India’s Competition Policy: An Assessment

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ABSTRACT

This paper undertakes a detailed economic assessment of India's emerging competition policy regime, in the context of the international debate on competition policy and the possibility of WTO negotiations on the subject. It begins with a review of several recent judgments of the Indian Supreme Court, in which it has overturned rulings by the Indian antitrust agency, the Monopolies and Restrictive Trade Practices Commission, depriving the latter of extra-territorial jurisdiction and the power to restrict imports. Section II of the paper assesses the new Indian Competition Act of 2002 from the perspective of modern industrial organization theory and contemporary international practice, both of which focus on "efficiency" as the major objective. It argues that several provisions of the new Act (especially the reinstatement of the competition authority's power to restrain imports) will be self-defeating or hard to implement. Section III adopts a more historical approach to show that competition policy has served many other objectives in Europe and the United States, especially distributive goals, and makes a case in the Indian context for generous exemptions from the new Act. Section IV argues that the gains to developing countries from a WTO agreement to control international cartels have been greatly overstated.
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In an earlier paper in this journal, I had drawn attention to the (mis)use of the Monopolies and Restrictive Trade Practices (MRTP) Act by Indian industries to protect themselves against cheap imports, and to the many inconsistent interpretations of the concepts of predatory pricing and the "public interest" advanced by the MRTP Commission and various official committees dealing with competition policy. In a second paper, I had examined the draft Competition Bill which was to replace the MRTP Act, evaluating it in the context of the (ambiguously-worded) decision by the 2001 Doha Ministerial meeting of the WTO to put trade and competition policy on the agenda for negotiations after the Cancun Ministerial in September 2003. In the past year, two important developments have seriously complicated the situation. In July 2002, the Supreme Court set aside the MRTP orders in two of the cases I had discussed, but went much further in interpreting the Act in a manner that would have made it extremely difficult to take action against restrictive trade practices (such as cartels) involving foreign suppliers. Then, in December 2002, the Competition Bill was passed with several changes, one of which explicitly arms the new Competition Commission with the power to take action against such practices by restraining imports, and several other amendments that are unfortunate, to say the least. In Sections I and II of this paper, I propose to discuss each of these developments sequentially, using insights from modern industrial organization theory as well as current international practice. Section III adopts a historical perspective in order to examine broader issues of political economy and income distribution. Section IV assesses India’s position at the likely WTO negotiations, and also critically evaluates some recent arguments that are being bandied about to induce developing countries to sign onto an agreement that will supposedly bring them tremendous benefits by curbing the activities of international cartels. Section V summarizes and concludes.
I

The Supreme Court Verdict

I begin by summarizing the two cases that were before the Supreme Court (see my 2000 article for details and excerpts from the MRTP orders). In September 1996, on a complaint by the Alkali Manufacturers’ Association of India (AMAI), the MRTP Commission granted an ex parte interim injunction order against the American Natural Soda Ash Corporation (ANSAC), restraining it from exporting soda ash to India. This was confirmed by the Commission in March 2000. Meanwhile, in September 1998, the All India Float Glass Manufacturers’ Association (AIFGMA) filed a somewhat similar complaint against three Indonesian companies. This time the Commission’s two-member bench was divided, and the matter was decided in favour of the complainant by a third member in February 2000, again resulting in an injunction against imports. Both cases went in appeal to the Supreme Court, the appellants being ANSAC in the first case, and Haridas Exports (the Indian importer of the float glass consignment) in the second. Both cases involved allegations of predatory pricing, although that part of the complaint was not pressed by AMAI, which based its arguments mainly on the allegation that ANSAC was a cartel. In the float glass case, on the other hand, the question of predatory pricing was central.

As it turned out, the Supreme Court did not go into either of these allegations. Instead, its judgment in *Haridas Exports vs All India Float Glass Manufacturers’ Association*,¹ which also subsumed the ANSAC vs AMAI case, set aside both the injunctions on the grounds that the MRTP Commission lacked jurisdiction. In the float glass case, the importers had contended that the AIFGMA complaint was essentially one of ‘dumping’ of exports, for which there was a specific remedy under the anti-dumping provisions of the Customs Tariff Act. The Commission therefore had no jurisdiction. Counsel for AIFGMA responded by setting out the differences between the two pieces of legislation, arguing that the anti-dumping laws did not implicitly repeal
the relevant provisions of the MRTP Act, nor oust the jurisdiction of the Commission. They further invoked the “effects doctrine”, widely used in other countries and also enshrined in Section 14 of the Act, to argue that the Commission had jurisdiction over that part of a trade practice initiated outside India which had effects in India. The Court partly upheld the AIFGMA contention regarding jurisdiction, setting out with admirable clarity (in para 52 of the judgment) the significant differences between the MRTP and anti-dumping laws to show that they operated in distinct spheres with no conflict between them. However, that did not help AIFGMA, for the Court also held that the MRTP Act had no extra-territorial operation, and the effects doctrine became applicable only with respect to a restrictive trade practice (RTP) after the goods were imported into India. The only remedy available to Indian industry against goods being exported to India at predatory prices was an anti-dumping duty. The Court further held that the Commission could not issue injunctions against the importation of goods or the foreign exporter’s price, although it could impose post-import restrictions to prevent an RTP taking place in India.4

In the soda ash case, too, the Supreme Court decided in favour of the appellant on the basis of jurisdiction. The Court ruled that the Commission’s reach could not extend to the formation of a foreign cartel, unless a member of the cartel carries out business in India. In any case, before granting an injunction the Commission had to satisfy itself that the cartel was engaging in a practice prejudicial to the public interest or the interest of any class of traders.5 While expressing no opinion as to whether ANSAC was a cartel, the Court turned the tables on AMAI: “prima facie, the allegation of the appellant [ANSAC] that it is the respondents [AMAI] which have formed a cartel and do not welcome any competition does merit consideration, perhaps in another case” (para 78).

This verdict was based on a particular reading of various sections of the MRTP Act in determining its jurisdiction, particularly its definition of ‘goods’ as being goods already imported into India and not merely intended for export to India. Obviously I am not competent to comment
on the Court’s legal interpretation. I wish to draw attention, however, to some of the implications of this judgment in respect of the issues discussed in my earlier *EPW* articles: predatory pricing, foreign cartels, and judicial interpretations of the “public interest” in competition policy.

In these earlier articles, I had cited several conflicting interpretations of the public interest by the MRTP Commission and the various official committees set up in recent years to examine Indian competition policy. Particularly noteworthy was the pronouncement in the float glass case itself by the then Chairman of the Commission, who quite clearly identified the public interest as that of the investors and workers in the Indian float glass industry. This interest, he said, should always prevail over consumer interests, so much so that “people of this country can very well afford payment of about 12% higher cost of float glass production manufactured and marketed by Indian companies rather than allowing them to go for that imported from Indonesia”. This, of course, goes against the very rationale for trade liberalization, and if the Supreme Court were to uphold such a position, it might as well give an injunction against the entire policy of economic reforms. But in deciding in favour of the importers, while again emphasizing the public interest test, it gave a very different interpretation, which is worth quoting at length. In respect of the float glass case, the Court declared:

… mere manipulation of prices or conditions of delivery would not be a restrictive trade practice under Section 2(o)(ii) unless it is done in such a manner as to impose on the consumers unjustified costs or restrictions. Lowering of prices cannot be regarded as imposing on the customers unjustified costs or restrictions. (Para 42).

What seems to have happened here is that the monopolistic Indian undertakings are now having to face competition. The quantum of import in the present case is
a small fraction of the total float glass which is manufactured and sold in India. The reduction in prices of the Indian importer is to the benefit of the Indian customer. It is only if there is an agreement between the Indian importer and the foreign seller which has such an effect that the production in India of float glass by an efficient Indian industry would have to stop and such stoppage is considered prejudicial to the public interest, can an order under Section 12-A or Section 37 be passed. (Para 54).

Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. If the normal or export price of any goods outside India is lower than the selling price of an indigenously produced item then to say that the import is prejudicial to the public interest would not be correct. The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor, as was sought to be submitted by the respondents. (Para 55).

And in relation to the soda ash case, the Court further emphasized this point:

It is to be borne in mind that public interest does not necessarily mean interest only of the industry. Unless and until it can be demonstrated that an efficient Indian industry would be forced to shut down or suffer serious loss resulting in closure or unemployment, the Commission ought not to pass an injunction restraining an Indian party from importing goods from a cartel at predatory prices. Importing goods at a price lower than what is available in India is not per se illegal. We have provisions under the Customs Act which enable the
Government to impose anti-dumping duties with a view to protect the Indian industry. Nevertheless, the era of protectionism is now coming to an end. The Indian industry has to gear up to meet the challenges from abroad. If the cartel is selling goods to India and still making profit then it will not be in the interest of the general body of the consumers in India to prevent the import of such goods. (Para 74).

A further observation made by the Court in the context of the soda ash case is actually more relevant to the float glass case. Apart from subordinating the Indian consumers’ interest in cheaper imported glass to that of the domestic manufacturers, the MRTPC Chairman had also chastised the importers for “profiteering” by importing it at such a low price.7 Without explicitly mentioning this stricture, the Supreme Court seems to have exonerated them: “The Indian importer obtaining goods at a low price does not contravene any law. He has obtained a good bargain.” (Para 76).

On the whole, the judgment is to be welcomed because it overturned orders of the MRTP Commission that could have set a dangerous precedent which could have been exploited by other industries threatened with import competition. Although the Court refrained from deciding on the question of predatory pricing, the excerpts given above do enunciate a criterion (pricing below costs so as to drive out a rival) that are closer to the international practice, even though it stopped far short of applying the kind of market structure tests that are common in Europe and the United States, as discussed in my earlier article. In denying the Commission’s power to restrain imports, the Court also established the salutary economic principle (although on purely legal grounds) that preventing import competition is an inappropriate remedy for a regulatory body that is meant to promote competition. I return to this in the next section, in discussing the new Competition Act.
There are some problems, however, with particular aspects of the Court’s formulation. Consider the following scenario. A foreign cartel (FC) engages in an RTP, whether predatory pricing or the more usual cartel behaviour of raising its price, selling goods to one or more Indian traders (IT), who sell them to Indian consumers (IC) at a profit. This can be represented schematically as follows:

\[(1) \rightarrow (2)\]

\[FC \rightarrow IT \rightarrow IC\]

According to the Haridas verdict, no action can be taken against the FC since the MRTP Act does not confer extra-territorial jurisdiction. Nor can stage (1) of the transaction be interdicted, since imports come under the Customs Act. There does seem to be one exception, however. In the lengthy excerpt from paragraph 74, the judgment seems to acknowledge that the Commission may block imports if predatory pricing by the FC results in “an efficient Indian industry” being faced with closure or unemployment, whereas elsewhere in the judgment (notably paras 49 and 57-60), it quite firmly ruled out this possibility. The only way in which these statements can be reconciled is with reference to paragraph 54, which requires as a prerequisite for an order that there be an agreement between the FC and an IT to sell at predatory prices. But the sections referred to there empower the Commission to order that an RTP be discontinued, or an agreement relating to an RTP be modified or made void. It is not clear whether import restrictions can be ordered.

Even if ‘an efficient Indian industry’ is to be saved, several questions arise. First, how is efficiency to be judged? Is it to be what economists call allocative efficiency, dynamic efficiency, or X-efficiency? These are three distinct concepts, requiring quite different (and difficult) techniques to evaluate them. Second, predatory pricing is unlikely to involve an agreement with a
distributor. Our hypothetical IT could claim that he is not selling at a loss, while the FC is beyond the reach of the Act, and both would therefore escape the charge. Third, suppose the predatory FC sells directly to the IC. It would appear from the judgment that this would go through without challenge, even if it had identical anti-competitive effects as compared to a transaction involving an agreement with an IT. Finally, in the case of a price-raising FC, the judgment gives the Commission jurisdiction with respect to stage (2), but again only if some IT is party to an agreement involving an RTP. If there is no IT, or if he acts quite independently of the FC, the cartel would have a free run. The judgment thus appears to focus on the marketing arrangements of foreign firms, rather than their impact on competition.

The problem, clearly, lies in the bad drafting of the MRTP Act and its insistence on agreements involving an Indian party. But effectively, by depriving the MRTP Act of extra-territorial operation, the verdict in Haridas made it almost impossible to take action against anti-competitive conduct involving imports, and foreign cartels in particular. This would have made it very difficult for India to participate in the emerging international consensus regarding the need to take action against such cartels. It would also result in an unfortunate situation in which RTPs by foreign firms exporting to India would be virtually immune to challenge, while Indian firms indulging in the same practices in the Indian market would be vulnerable. Of course, we now have a new Competition Act that restores the competition authority’s ability to interdict imports. This is discussed in the next section. But since the relevant sections of the new Act will apparently come into effect only after a year of purely educational activities, and according to its Section 66, all pending RTP cases will continue to be decided under the MRTP Act, the points made above are still relevant.
Other Cases

Before turning to the Competition Act, I would like to mention some other recent MRTP cases that reveal a certain trend. In a 1999 order that I quoted in my 2000 article, the Commission (again on a complaint by AMAI) fixed a “fair market value” for soda ash exports to India from a Chinese company. Presumably this too would now be unsustainable in view of the Supreme Court’s verdict in *Haridas Exports*. Even before that judgment, the Court had established a sound economic principle in setting aside other orders of the MRTP Commission on alleged restrictive trade practices, even though it did so using a purely legal interpretation of the Act. The Commission had passed orders against a private school for charging a security deposit of 500 rupees, and a state housing authority for delaying the handing over of a residential flat. These had been held to be RTPs under Section 2(o)(ii) of the Act, which deals with practices that tend to “bring about manipulation of prices, or conditions of delivery … in such manner as to impose on the consumers unjustified costs or restrictions”. On appeal, the Supreme Court held that this clause could only be read in conjunction with the main clause of 2(o), which requires proof that the impugned practice prevents, restricts or distorts competition. Clearly, neither of the cases met this standard.

In a more recent case that has not yet been finally decided, in 2002 the MRTP Commission terminated an enquiry against ten chemical manufacturers who had allegedly formed a cartel, on the grounds that there was absolutely no evidence of the essential ingredients of a cartel as laid down in an earlier Supreme Court judgment. But the Commission also decided that in respect of a second charge, pertaining to an abnormal increase in prices without a significant change in sales or costs of production, the enquiry was maintainable as there was a “strong inference in regard to manipulation of conditions of delivery or prices leading to distortion and restriction of the competition in the market”, bringing it under Section 2(o)(ii). The Commission order itself mentions that there were 42 producers of the concerned products in India, and it will
be interesting to see how this increase in prices can be held to be an RTP with no evidence of collusion.\textsuperscript{9}

Taken together with \textit{Haridas Exports}, these cases show that the MRTP Commission has displayed a tendency to issue orders against business practices or prices that it regards as ‘unfair’. However, the proper role for a competition authority, as rightly enunciated by the Supreme Court in setting most of these orders aside, is to restrain business practices that endanger competition. The Commission has undoubtedly been performing a vital function in vigorously enforcing a separate chapter of the MRTP Act dealing with ‘unfair’ trade practices such as misleading advertisements and prize schemes, and with deficiency in the quality of goods and services. But far too much of its time was spent on such cases, and the Competition Act rightly transfers this role to the consumer courts so that the new Competition Commission can concentrate on the preservation of a competitive market structure. Price regulation may be necessary where technological conditions result in limited competition (such as telecommunications) or where basic needs that might be regarded as fundamental rights are not being met (foodgrains and essential drugs, where the Supreme Court has recently intervened). The modalities of such interventions, however, are best left to specialized government bodies, with the superior courts laying down broad public interest guidelines, ensuring procedural fairness, and enforcing compliance. It is not the job of a competition authority to adjudicate on ‘fair’ prices, unless the pricing behaviour is such as to undermine competition, as with predatory prices.

The real cause for concern is that the Supreme Court has had to set aside orders of the MRTP Commission in which it has ventured into the terrain of ‘fair’ pricing, and the very fundamental differences that evidently exist between these two august bodies in regard to the nature of competition and the proper functioning of a market economy. This is brought out very sharply in the contrasting excerpts from the verdicts of the MRTPC Chairman and the Supreme
Court in the float glass case. Whichever view one supports, this is not a good sign. Apart from unnecessary legal costs and delays, this kind of fundamental disagreement generates uncertainty for those contemplating long-term investments. It is one thing for such differences within the legislative and executive branches of government to result in flip-flops on privatization and regulatory policy, rollbacks in announced taxation measures and utility charges, and proliferating exemptions and adjustments in tariff schedules. These, after all, reflect the deep divisions in society over the distributive consequences of economic reforms, and are inevitable in a democracy. It is quite another matter for such reversals to come about due to conflicting judicial interpretations of the same statute.

Such episodes add another source of uncertainty to the business environment, which can only further depress investment, and can be regarded as examples of the kind of inappropriate judicial activism commented on recently in these columns in a much broader context by Anant and Singh.10 Applying their framework to the present issue, judicial bodies have neither the executive’s technical expertise to gauge the gains and losses to different sections of society that result from interfering with the market mechanism, nor the legislature’s prerogative of representing society’s preferences. Unfortunately, in the MRTP Act, the door to such judicial activism, and to variant interpretations, was kept invitingly open by two props: the ‘price manipulation’ clause of Section 2(o)(ii), and that malleable construct, ‘the public interest’. While the Supreme Court’s verdict in the Rajasthan Housing Board case (see n.8) has removed the first prop, the second is still in place. Although the Haridas verdict upheld the principle of competition, it simultaneously insisted on a public interest test: recall the excerpts from paragraph 54 and 74 above. More generally, after reviewing various sections of the Act, the Court declared:

The impact of reading of the provisions together is that what is sought to be targeted in relation to restrictive trade practice is not the nature or the factum of
the restriction but such restriction should not be prejudicial to the public interest.

(Para 71).

This could lead to more conflicting judgments. As I showed in my earlier articles, the public interest means very different things to different individuals, even amongst the few who have dealt with it in the context of Indian competition policy. The new Competition Act removes the public interest criterion altogether from the adjudication of cases by the Competition Commission, but as I show below it reappears in new guises. And the Act instead empowers the government to issue policy directives to the Commission, to supersede it, or to exempt particular sectors, all in the public interest. I do not intend to belittle the important questions of social policy that go into the public interest test, but using competition policy to deal with them is fraught with difficulties. I address this issue more fully in Section III, which also shows that this difficult balancing of the conflicting objectives of competition policy involves a debate that has been taking place in developed countries for decades.

II

The Competition Act, 2002

With several reservations, in my 2001 *EPW* article I had welcomed the new Competition Bill as a move in the right direction. I had called for its swift passage and implementation, so as to permit the regulation of mergers and more vigorous prosecution of RTPs by foreign firms. This would have strengthened both India’s technical skills in the enforcement of a modern competition law, and also our bargaining position at the upcoming WTO negotiations. The Bill was introduced in Parliament in August 2001, and was referred to the standing committee on Home Affairs. The committee submitted its report in August 2002, but because Parliament was not in session, it was not tabled in Parliament until 21 November. Thereafter, the government moved with alacrity: an amended Bill was passed by the Lok Sabha on 16 December, by the Rajya Sabha
on 20 December, and the resulting Competition Act 2002 received the presidential assent on 13 January 2003. Then the pace slackened: the Act provides for only a Chairman and one Member to be appointed during the first year of the Commission’s existence, which has been earmarked for education and advocacy activities, but the Member was appointed only in July, and the Chairman is to take over only in September. We would have been much better placed had this process been completed about a year ago.

Having discussed the original Bill in my 2001 article, I shall focus here on the amendments introduced during its passage, while raising certain issues I had overlooked in my earlier appraisal. A careful comparison of the final text of the Act with the 2001 draft shows that several crucial changes have been made.11 Some are good, some bad, and some ambiguous because they will depend on how they are implemented. I shall mention a few in each category.

**The Good**

The unambiguously positive amendments can be summed up in a single paragraph. The age limit for the Chairperson has been reduced from 70 to 67 years, although it could have been reduced much further. The Chairperson and Members of the Competition Commission are now debarred from employment with any enterprise that has been a party to a proceeding before the Commission for a year after they leave office, as against six months in the draft. A phrase has been inserted so that, apart from the hierarchy of “Additional, Joint, Deputy or Assistant Directors General” mentioned in the draft Bill, “other advisers, consultants or officers” can now be appointed to assist the Commission, enabling it to draw upon external expertise. Sensibly, the threshold size of business groups subject to merger review now applies to the acquiring group rather than the group to which the target firm belonged. (However, the reservations expressed in my 2001 article about the lack of expertise to evaluate mergers are still relevant.) And finally, provision has been made for the Commission to enter into arrangements with foreign agencies;
this is vital for dealing with cross-border RTPs. More generally, the language of the Bill has been
tightened up, and redundant clauses deleted.

**The Ambiguous**

These amendments require more detailed analysis, precisely because they can be interpreted in
diverse ways.

* A1: The ‘Development’ Criterion. The list of objectives prefacing the Act has been
  amended to include the phrase “keeping in view of the [sic] economic development of the
country”. Correspondingly, the following new clause 19(4)(l) has been inserted into the list of
criteria for determining whether a firm enjoys a dominant position: “relative advantage, by way
of the contribution to the economic development, by the enterprise enjoying a dominant position
having or likely to have an appreciable adverse effect on competition”. A similar clause 20(4)(m)
has been inserted into the list of criteria for determining whether a combination (i.e., a merger or
acquisition) would have an adverse effect on competition. Since ‘development’, like ‘the public
interest’ is a matter of subjective perception, these provisions can be used to exonerate blatantly
anti-competitive activities by large corporations that purport to be promoting development.

Section 38 of the MRTP Act at least listed specific circumstances (the so-called ‘gateways’) that
could be adduced to rebut the presumption that a particular RTP was against the public interest;
the amended Competition Act leaves it entirely to the Commission’s subjective understanding of
‘development’.

On the other hand, such an interpretation may not be sustainable, for the following
reason. Whether a firm is dominant or whether a combination affects competition are technical
issues. Sections 19(4) and 20(4), into which these ‘development’ clauses have been inserted, each
list a dozen or so criteria to guide that determination. Quite distinct from these is the question of
whether there can be a *justification* for allowing an anti-competitive action. As I point out in A2
and B1 below, other exceptions/justifications were inserted into Sections 3 and 4, which define and prohibit anti-competitive agreements and abuse of dominance, respectively. If Parliament wanted to make an ill-advised ‘developmental’ justification available for abusive conduct and for combinations, it should have been included likewise in Sections 4 and 6, which contain the relevant prohibitions. It seems, therefore, that the developmental clauses are redundant, since they in no way help to determine the impact on competition, which is the purpose of the sections into which they have been inserted. Or so it seems to someone with no legal training; no doubt lawyers will have a field day debating the relevance of these clauses.

_A2: The ‘Efficiency’ Defence._ An amendment to Section 3 excludes efficiency-enhancing joint ventures from the prohibition of ‘horizontal’ anti-competitive agreements (i.e., those between competitors). This superficially resembles similar provisions in other jurisdictions. A ‘block exemption’ has been available since the mid-1980s in the EU for joint ventures devoted to research and development, subject to certain conditions. In the US, the 1984 National Cooperative Research Act allowed such ventures to be treated under a ‘rule of reason’, allowing offsetting efficiency benefits to be considered, unlike other arrangements that restrict competition, which are treated as illegal ‘per se’. (These two legal approaches are crucial in the competition laws of most countries, and will be referred to frequently below.) Research joint ventures have also been allowed more recently to engage in joint production to allow commercial exploitation of the fruits of such efforts. Certain ‘vertical’ agreements (i.e. those between firms at different stages in the chain of distribution) are also given conditional block exemptions in the EU, and Article 81(3) of the EU Treaty (reproduced almost verbatim as Section 9 of the UK Competition Act of 1998) permits exemptions for other efficiency-enhancing agreements and concerted practices, provided that they allow consumers a fair share of the resulting benefits, do not impose restrictions that are unnecessary to the efficiency objective, and do not allow for substantial elimination of competition.
In contrast, the new exemption in the Indian Competition Act is too broad, in that it is neither limited to R&D, nor imposes any other conditions. It is simultaneously too narrow, in that it is available only to inter-firm cooperation in one particular legal format, that of a joint venture. Other kinds of agreements might be covered by Section 19(3), which lists certain possible defences including benefits to consumers, improvement of production and distribution of goods and provision of services, and promotion of technical or economic development by means of production or distribution of goods. As in the case of the ‘development’ criterion, these justifications appear incongruously in a section that supposedly lists criteria for judging whether an agreement has an adverse effect on competition. But the more relevant point here is that, unlike the Article 81(3) provisions of the EU, these are permissive rather than mandatory conditions. It is also not clear whether they can over-ride Section 3, according to which certain ‘hard-core’ cartel agreements are presumed to have an adverse effect on competition, which would make such agreements illegal per se. In short, the door has once again been kept wide open to subjective case-by-case interpretations. There also does not seem to be any scope for EU-style block exemptions for specific RTPs in the Act. Section 54 allows exemptions only for “any class of enterprises” in the public interest, or for enterprises performing sovereign functions, or for only those specific practices and agreements that may arise out of any obligation assumed by the government in an international agreement. Thus, ironically, an RTP can be exempted if a WTO agreement requires it to be exempted, but not if the government of India desires an exemption.

Even as regards efficiency-enhancing joint ventures, much depends on how the Commission evaluates ‘efficiency’ in practice. Note that even ANSAC had argued that it was not a cartel at all, but an independent trading company or joint venture, promoting efficiencies that it shared with its customers. It made similar claims (which were rejected) in cases in Europe and
South Africa. If such arguments are accepted by the Competition Commission, ANSAC need not fear the reimposition of an import restriction consequent on the amendment to be discussed under B2 below. And since the efficiency defence has long been available in the EU, their firms will have much greater experience in invoking it in their favour, without having to meet the conditions that would be required in the EU itself.

**The Bad**

Each of the unambiguously negative amendments also needs to be dissected in greater detail.

**B1: The ‘Meeting the Competition’ Defence.** An ‘Explanation’ has been inserted into Section 4 (which deals with the abuse of a dominant position) so as to exclude from its purview unfair or discriminatory conditions or pricing if they are adopted to “meet the competition”, i.e. to match rival offers. In the first place, modern economics does not regard price discrimination as necessarily bad: discrimination allows producers to cross-subsidize low-income consumers who might not be served otherwise, and can be welfare-increasing. If, despite this, discrimination is to be made an offence, then perhaps it is sensible to allow pricing to meet the competition as a defence. But the wording of the Explanation explicitly includes predatory pricing, which is defined in a subsequent ‘Explanation’ to the same section as pricing below cost “with a view to reduce competition or eliminate the competitors”. The “meet the competition” defence, in conjunction with this cost test, will legitimize predatory pricing by firms with ‘deep pockets’: the financial resources to incur losses in order to drive out more efficient producers. Such a defence is not admissible in Europe; it seems to have been taken from the American Robinson-Patman Act, which has been little used in the last 30 years.

While the preceding point makes the amendment appear problematic in principle, two other objections could be innocuous or disastrous, depending on how it is interpreted in practice.
First, a publicly-announced *commitment* by a firm to meet the competition is actually anti-competitive. A dominant firm making this commitment can deter small potential entrants since it can offer consumers a low matching price only on its marginal sales, while the entrants must incur it on their entire sales. The European Commission imposed a fine of 20 million Euros on the chemical giant Solvay for engaging in this exclusionary practice in its sales of soda ash, even though it acknowledged that Solvay had undertaken this and other restrictive measures under pressure from import competition (in fact, from ANSAC).¹⁴

Second, an offer to meet the competition can also serve as a ‘facilitating practice’ to support collusion by producers. The reasoning is as follows. Price-fixing cartel arrangements give each firm an incentive to ‘cheat’ in the form of offering secret discounts. *If* the cheating is detected, and *if* rival firms retaliate, a ‘price war’ results, undermining the cartel. Collusion survives on both these conditions not being met. (This is another reason why modern economics looks benignly on unsystematic price discrimination, since it allows cartels to unravel through cheating.) A discriminatory offer to ‘meet the competition’, on the other hand, means that the seller promises to match any lower price offered by a rival for the same product. This apparently consumer-friendly offer actually supports the collusive price, since it creates both an incentive for consumers to report discounts offered by rivals, and also a binding commitment by the firm to retaliate. Firms employing such a clause are actually discouraging cheating and thereby propping up the cartel. Although this is properly the subject of Section 3 of the Act, rather than Section 4 where the amendment has been inserted, it might be wrongly regarded as innocuous in a cartel case, if the Commission lacks the technical expertise to understand the subtle difference between actually meeting the competition (which can be a legitimate defence) and promising to do so (which should be regarded as an offence).
B2: Import Restrictions Redux. In what seems to be a direct response to the Haridas judgment, a new subsection 33(2) has been inserted, allowing the Commission to issue temporary injunctions to restrain any party from importing goods, if the import is likely to contravene the Act’s sections on anti-competitive agreements, abuse of dominance, or combinations. Such injunctions can be given without hearing the other party. This amendment will reinstate the licence-permit Raj in another guise. It will come as a boon for domestic producers hankering for the good old days of import control when they could shut out import competition altogether thanks to the requirement that a prospective importer produce a certificate to prove that the product was not available in India. A similar power, of course on different grounds and only with respect to imports from particular sources, will now be vested in the Competition Commission, which need not hear the importer at all. Paragraphs 56 and 72 of the Haridas judgment required notice to the respondent, an enquiry to prove an RTP, as well as a public interest test, as prerequisites for granting injunctive relief under the MRTP Act. Sections 3 and 4 of the Competition Act, in contrast, make certain types of collusive agreements and abuse of dominance illegal per se. This is subject to the ambiguous exceptions discussed in A2 and B1 above, but even these cannot be effectively considered at the injunction stage if the opposite party is not given a hearing.

Even if a prima facie case can be established, an import prohibition would not be appropriate. Imports might be targeted for being priced too high (e.g. by a foreign merger or cartel), or too low (by a dominant foreign firm engaged in predatory pricing). If the former, then further restricting competition by shutting out imports amounts to cutting off one’s nose to spite one’s face. The threat of an import restriction might be useful for compelling foreign defendants to cooperate with the investigation and to pay the fine if the case is decided against them, but to shut out their goods for the entire duration of the case is self-defeating. As the two cases that were finally decided in Haridas illustrate, the injunction can remain in force for several years during
the regular hearing, the review hearing, and the appeal to the Supreme Court. There is no way the exporters, the importers, and the ultimate consumers can be compensated for the losses they have suffered in the meanwhile. Requiring the posting of a bond or cash deposit (as in the case of provisional anti-dumping and countervailing duties), to be adjusted against the fine in case the verdict goes against the cartel and refunded otherwise, would be better than denying market access.

If, on the other hand, the impugned practice is predatory pricing, then an import restriction will probably be held to be inconsistent with Article VI of the GATT and the Uruguay Round Anti-dumping Agreement, which lay down a procedure for dealing with low-valued imports, and require domestic laws to be brought into conformity with that procedure. As pointed out in my earlier articles, in 2000 the WTO Dispute Settlement Body held that the United States 1916 Antidumping Act was inconsistent with these requirements, and could not be exempted on the grounds that it was a national competition law. Ironically, India included itself as a third party in that case, on the side of the complainants, the EU and Japan. The US can get away with defying such rulings, but India is likely to be hit by retaliatory tariffs. As the Haridas verdict also pointed out, the appropriate remedy for low-priced imports is an anti-dumping duty, which the Commerce Ministry seems quite ready to impose. Unlike an import prohibition, this brings revenue to the government while maintaining some price discipline on domestic producers – which is why the latter will always prefer the prohibition. The drawback of an anti-dumping case, of course, is that the buyers of the imported product do not get a hearing.

**B3: The Amnesty Scheme.** A new Section 46 allows for imposition of a reduced penalty on a participant in a cartel who makes a full disclosure of having violated the Act. I would have gladly included this in the list of positive amendments (I had suggested something similar in my 2001 article) – except that it provides that such reduction is available only to the first participant
who comes forward, and is not possible if any proceedings or even an investigation have already commenced. Where such provisions have been made abroad, they give investigators the ability to offer leniency to more than one participant, and at various stages of the proceedings, in exchange for evidence that can be used to prosecute co-conspirators. In fact, the amnesty scheme in the USA was largely ineffective for the first 15 years mainly because it did not apply after an investigation had begun. It was amended in 1993 to guarantee complete immunity to a firm that provided evidence to commence an investigation, and discretionary amnesty during the investigation. Consequently, the number of applications multiplied from about one a year to over twenty a year. In 2002, the EU modified its scheme along similar lines.16

III

Broader Issues: History and Political Economy

Thus far, I have employed the analytical toolkit of modern industrial organization (IO) theory, and current practice in the EU and US, to assess India’s old and new competition regimes. This framework privileges ‘efficiency’ as the sole criterion for evaluating outcomes. I had dealt briefly with other objectives in my earlier articles, but here I would like to address them at greater length. Once one moves away from the model-driven world of IO and contemporary practice to more historically-informed research, one is forced to recognise a much greater diversity of practices and objectives. Frederic Scherer, a leading IO theorist with a historical bent of mind, has shown that during the late nineteenth and early twentieth century, restrictive agreements were legal in Britain and France, and actually enforceable by the courts in Germany, while cartels were promoted by the state in both Britain and Germany in the 1930s. Other historical accounts make similar points.17 Active prosecution began in these countries only in the last fifty years, but Britain continued to allow exemptions in the public interest; while in the 1970s the European Community (as it was called at the time) itself encouraged cartels to “wring out excess capacity” in some industries.18 Rationalization agreements are even now covered by a block exemption in
the EU, and crisis cartels can be considered under the 81(3) exemption discussed above. Although ‘efficiency’ is the touchstone for granting such exemptions, they would usually soften the impact of recessions on employment. As the World Bank has pointed out, ‘In contrast with U.S. legislation, the EU’s competition regime emphasizes equity objectives as well, such as employment and measures that encourage cooperation among small and medium enterprises’.19 It is ironic that the EU is now leading the charge to impose uniform competition principles on other countries as part of a WTO agreement.

In order to appreciate the relatively recent arrival of the ‘efficiency’ standard in the developed countries, it is instructive to examine in greater detail the experience of the UK and US. The protean concept of the ‘public interest’ in competition policy was first articulated in Britain’s 1948 Monopolies and Restrictive Practices Act, which involved a procedure that was very different from the Indian MRTP Act. Stephen Wilks’ history20 is illuminating in this respect. The British Monopolies Commission conducted inquiries that led to reports, not cases that led to verdicts. These inquiries were conducted by panels of five part-time members, drawn from the legal profession, the civil service, industry, finance, trade unions and academic economists, with technical support from staff provided by the Commission. Each panel used its own criteria, bound neither by guidelines nor precedents. This permitted a nuanced understanding of the ‘public interest’ in each case. But the recommendations of the panels were not binding, the idea being self-regulation by industry. According to Wilks, this was very much part of the political economy of the ‘post-war settlement’ between capital and labour in the UK, based on accommodation and mediated by bureaucratic and political discretion. After the 1956 Restrictive Trade Practices Act, RTPs were subject to a separate judicial procedure, while monopolies and mergers remained within the purview of the Commission. But the public interest test was enshrined in Section 10 of the Act, which laid down several ‘gateways’ that could be pleaded by the defence, including protection of employment and exports.
In this setting, promotion of competition was, ironically, not a priority of British competition policy until the 1980s. Wilks emphasizes that it is important “to appreciate that the machinery of government was designed as much to restrict competition as to encourage it” (p.25). Efficiency was not a major objective; other goals that were given greater priority at various times included export promotion via building ‘national champions’, full employment, balanced distribution of industry, technical improvement and price control. The 1973 Fair Trading Act was a ‘shotgun marriage’ in which “two pieces of draft legislation – on competition and on consumer protection – were hastily stapled together” (p.184). (In an Indian remake of this episode eleven years later, the square peg of Section V.B on Unfair Trade Practices was forcibly inserted into the round hole of the MRTP Act, and kept there despite the enactment of the Consumer Protection Act with overlapping provisions two years later.) Burdened with so many objectives, it is not surprising that UK competition policy has been judged by most commentators to have been largely ineffective. As Wilks writes: “Economists have been critical of the politicisation of competition policy, the diverse criteria allowed by the public interest test, the apparent incompatibility of the reasoning on different reports and the divergences from the prescriptions of welfare economics” (p.335). But these criticisms, he argues, are beside the point: until the 1970s, “the policy more or less did what it was intended to do. It allowed government to address episodic problems, it provided a façade of control and it allowed industry, on the whole, freedom to operate in a context of reasonable self-regulation. It did not deliver economic efficiency or consumer welfare, but then it was never intended to” (p.340). It “has made a minor contribution to the efficiency of the economy, but a major contribution to the legitimacy of the market” (p.346). With the market presumably having being legitimized by the events of the 1980s and 1990s, the new UK Competition Act of 1998 abandoned this messy balancing of objectives and adopted a clear focus on competition.
Arguably, the Indian MRTP Act, a product of Indira Gandhi’s leftward lurch, sought political legitimacy of a very different kind. But here too, the government exercised similar political discretion in monopoly and merger cases, which it could refer for inquiry to the MRTP Commission, whose reports it could ignore. Few such references were ever made. In RTP cases, on the other hand, the Commission could initiate cases and pass its own orders. Section 38 of the Indian MRTP Act, listing the ‘gateways’, was taken almost verbatim from Section 10 of the UK RTP Act. But in the British Act the ‘public interest’ was restricted to defensive arguments on behalf of the respondents, whereas in India it came to pervade the entire Act. In both the cases that were decided in *Haridas Exports*, for example, losses in employment caused by import competition were accepted by the MRTP Commission as arguments *against* the respondent foreign suppliers. Offsetting gains in employment that would have been encouraged by cheaper inputs for the industries using the products were not considered.

In the United States, the Sherman Act was a product of late nineteenth century animosity towards big business, and the procedure remains a judicial one. Here it is appropriate to discuss the views of Richard Posner,\textsuperscript{21} who uniquely combines the roles of sitting judge, trained economist and legal scholar, and whose judgments and academic writings have contributed substantially to the growing influence of an ‘economic’ approach based on an allocative efficiency criterion in American antitrust jurisprudence. As in the UK, this has occurred only in the last thirty years. Posner shows how until well into the twentieth century, American antitrust legislation was motivated by ‘populist’ concerns about income distribution and the survival of small businesses. But the legislature gave no explicit guidelines for incorporating these goals into the actual working of the laws; according to Posner such guidelines would have been incoherent and unworkable, resulting in serious damage to the economy. He combines a fervent belief in the efficiency criterion with a critique of the internal consistency of the populist position to argue that, given the absence of specific guidelines in the American laws, “the economic approach
emerges as the natural, the feasible and the legitimate guide to interpreting the antitrust statutes” (p.27).

Lack of space precludes a full assessment of Posner’s arguments against the populist position, some of which (such as his assertion that very large personal incomes in the US have little to do with monopoly power) are quite unacceptable. Two others are somewhat persuasive, but ultimately do not support his position. He first argues that once one takes into account the effects of monopolization in raising the demand for producers of substitute goods and for the inputs used in the monopolization process itself, the effects on income distribution are “complex, ramified and unpredictable” (p.23). This is true, but the Theory of the Second Best tells us that the same is true of the impact on allocative efficiency, once one admits the presence of market imperfections (‘distortions’) other than monopoly. By this logic, there would be no ‘economic’ case for antitrust policy either. Posner also challenges the populist belief that antitrust policy can promote small firms, correctly pointing out that they are actually benefited by the ‘price umbrella’ held up by dominant firms or cartels in their industry. But he stretches the argument too far, concluding that “the best overall antitrust policy from a small-business standpoint is no antitrust policy” (p.26). This is sheer hyperbole. First, it ignores other antitrust policies, such as those governing predatory pricing and abuse of intellectual property rights, which can protect small firms from large ones (and poor consumers from large corporations). Whether these measures involve an unacceptably high sacrifice in terms of efficiency is a separate issue. Second, the umbrella argument is inapplicable in markets that are dominated by one or a few large players, without any small fry. In such a context surely antitrust policy can be used on behalf of small firms that are buyers of the product. And finally, even where there are small firms that could benefit from such an umbrella, then it can be deployed without throwing out the entire law, by giving selective exemptions to activities that can be shown to promote small enterprises, or
those owned by historically disadvantaged persons. The new South African Competition Act is an interesting experiment in this respect.²²

These arguments against Posner overlap in one particular situation that is of considerable relevance in developing countries. Where there is already monopoly or monopsony power on one side of the market which cannot be touched, allocative efficiency is not necessarily diminished, and equity is likely to be promoted, by allowing collusive behaviour on the other side. Many developed countries provide exemptions in sectors characterized by unequal bargaining power, such as labour markets, agriculture, fisheries, and small firms that have to deal with large ones.²³

On the whole, however, although I take distributional goals more seriously than most writers on this topic, I have reservations about using competition policy for meeting them. Not because I believe that market outcomes are benign, or in the mythical lump-sum taxes and transfers that economists use to dodge the issue, but because it is difficult to redress the many inequities of the market with a law intended to promote competition. If anything, in requiring recourse to an expensive judicial process which allows for only ‘win/lose’ outcomes, competition policy is inevitably tilted against the less well-off. In the Indian context, the potentially redistributive competition policies mentioned in the preceding paragraphs will be difficult to implement via the Competition Act, since the ‘meet the competition’ defence effectively legitimizes predatory pricing, while authority for preventing abuse of intellectual property rights has been reserved for the Patents Act. There is little that the Competition Act can do to serve distributional objectives except by exempting small producers and particular sectors, through the power available to the government in Section 54.

It is important, however, that as far as possible these exemptions be granted in advance on the basis of sound criteria, rather than to applicants who have the resources to lobby for them.
A focus on the bigger players is already mandated by the thresholds for merger review, and implicit in the criteria defining dominant positions. The exemptions would therefore be needed mainly for anti-competitive agreements. As in the EU, a blanket exemption could be given to agreements involving firms that have a certain maximum turnover and market share. Additional exemptions could be given to particular industries, and in order to limit the effects of political patronage in choosing them, let the rules be written to exempt defensive cartelisation by only those domestic firms facing international competition without significant tariff protection, and either dealing with highly concentrated buyers or sellers, or holding a price umbrella over small competitors and ancillary suppliers. These are verifiable criteria, unlike the nebulous ‘public interest’ test. The first criterion will ensure that bid-rigging by suppliers of non-tradables such as construction services does not get exempted. It will also ensure that for tradables, import competition will impose ‘market discipline’ on domestic producers and prevent serious anti-competitive effects. Even if there is a trade-off between efficiency and equity, there is no particular justification for insisting on a corner solution.

The approach suggested here is a pure ‘safety net’. It does not attempt to replicate the EU’s 81(3) exemption, because the Indian Competition Commission will not have the technical competence to evaluate claims to efficiency for the foreseeable future. Nor does it amount to promotion of particular industries chosen by the government. In particular, I am not endorsing the argument, popular in some circles and frequently raised in India’s submissions to the WTO Working Group, that competition policy should be subservient to East Asian style industrial policies, with state-mandated mergers and cartels. This naively ignores the historical and institutional specificity of the East Asian example, and also the new research that has questioned the merits of that strategy. In any case, the Indian government did not lack the authority to carry out such a strategy. The 1984 amendment to the MRTP Act inserted a new ‘gateway’ under which restrictive agreements could be condoned if they were specifically authorised by the
government, which already had (and continues to have) the power, under Section 396 of the 1956 Companies Act, to bring about mergers in the public interest. I am not aware of these powers ever being used for industrial development policies of the East Asian kind, or even for supporting declining industries. In the Indian context, is there a single example of the state (a) correctly identifying industries in which collective action would result in better outcomes, (b) getting large business houses to agree to take such action against their wishes, and (c) enforcing performance requirements imposed on them? Whether one considers traffic rules, building codes, common effluent treatment facilities or restrictions on water use, the state’s ability to promote collective action and enforce much less complex laws on even small businesses and ordinary citizens has been visibly deteriorating. Granting exemptions to import-competing industries, in contrast, leaves it to them to work out their own solutions.

IV

WTO Negotiations on Competition Policy

For the first few years after it was set up at the 1996 Singapore Ministerial Conference, discussions at the WTO Working Group on Trade and Competition Policy ranged widely over all manner of issues, with little progress towards a consensus on any of them. Despite this, at the 2001 Doha Ministerial, the European Union made a strong bid to bring competition policy onto the WTO negotiating agenda. It continues to interpret the ambiguous wording of the Doha Declaration as a commitment by all WTO members to commence negotiations after the Cancun Ministerial in September this year, leading up to a multilateral agreement which would allow for cross-sectoral retaliation in case of deliberate or unwitting violation. The Declaration also narrowed the Working Group’s mandate in the run-up to Cancun, directing it to study only (a) the applicability of the core WTO principles such as non-discrimination, transparency and procedural fairness; (b) modalities for voluntary international cooperation; and (c) provisions on ‘hard-core’ cartels. I had argued in my 2001 article that India could subscribe to a limited agreement that
would target international cartels, and in order to gain valuable experience and strengthen our bargaining position, the new Competition Act should be vigorously enforced against mergers and cartels involving foreign firms, while going slow for the time being on Indian firms which needed time to restructure in the wake of deregulation and import liberalization.

I am now much more sceptical, however, about the benefits of an agreement. The long delay in passing the Act and constituting the Commission has meant that an opportunity has been lost for building the institutional capacity to engage the developed countries on more equal terms. In the meanwhile, discussions at the Working Group indicate that the EU is going to insist that the WTO principle of ‘National Treatment’ (NT), i.e. non-discrimination between domestic and foreign suppliers, be part of a WTO agreement on competition, which means that it will have to be incorporated into national competition laws.\(^{25}\) India, on the other hand, advanced several reasons in its communication to the Working Group as to why the arguments that make NT vital in respect of trade in goods cannot be extended automatically to competition policy. It also pointed out that since developing countries lack the resources to prosecute the anti-competitive practices of firms located abroad, domestic firms will in practice bear the brunt of a ‘non-discriminatory’ competition law.\(^{26}\) But just a few months later, Parliament passed the Competition Act, which is silent on the question of discrimination, thereby conceding \textit{de jure} NT, which is what the EU wants. The EU submission leaves open the possibility of \textit{de facto} discrimination in the form of discretionary implementation, but this is likely to be a potential area of conflict.

Furthermore, the Competition Act contains what amounts to a \textit{per se} prohibition of exactly the kind of ‘hard core’ cartels targeted by the EU (and more broadly, the OECD).\(^{27}\) The ‘public interest’ gateways of the MRTP Act will no longer be available. Although I have been critical of the way in which this construct was employed, a blanket prohibition on cartels has
equally serious consequences. One can imagine a situation in which highly-paid lawyers representing the EU dairy industry argue before the Competition Commission that Amul, for example, is a price-fixing cartel, paving the way for massively subsidized European exports which have destroyed unorganized small-scale dairy farmers in many developing countries. (Agricultural cooperatives are exempted from provisions of the competition law in most developed countries.) The case for exemptions is equally strong in the case of certain manufactured exports, such as garments and footwear, that are supplied to large ‘oligopsonistic’ buyers in developed countries. Allowing organization of exporters will go some way to level the playing field. Even in other industries, an unfamiliar and complex legal regime disproportionately burdens small firms with the costs of compliance, placing them at a competitive disadvantage relative to larger foreign rivals in a manner that has nothing to do with ‘efficiency’. This only strengthens my argument in favour of exemptions for small firms participating in anti-competitive agreements in tradable sectors.

Selective exemptions might be required even for the large-scale industrial sector that should be the prime target of competition policy. Here there is a further dissonance between the Act and India’s submission to the Working Group. Pointing to deep-rooted imperfections in the markets for land, labour and capital that impede the reallocation of resources in the face of import liberalization, and the absence of social safety nets for those displaced, India had argued for a permissive attitude towards domestic mergers and rationalization cartels to allow for orderly restructuring and downsizing. But while the ‘failing firm defence’ of a merger is recognized in Section 20(4)(k) of the Competition Act, the *per se* prohibition of cartels in Section 3 does not seem to allow for rationalization cartels. As we saw in the preceding section, most developed countries have allowed several exemptions from the cartel prohibition on this and other grounds. Presumably, the government could still use its power to grant exemptions. But this would also involve confronting the controversial NT principle, and could by hijacked by lobbying pressures.
The EU Trade Commissioner was recently quoted as saying that India’s opposition to a WTO agreement on competition is “only tactical because India’s investment regime and competition law are already WTO-plus-plus”. By enshrining both de jure National Treatment and a per se prohibition of hard-core cartels, the Competition Act concedes the EU’s main objectives even before negotiations begin. A multilateral agreement at the WTO will lock in these provisions, and make it difficult to revise them in the light of experience, since any departures will then become subject to dispute settlement and retaliation. The reintroduction of import restrictions as a remedy for foreign anti-competitive practices, apart from being self-defeating, is probably WTO-incompatible and further complicates the situation.

No gains from an agreement

India’s gains from a multilateral agreement are also likely to be illusory. The Competition Act being already WTO-compliant in the eyes of the EU means that we have no bargaining chips, except an offer to bind these provisions in a WTO agreement before we wake up to their implications. Nor is an agreement likely to affect the behaviour of firms and governments in developed countries in meaningful ways. In one of his rare writings on development, Scherer opined that the principal benefits accruing to developing countries from a multilateral agreement would be the control of international cartels that overcharge them for imports, and the replacement of arbitrary anti-dumping barriers to their exports with more stringent predatory pricing rules. The latter is most definitely not on the agenda of the WTO, being opposed by both the EU and the US. On the former, while evidence of international cartel activities is now plentiful, the case for a WTO agreement is questionable. A recent WTO Secretariat study by Simon Evenett, a consultant appointed by the Working Group, offers estimates of the huge amounts that developing countries have lost on account of the operations of some of the forty-odd international cartels that have been prosecuted in the US and EU in recent years. This is based on
a study by Margaret Levenstein and Valerie Suslow commissioned by the World Bank, and also Evenett’s own finding (in joint work with Julian Clarke) that the overcharges of the notorious vitamins cartel were higher in countries with no effective cartel law. He argues in the WTO study that the amount that developing countries could save by a crackdown on such cartels would amount to a significant share of their total imports and dwarf the expenditure that they would have to incur in setting up the necessary regulatory bodies. Although commissioned at the request of countries like India who are opponents of a WTO agreement on competition policy, the study ends up endorsing the idea.

Developing countries should not allow themselves to be enticed into an agreement by calculations of this kind, for if one delves into the methodologies adopted, one begins to recognize the frailty of the results. An updated version of the Levenstein-Suslow study makes several relevant points. First, to the extent that producers in developing countries benefited, whether in their own or export markets, from the price umbrella of the foreign cartels, any calculation of costs based only on losses to consumers is exaggerated. Second, Levenstein and Suslow only report the developing countries’ imports of the products affected by the known cartels, being careful to acknowledge the methodological problems involved in comparing the product descriptions with those of SITC data on trade flows. The latter are broader in many cases, even at the 4-digit level, resulting in an overestimate of the value of cartel-affected imports. What the authors do not acknowledge is that looking at developing countries’ total imports of the relevant products ignores the possibility that a significant proportion could have been supplied by exporters who were not cartel members. These exporters might have raised their own prices under the cartels’ umbrella, but they might equally well have tried to undercut it. China seems to have played this role in a couple of the case studies in the paper. Ignoring the behaviour of such ‘maverick’ suppliers would again overestimate the cartels’ effects.
The WTO study does not mention any of these problems, and calculates losses to developing countries as 20 to 40 per cent of the Levenstein-Suslow import figures. This percentage conforms roughly to the range of price increases found in the EU and US cartel cases. But there seems to be a simple arithmetical error involved here: price increases of this magnitude will correspond to overcharges of 20/120 to 40/140, or roughly 17 to 29 per cent, of the post-cartel value of imports. Using the 20-40 per cent range results yet again in an overestimate. And in any case, assuming the same markups for all countries ignores the fact of international price discrimination, or ‘pricing to market’, which is well established in the empirical international trade literature. Levenstein and Suslow’s case study of the graphite electrodes cartel, for example, shows that the cartel underpriced its exports to India, attracting anti-dumping duties.

The Clarke-Evenett paper avoids some of these problems by econometrically estimating the impact of the vitamins cartel on the value of vitamin imports of individual countries from countries where the cartels were known to operate, controlling for other determinants of bilateral trade flows and for vitamin exports from China, which were an important competitive influence. This is a promising advance, but the dummy variable they use to capture the effectiveness of a country’s competition policy is rather crude: a country reporting any action taken against a cartel to the OECD Global Forum on Competition Policy in 2001 or 2002 is classified as having ‘active cartel enforcement’ for all the years since 1985, or the year its national cartel law came into force, whichever is later. By this criterion, India is classified as not having active enforcement, which is probably an accurate characterization. But had India reported the MRTP injunction that was then in force against ANSAC, it would have been classified as having an active policy since 1985! Similar non-reporting might have resulted in misclassification of some of the 65 other countries categorized as not having active cartel enforcement; conversely, a country reporting a stray case of enforcement (to impress the OECD Forum?) would be classified as having an active enforcement record.
Even if we grant that international cartels are a serious problem, will a multilateral agreement help in curbing their activities? In an earlier published paper, Evenett, Levenstein and Suslow have themselves shown considerable scepticism about a WTO agreement being able to deliver the goods, for three cogent reasons. First, they present evidence that once cartels are detected, they take other forms such as mergers, joint ventures, and technology licensing agreements – and there is no proposal for an international agreement that will cover all these. Second, the widely diverging practices in member countries will be difficult to reconcile in a way that can be codified in an agreement subject to WTO dispute settlement. Third, they cite a standard result from cartel theory according to which the gains from cartelization of firms that compete in many markets exceed their gains from cartelizing in each individual market. This means that fines based on the latter (which is the most that a WTO agreement will arrive at, since it leaves enforcement to national agencies) will be insufficient to deter cartels that operate in many countries. They conclude that “For all these reasons a WTO agreement is, at present, unlikely to remedy the deficiencies of national anti-cartel enforcement”.

To these arguments, one can add several more. Prosecution of foreign cartels requires cooperation from the authorities in their countries to obtain evidence. But such cooperation is lacking even between the member countries of the OECD, amongst whom a fair amount of communication and institutional convergence has occurred on antitrust matters. A recent official review has expressed disappointment about restrictions imposed by various members on sharing even non-confidential information obtained in the course of an inquiry. Moreover, the EU and US will not contemplate a WTO agreement that would require them to extend cooperation on anything other than a voluntary basis to the competition authorities of other countries. They also oppose the extension of the WTO’s MFN principle (prohibiting discrimination between members) to the bilateral cooperation agreements they have entered into with each other and
some selected partners. The US also insists that its export cartels will continue to be exempted from antitrust scrutiny, and that its laws do not allow for prosecuting firms that have adverse effects only on foreign parties. With no promise of effective international cooperation, developing countries are being asked to set aside financial and human resources to set up competition agencies and crack down on their own cartels, in pursuit of the mirage of the supposedly huge gains that will accrue to them once international cartels are magically brought to heel.

Even developing countries that already have competition agencies in place, and some experience of their working, are likely to lack the relevant enforcement capability. The kind of WTO agreement being proposed would merely require members to enact non-discriminatory anti-cartel laws. If that is all that is needed to deal with the problem of cartels, then India’s MRTP Act, the relevant sections of which were taken almost verbatim from the UK RTP Act, would have been a powerful weapon (at least until the Haridas ruling divested it of extra-territorial jurisdiction). But India’s track record in prosecuting even domestic cartels is quite dismal, and in this respect the classification in the Clarke-Evenett study is accurate. Only one per cent of MRTP cases reported during 1991-98 involved Section 33(1)(d), which covers price-fixing and bid-rigging. Since then, only three further cases have been decided by the MRTP Commission under this section (all in 2002), and none of these involved the successful uncovering of a conspiracy. Two complaints were dismissed for want of evidence, and the third (fixation of service charges by the Indian Banks’ Association) was disposed of on the grounds that the Reserve Bank of India had already given instructions to discontinue the practice. We now have ambiguous anti-cartel provisions in the Competition Act (A2 above), a leniency clause that will probably be ineffective (B3 above), an inexperienced Competition Commission, and the MRTP Commission’s legacy of importing non-competition concerns into competition policy, all of which will make it difficult to
engage the competition authorities of developed countries on their own terms and obtain their assistance, even if they should be willing to extend it.

For all these reasons, domestic as well as international, I now believe that India should resist a multilateral agreement on competition. As a fall-back position, in return for concessions in other areas such as TRIPS, a limited agreement could be negotiated that (a) provides for a prolonged implementation period to allow capacity building and informal international cooperation; (b) is confined to measures that actually restrict trade, provided it is even-handed as between export cartels and import cartels that could countervail them; and (c) allows for exemptions of sectors, practices and core principles like NT, perhaps by adopting the ‘positive list’ approach of GATS, which allows only certain sectors to be bound by multilateral disciplines, with the option to exclude NT for some of them. These privileges could be demanded under what is known in WTO parlance as ‘flexibility and progressivity’, if not ‘special and differential treatment’, for developing countries. Ideally, any agreement should be plurilateral and outside the WTO Single Undertaking, allowing members to sign in when they are prepared and to sign out if they find it too costly, without prejudice to their rights under other agreements. Another option being talked about very recently is a ‘soft’ agreement that would provide a forum for consultation, voluntary cooperation, capacity building, and peer review of national policies, without any binding obligations. Better still, such an agreement could be outside the WTO framework altogether.

Several recent developments are propitious for confronting on the EU on this issue. Having lost a string of WTO disputes, including several with the EU, and even though it refuses to comply with adverse rulings, the US is now much less enthusiastic about the WTO. It is less likely to sign on to a new agreement that limits its options, especially on a subject on which it has far greater experience than any other country. Its interventions in the Working Group have been
decidedly sceptical. On the other side, India’s negative position has been supported by the representatives of Venezuela, Malaysia, Cuba, Hong Kong, and – repeatedly and emphatically – by Pakistan. While Indonesia and Korea did not oppose an agreement, they argued strongly for the right of members to grant exemptions. This degree of solidarity is significant. After differences appeared between developing countries at both the Singapore and Doha Ministerial Conferences, voices were raised in India calling for aggressive pursuit of the ‘national interest’, abandoning outdated notions of Third World unity. While it is true that there are inherent conflicts of interest between developing countries on various issues, going it alone will only play into the ‘divide and rule’ strategy of the more powerful members. Developing countries have good reason to be wary: the Uruguay Round resulted in agreements whose implications they did not fully comprehend, forcing them to reduce their own trade barriers and subsidies while leaving loopholes for developed countries to exploit, often with devastating consequences. The same is likely to happen with an agreement on competition policy, on which there is scope for putting together a ‘coalition of the unwilling’.

V

Summary and Conclusions

This paper has shown that on the vital question of the application of competition policy to international trade, India has swung from one extreme to the other and then back again. First, the MRTP Commission imposed injunctions on imports. As discussed in section I, the Supreme Court’s verdict in Haridas Exports rightly overturned these, but also made it difficult to take any effective action against anti-competitive practices originating abroad. Then, one of the many amendments to the Competition Bill (discussed in section II) again permitted injunctions on imports, a measure which I argued in B2 above is self-defeating and in probable violation of WTO rules. The other amendments, too, create more difficulties. In my 2001 EPW paper (see n.2), I had expressed concern that even the many progressive features of the new law could be
undone by the lack of suitable technical expertise to interpret it, and that our experience with the MRTP regime left much to be desired in this respect. While the Competition Act does allow for phased implementation, involvement of outside experts, and a year of purely educative activities, the amendments (especially those discussed under A1, A2 and B1 above) put an even greater burden on the Commission’s ability to make reasoned judgments based on quite complex technical criteria. In regard to cartels, the penalties have been substantially hiked, but the new leniency provision, as I argued in B3 above, is likely to be ineffective. Furthermore, some of the amendments will work in favour of foreign firms, for example in allowing an efficiency defence without the conditions that would be imposed in their home jurisdictions; or the ‘meet the competition’ defence even in cases of predatory pricing, which will help firms with financial deep pockets.

Section III of the paper examined broader issues of political economy, governance, and income distribution to show that while the obsession with allocative efficiency that colours the debate is of relatively recent origin, there is little that competition policy can do to secure distributional objectives in the Indian context, except through selective non-implementation. I suggested an empirical criterion for such exemptions, to minimize the chances of political favouritism and of excessive damage to competition. Finally, I argued in section IV that the legacy of the MRTP Act, the imperfections of the Competition Act, and the intransigent stand of the US and EU on important issues, will adversely affect India’s ability to benefit from a possible WTO agreement on competition policy, which could also impose onerous costs of compliance on Indian firms. Such an agreement should therefore be resisted or at least severely circumscribed by a prolonged implementation period and scope for exemptions.

The note on which I would like to conclude this paper is with a plea for greater economic input into the formulation and enforcement of competition policy. At a minimum, given the
limited expertise that is available, economic analysis can suggest screening devices based on empirically verifiable aspects of market and product characteristics that will help to narrow down the list of cases for investigation and prosecution. Then, given that antitrust enforcement worldwide has moved away from holding certain practices illegal *per se*, economics can provide one kind of reasoning to support “rule of reason” judgments. Ex post, economic (and even statistical) analysis of judgments can help to highlight systemic failures. Analyses of this kind (such as those by Scherer and Posner) show that even in developed countries, competition policy is not always consistent, based on economic logic, or immune to politics. Economic inputs can also contribute to the formulation of amendments to the law. The Patents and Companies Acts have been repeatedly amended in recent years, and it is obvious from my analysis in Section II that the Competition Act needs the same treatment. Apart from amendments, economic analysis can suggest guidelines for enforcement, operationalizing the multiple criteria in the Act. These guidelines should be widely publicised and replace subjective case-by-case interpretation. This would reduce uncertainty, delays and legal costs. The insights provided by modern economics into strategic behaviour by firms can help to prevent unintended outcomes, such as those discussed in B1 above, even if its efficiency criterion is not adopted as the sole method of judging them.

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Notes

[NB: All WTO documents cited here (those numbered WT/WGTCP/…) can be accessed from the

1 ‘Predation, Protection, and the Public Interest’, EPW, 8 December 2000. See also C. Satapathy,

2 ‘Competition Policy: India and the WTO’, EPW, 22 December 2001. I have attempted a more
comprehensive analysis of the past and future of Indian competition policy, in light of the
prospects for a WTO agreement, in my essay ‘Trade, Investment and Competition Policy: An
Indian Perspective’, in Aadiitya Mattoo and Robert M. Stern (eds.), India and the WTO: A

3 (2002) 6 SCC 600.

4 Id., paras 33, 34, 40, 42-46, and 57-61.

5 Id., paras 71-73.

6 All India Float Glass Manufacturers' Association vs P.T. Mulia Industrindo & Others, 2000
CTJ 252 (MRTPC), para 21 of the Chairman’s order, quoted at greater length in my 2000 EPW
article.

7 Id.

8 Principal, Apeejay School vs MRTP Commission, (2001) 8 SCC 702; Rajasthan Housing Board

9 Director General (I & R) vs Modi Alkali and Chemicals Ltd and Ors., II (2002) CPJ 19
(MRTP). Quotation from para 16.

10 T.C.A. Anant and Jaivir Singh, ‘An Economic Analysis of Judicial Activism’, EPW, 26
October 2002.

11 I have compared the draft bill with the gazetted Act posted on the website of the Department of
Company Affairs, www.dca.nic.in. I have also referred to the official proceedings of the Lok
Sabha for 16 December 2002 when the amendments were moved, available at
http://164.100.24.208/debate/debtext.asp.

12 F.M. Scherer, Competition Policies for an Integrated World Economy (Washington: Brookings,
1994), pp. 60, 102. Scherer cautions that these agreements might actually retard innovation.

13 These are defined in various EU and OECD documents as collective agreements involving
price-fixing, market-sharing, output restriction and bid-rigging. These are precisely the types of
agreements listed in Section 3(3) of the Competition Act which are presumed to be anti-
competitive, and anti-competitive agreements are prohibited.


F.M. Scherer, op.cit., pp.23-27; Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press, 1999), pp.11-12. See also Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002), pp.91-92. This remarkable and wide-ranging little book shows that the policies and institutions that today’s developed countries are trying to impose on developing countries are very different from the ones that they themselves adopted at a comparable stage of development. I summarize and critically appraise Chang’s book in the *Indian Economic Review*, 38(1), January-June 2003, pp. 126-29.

Scherer, p.53. For legal reasons, the EU is still known as ‘the European Community and its member states’ in the WTO; for simplicity I refer to it as the EU throughout.


Wilks, *op.cit.*


See WTO document WT/WGTCP/W/220.


WT/WGTCP/W/222.

WT/WGTCP/W/216.

See n.13 above. As discussed under A2 above, the status of the possible mitigating criteria in Section 19(3) relative to this prohibition is unclear.

WT/WGTCP/W/216.


India has emerged in the last few years as a major user of anti-dumping, and most of its own actions would fail the tests required in predatory pricing cases, so it is probably quite willing to go along with this.

WTO Secretariat, op.cit. (WT/WGTCP/W/228), paragraphs 293-304.


On the other hand, Levenstein and Suslow’s sample included only those cartels which were successfully prosecuted in the EU or US, and excluded from that list cartels in the services sector and those for which no reasonable match could be found in the trade data. These omissions would lead to an underestimate of the losses inflicted by cartels. With such large errors in both directions, the WTO study gives a false sense of precision in comparing these estimated losses to magnitudes such as developing countries’ imports, competition agency budgets, aid receipts, and gains they would obtain from liberalization of agricultural policies by the developed countries.


See the country positions stated in the report of the Working Group meeting of July 2002, in WT/WGTC/M/18.


This is based on an investigation of all RTP cases reported in the *Consumer Protection Journal* from 1999 to 2002. The handful of cases reported under Section 33(1)(g), which relates to output restriction or market sharing agreements, all turned out to be cases against single firms rather than cartels.

See the sharp exchanges between the EU and US representatives at the February 2003 meeting of the WTO Working Group, WT/WGTC/M/21, paras 28-31 and 82-83.

WT/WGTC/M/18, paras 35-39.
For a carefully documented and compellingly written account of the developed countries’ hypocrisy on trade agreements and what it has meant for developing countries, see *Rigged Rules and Double Standards* (London: Oxfam, 2002), available from [www.maketradefair.com](http://www.maketradefair.com) or [www.oxfam.org.uk](http://www.oxfam.org.uk).