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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from India

-- Session I --

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. The Government of India has recently enacted a modern competition law in the form of the Competition Act, 2002 (12 of 2003). The Central Government has also established the Competition Commission of India w.e.f. 14.10.2003 to carry out the objectives of the Act. The Monopolies & Restrictive Trade Practices Act, enacted in 1969, dealt with some competition issues. The MRTP Act was too narrow in its sweep to deal with competition issues especially in the era of liberalisation and globalisation. The MRTP Commission had taken up complaints against anticompetitive practices but was handicapped on account of certain limitations in the law. These limitations have been adequately covered in the new law. A couple of illustrations are given below relating to the limitations of the MRTP Act as well as those provisions of the new law that get these infirmities.

2. The All India Float Glass Manufacturers' Association (the Association) filed a complaint and also an application for grant of temporary injunction before the Monopolies and Restrictive Trade Practices Commission (the MRTPC) against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices in terms of the MRTP Act, 1969. In the complaint, it was stated that the float glass of Indonesian origin was being exported into India at the CIF price of US\$155 to 180 PMT. At this price, some float glass had been shipped into India during the period December, 1997 to June, 1998. It was alleged that these sale prices were predatory prices as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product. The complainant also furnished figures indicating the estimated cost of float glass internationally as well as the cost of production of float glass in India with a view to demonstrate that the Indian manufacturers of float glass would not be able to compete with the price at which the Indonesian manufacturers were presently selling or intending to sell to India consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price of US\$155 to 180 PMT will restrict, distort and prevent competition by pricing out Indian producers from the market. The MRTP Commission instituted an enquiry on the complaint and granted interim injunction restraining the Indonesian companies from exporting their float glass to India at predatory price.

3. The Alkali Manufacturers' Association of India (AMAI) filed a complaint as well as an application for grant of temporary injunction before the MRTP Commission alleging that American Natural Soda Ash Corporation (ANSAC), consisting of six producers of natural soda ash, have joined hands together to form an export cartel by virtue of a membership agreement amongst them entered into in America on 8th December 1983. By this agreement, the six producers had agreed that all export sales by them or by any of their subsidiaries will be made through ANSAC which was set up as a Corporation in accordance with the provisions of United States Export Trade Act, 1918. It was further alleged in the complaint that the ANSAC is an attempt to invade the Indian market and undercut the Indian producers, as it sold American soda ash to Indian consumers at an unrealistically low price of US\$132 PMT – CIF. With a view to circumvent the prohibition of Indian law against Monopolistic Restrictive and Unfair Trade Practices a strategy was adopted by ANSAC by selling American soda ash to Indian consumers through M/s. G. Premjee of Singapore in whose favour the Indian producers had opened letters of credit. According to the complaint there was a bulk soda ash by ANSAC to Indian consumers through the conduit of M/s. G. Premjee of Singapore. According to the complainant, ANSAC was a cartel of American Ash Soda producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of soda ash. The MRTP Commission instituted an enquiry and passed an ad interim injunction which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly.

4. Aggrieved with the orders passed by the MRTP Commission, the appellants namely, M/s. Haridas Exports on behalf of Indonesian companies and the ANSAC filed an appeal in the Supreme Court of India which *inter alia* passed the following orders:

- the MRTP Commission can *inter alia* take action when a restrictive trade practice is carried out in India in respect of imported goods. In both the cases, 'goods' have not been imported into India and hence the matters are beyond the jurisdiction of the MRTP Commission;
- Under the MRTP Act, there is no power to stop import;
- the MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission;
- if a cartel is selling goods to India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.

5. The Competition Act, 2002 *inter alia* provides for the following:

- the term "cartel" has been explicitly and unambiguously defined in Section 2(c) of the Act as "cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services";
- the term "predatory price" has been explained in clause (b) in Explanation below Section 3(2) of the Act: "predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors";
- the Commission is vested with the power to restrain temporarily any party from importing such goods until the conclusion of such enquiry or until further orders;
- the Commission has been conferred u/s 32 of the Act power to enquire into Acts taking place outside but having adverse effect on competition in India.

6. The newly enacted Competition Act has removed deficiencies noticed in the MRTP Act.