic situation of Pakistan and, of course, the international dimension, is not available to the MCA internally.

2. Training: Another area where MCA could benefit from technical assistance is to improve the skills of MCA officers. Presently, MCA has a limited staff strength that makes it even more important to upgrade the qualification/understanding of its present staff. This may take the form of providing refresher courses to the officers especially in the field of investigative techniques and methods to analyze cases relating to unreasonable monopoly power, merger evaluation and unreasonably restrictive trade practices, accounting and law. A visit from a resource person(s) of some international organization(s) may prove beneficial in imparting customized training to MCA officers.

2. Upgrading management information section: Information management possesses a central position in the efficient working of an organization like MCA. These are basically to replace obsolete equipment (PCs with a speed of 90mhz only) and to make data accessible to the officers through local area networking.

Concluding Remarks: In the years to come, the competition agencies need to be strengthened in real terms. With the falling of international barriers to trade, the competition policy will perhaps be the most effective tool left with the governments to deal with restrictive practices of transnational corporations and at the same time providing a level playing field to the relatively small domestic firms. However, in order to make competition agency i.e., MCA, discharge its functions effectively and to face international challenges, the institutional capacity building is a pre-requisite. The essential tasks involved are: a review of the Ordinance; training of personnel; and upgradation of the management information section.

In the post Doha scenario, it is important the technical assistance programs should be continued side by side with the negotiations to help develop understanding of competition policy and the effective implementation on the part of developing countries. As a first step, developing countries may be consulted through international/regional symposia or other means to ensure the "Agreement under development" and the technical cooperation programs are practical and responsive to the needs of WTO members and the private sector as well. MCA has drafted this new competition law by using the UNCTAD's model law as a guideline document. Major

changes have been introduced in the draft law, Still it would be useful to assess the amendments with reference to overall economic situation of Pakistan, and of course the international norms. For instance the issues relating to intellectual property rights, competition-sectorial regulation interface are not contained in the new law. These seem to be serious omissions.

There is no universal role model to be followed in the area of competition law. Nevertheless, it is imperative to benefit from the experience of developed countries having established norms in this field other than UNCTAD Model Law. This approach has several advantages, for instance, ready-made case law, learning externalities, etc. In any case, a word of caution is necessary because the underlying economic concepts of these competition laws may not necessarily applied to our case since we face a different array of welfare maximization variables as compared to the larger economies coupled with financial constraints and low capital base of the business/investors.

As Doha Declaration accepts the isupport for progressive reinforcement of competition institutions in developing countries (through capacity-building), including policy analysis and developmentf, it is highly desirable that Pakistan call for technical assistance from international organizations or consultancy may be sought to identify the shortcoming and a review of the new law by experts.

¹ Article 38 of the constitution makes it incumbent upon the State, ie. The Federation, to inter alia, secure the well-being of the people by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest; Clause 2 of Article 151 (clause 1 of which provides for freedom of trade) stipulates that Parliament may impose such restrictions on the freedom of trade, commerce or intercourse between one province and another or within any part of Pakistan as may be required in the public interest