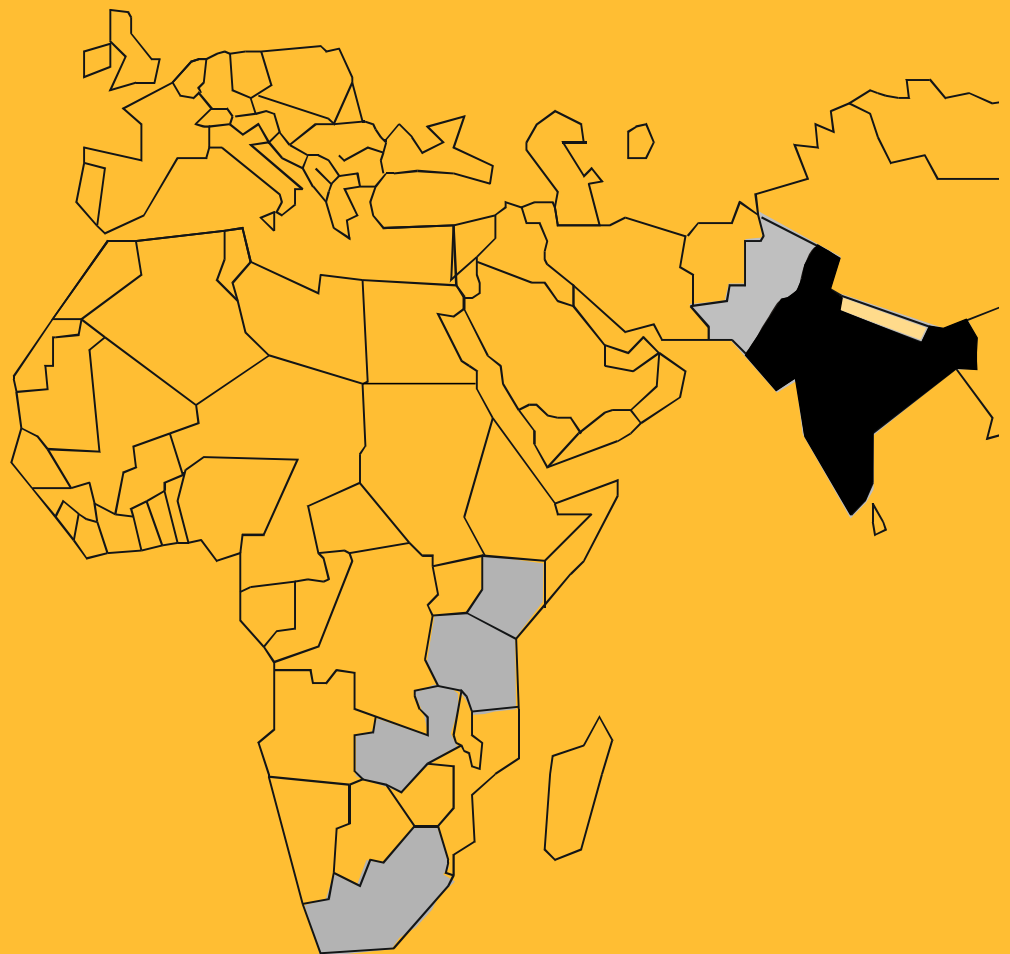



REORIENTING COMPETITION POLICY AND LAW IN INDIA



 National Council of
Applied Economic
Research

कट्स  CUTS
Centre for International Trade,
Economics & Environment

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LIST OF ABBREVIATIONS

| | |
|-------|--|
| AMAI | Alkali Manufacturers' Association of India |
| ANSAC | American National Soda Ash Corporation |
| BIFR | Board for Industrial and Financial Reconstruction |
| BPL | Below the Poverty Line |
| CA | Competition Authority |
| CERC | Central Electricity Regulatory Commission |
| DGIR | Director-General of Investigation and Registration |
| EOU | Export Oriented Unit |
| EPZ | Export Processing Zone |
| EXIM | Export-Import |
| FERA | Foreign Exchange Regulation Act of 1973 |
| FII | Foreign Institutional Investors |
| FIPB | Foreign Investment Promotion Board |
| GDP | Gross Domestic Product |
| IT | Information Technology |
| MIGA | Multilateral Investment Guarantee Agency |
| MNC | Multi-National Corporation |
| MRTPA | Monopolies and Restrictive Trade Practices Act of 1969 |
| MTP | Monopolistic Trade Practice |
| PMP | Phased Manufacturing Programme |
| PSU | Public Sector Undertakings |
| QR | Quantitative Restriction |
| RTP | Restrictive Trade Practice |
| SEBI | Securities & Exchange Board of India |
| SSC | Staff Selection Commission |
| SSI | Small Scale Industry |
| TRAI | Telecom Regulatory Authority of India |
| UN | United Nations |
| UTP | Unfair Trade Practice |
| VRS | Voluntary Retirement Scheme |
| WTO | World Trade Organisation |

FOREWORD

The decade of the 1990s has been a very active period for economic reforms in India. After more than four decades of a command-and-control orientation in the economic policy, a decisive break was made in 1991 towards liberation of the country's economy. The key feature of this new approach has been the promotion of competition in all the sectors of the economy in order to introduce greater efficiency in resource use and, hence, induce higher economic growth, all round. The introduction of competition requires the removal of the many regulations that hinder entry and exit in different segments of the economy. It is only after such changes, legislative or otherwise, have been put into effect that the role of modern competition law becomes relevant.

The Government of India appointed a "High Level Committee on Competition Policy and Law" in 2000, of which I had the privilege of being a member. This Committee explicitly recognised the importance of the pre-requisites of competition policy and law. It emphasised that even after the many reforms that have been implemented over the past decade, much more remains to be done if real competition is to become the norm in the Indian economy. There has, unfortunately, been much more discussion on the *competition law* recommended by the Committee than on the recommendations on *competition policy* that need to precede such a law. The Committee also commented on the need for competition advocacy before the promulgation of a competition law. Legal provisions on any issue are difficult to enforce unless there is widespread understanding of such issues in the public, at large, and in the judiciary, in particular.

This report contributes to the understanding of competition policy and law in India by providing a background to the economic policies that existed before the reforms and also a bird's eye view of the reforms of the 1990s. It summarises the provisions of the extant competition law in the shape of the Monopolies and Restrictive Trade Practices Act (MRTP) and how it has operated in practice. The information collated on the actual administration of the Act and the staff and infrastructure back up provided by the Government is particularly illuminating. The administration of a complex legislation that is typical of any modern competition law requires sophistication and expertise in the staff that administers it. This has traditionally been lacking in the many regulatory and other authorities that have often been set up in India. As the economy is further liberalised and command-and-control mechanisms progressively give way to competition and regulation, we will need to give much greater attention to the new requirements of governance in the new regulatory authorities. This is a problem that is common to most developing countries.

Review programmes, such as this one, will help in providing adequate information in a cross-country framework so that policy-makers can understand the need for devising new administrative frameworks that are suitable for dealing with the emerging realities of economic administration. I am also glad that this paper gives adequate attention to economic policy as a whole in the context of competition policy, rather than a narrow focus on competition law itself.

Dr. Rakesh Mohan
Director & Chief Executive
Indian Council for Research on
International Economic Relations

PREFACE

The economic environment in India has changed substantially over the past decade, with the launching of wide-ranging policy reforms. Starting from the trade sector and industrial licensing, the scope of reforms has, gradually, broadened across virtually all the sectors of the economy, as well as deepened over time, resulting in a gradual decline of the role of the state in production and regulation of the economy. Towards the end of the last decade, partly in view of the changing economic landscape, the Government of India sought to bring within its ambit of reforms another important regulatory area, namely, competition law and policy. Consequently, it set up a Committee to review the existing law, the Monopolies and Restrictive Trade Practices Act, 1969, and to propose a more modern law.

The desire to review and reform the existing competition law was also based on the vast changes in the global economy, resulting in a far greater integration of markets and economies. An important element of the changing global environment was the signing of the Uruguay Round of trade agreements and the creation of the World Trade Organisation. These changes have led many other countries, both developing and developed, to modify their competition laws and policies.

Subsequently, competition concerns in the new environment, both in terms of domestic anti-trust issues, as well as cross-border implications of mergers and acquisitions, have been acquiring even greater attention and have also edged into the arena for the next round of global trade negotiations. The Singapore Ministerial Declaration in 2001 identified Competition Policy as one of the issues to be studied, as it could potentially be a part of the new trade negotiations.

Despite its growing importance, competition policy remains an area of relatively low awareness in India and is subject to substantially divergent views regarding the nature, scope and powers of any new competition law and competition authority in the country. The report of the Committee appointed by the Government of India to propose a new law, submitted in May 2000, reflected this plethora of views with a note of dissent from one member, another comment of dissent from three other members and supplementary notes by two members. Even the Chairman of the Committee expressed considerable sympathy with the dissenting views. A new competition law for India, based on the proposals of the Committee, has been submitted to the Parliament and is under review by a Parliamentary Sub-committee.

How specific laws are implemented is often as important as the content of the laws themselves. Indeed, the printed text of the law can, often, be at substantial variance from the law as it is practised, depending on the nature of implementation. This is a critical issue for competition law, particularly in the context of developing countries like India, and is the focus of the Report presented here. This Report is a part of a seven-country study of the implementation of competition laws in select developing countries of South Asia and sub-Saharan Africa, undertaken by CUTS, Jaipur, in which NCAER is the partner responsible for India. I would like to thank CUTS for its continuing partnership with NCAER in areas of common interest.

The Report reviews the existing Competition Law, the MRTP Act and the proposed new law, focusing on the implementation of the MRTP Act. A number of important issues, such as the division of overlapping jurisdictions between the Central Competition Authority and Sectoral Regulators, the composition of the new Competition Authority proposed under the new law and, perhaps most importantly, the extent of discretionary powers to be vested with the new Competition Authority, still elude broad consensus in the country. However, by pulling together the diverse elements of the competition regime in India and focusing on the gaps between the laws and their implementation, it is hoped this Report will lead to improved awareness of this critical area of policy reform in the economy.

I would like to thank Dr. Pradeep Srivastava and Mr. Sanjib Pohit for their hard work in preparing this report.

Dr. Suman Bery
Director General
NCAER

CHAPTER-I

Introduction

In October 1999, the Government of India constituted a committee to examine the provisions of the existing Competition Law, the Monopolies and Restrictive Trade Practices Act, 1969, and to propose a more modern law. The committee was to submit its report within three months from its constitution.

The removal of government from non-essential commercial arenas and the lowering of barriers to external trade had, generally, increased the scope of competition in the economy.

The need for a new competition law was based, primarily, on two factors. First, the economic environment had undergone substantial transformation following the structural reforms initiated in 1991. In particular, pernicious government controls on industry had been reduced. Licensing, limitations on installed capacity and its expansion and other such restrictions on firms' decisions had been dismantled, as had extensive restrictions on external trade. Economic reforms were gradually deepened and broadened during the 1990s to include sectors such as the financial sector. Government controls on prices of various essential items, such as food-grains, kerosene, diesel and petrol, which had been administered through different government agencies, had also been disintegrating due to fiscal pressures (although they are not yet fully dismantled). The removal of government from non-essential commercial arenas and the lowering of barriers to external trade had, generally, increased the scope of competition in the economy.

The draft Bill of a new Competition Law, following the Committee's Report, is with a Parliamentary Sub-committee, and the debate is still going on.

Second, parallel to domestic reforms, the global economy had undergone wide-ranging changes, resulting in far greater integration of markets and economies. An important element of the changing global environment was the signing of the WTO agreements. The changing international situation was reflected in changes in the competition regimes elsewhere, such as in the UK, Canada, Australia and the European Community. A fresh look at India's competition law was seen to be desirable in the light of these developments.

Instead of the three months allotted to it, the Committee took six months, during which it was named the 'High Level Committee on Competition Policy and Law'. Its report, released in May 2000, was quite remarkable for the lack of consensus among the members.

The Report of the High Level Committee and the proposed new Competition Law envisage the creation of a Competition Commission of India to replace the Monopolies and Restrictive Trade Practices Commission.

The disagreement within the Committee was reflected outside, with considerable debate in public policy discourse on the Report, in particular, and Competition Law and Policy, in general. The draft Bill of a new Competition Law, following the Committee's Report, is with a Parliamentary Sub-committee, and the debate is still going on.

This report focuses on one aspect of the wide-ranging debate on the new Competition Law in India, namely, that of enforcement. Specifically, both the Report of the High Level Committee and the proposed new Competition Law envisage the creation of a Competition Commission of India to replace the Monopolies and Restrictive Trade Practices Commission. The amount of power that the new Commission should be vested with is also a matter

of discussion. At one level, there are significant concerns regarding the creation of another 'super regulator' that will allow the government to intrude into the market in ways reminiscent of the old-style control. On the other hand, a competition authority without teeth may prove ineffective. There are also questions about the composition of the new Competition Authority, in terms of the skills of the members, and the appropriate minimum and maximum ages.

The manner in which laws are enforced is as important as the content of laws themselves. Thus, the nature of the new competition authority, its mandate and its composition, are important issues in the transition to a new competition regime in India.

The manner in which laws are enforced is as important as the content of laws themselves. Thus, the nature of the new competition authority, its mandate and its composition, are important issues in the transition to a new competition regime in India. This report approaches these questions by looking at the history and workings of the previous (and current) Competition Law and Authority to draw lessons for the future.

The outline of the report is as follows: Chapter Two gives an overview of the social and economic context in which competition policy must function; Chapter Three examines the other policies which the Government of India is pursuing and how these influence the competitive environment; Chapter Four lays out the scope of the existing Competition Law, describing its objectives, focus and coverage; Chapter Five includes a discussion of the administrative aspects of the Competition Authority; Chapter Six presents an assessment of its capacities and workings; Chapter Seven analyses the proposed Competition Law, drawing on the experiences with the previous Competition Law and Authority; and Chapter Eight concludes the Report.

Socio-Economic Development Context

2.1 Key Demographic Characteristics

India is the world's largest democracy. Geographically, it is the seventh-largest country, with a landmass of 3.29 million square kilometres, and it is second only to China in terms of population. According to the latest census, India's population in 2001 stands at 1.027 billion.. Notwithstanding its relative poverty, India, with more than a billion people, almost 17 percent of the global population, represents a truly large economy. By 2050, UN demographers project, it will house another 530 million people, to reach a total of more than 1.5 billion, making it the world's most populous country.

Like most developing countries, India has been urbanising rapidly. At the same time, it still has high levels of poverty and illiteracy.

Like most developing countries, India has been urbanising rapidly. The urbanisation level is approximately 30 percent, comprising about 300 million people. There are already more than 300 cities with a population of more than one hundred thousand and 23 cities with a population exceeding one million.

At the same time, India still has high levels of poverty and illiteracy. The official concept of poverty in India is based on a calorie norm. Families which cannot afford enough food to reach a stipulated minimum calories per capita per day are defined to be below the poverty line (BPL). The calorie norm is 2400 calories per day in rural areas and 2100 calories in urban areas. Using this measure, poverty in India has declined steadily since the mid-seventies, with the head count ratio (the proportion of the population below the poverty line) dropping from about 55 percent in 1973-74 to about 26 percent in 1999-2000.

Table 1: Estimates of Poverty – Percent of Population under the Poverty Line

| Year | All India | Rural | Urban |
|-----------|-----------|-------|-------|
| 1973-74 | 54.9 | 56.4 | 49.0 |
| 1977-78 | 51.3 | 53.1 | 45.2 |
| 1983 | 44.5 | 45.7 | 40.8 |
| 1987-88 | 38.9 | 39.1 | 38.2 |
| 1993-94 | 36.0 | 37.3 | 32.4 |
| 1999-2000 | 26.1 | 27.1 | 23.6 |

Source: Planning Commission, Government of India

Note: The figures are estimated on a 30-day recall basis

With regard to literacy, latest data (2001 census) show that, for the first time since the country gained independence, the absolute number of illiterate people has shown a decline. This level dropped by 31.96 million during the ten years between 1991 and 2001. However, levels of illiteracy still remain high. One quarter of the male population and close to half of the female population in the country is illiterate.

2.2 Key Economic Indicators

At the macro-economic level, the performance during the past decade has been remarkable in many ways, with India's real GDP growth in the 1990s being among the highest in the world.¹ At the same time, inflation rates have been low and the external position has been comfortable, with current account deficits ranging mostly from 1 to 1.5 percent of the GDP. This performance was achieved despite three years of negative agricultural growth (1991/92, 1995/96 and 1997/98),² significant political uncertainty, which saw five elections in three years, the Asian financial crisis of 1997 and 1998, international economic sanctions following the tests of nuclear devices in 1998 and increasing volatility in international oil prices in the late 1990s.

Following the macro-economic crisis in 1991 and the intensification of economic reforms, the real GDP growth rate leapt above seven percent for three consecutive years, starting in 1994/95 (see Table 2). The increase in growth rates was related to rising exports and private investment, strong growth in the services sector, and a relatively strong agricultural performance.

Table 2: India's Economic Performance in the 1990s

| Year | GDP Growth | Investment (% of GDP) | | Consumption (% of GDP) | | Exports | Imports |
|---------|------------|-----------------------|---------|------------------------|---------|---------|---------|
| | | Public | Private | Govt. | Private | | |
| 1990-91 | 5.6 | 9.4 | 13.8 | 11.5 | 62.1 | 5.8 | 8.8 |
| 1991-92 | 1.3 | 9.5 | 12.6 | 11.3 | 62.4 | 7.3 | 8.3 |
| 1992-93 | 5.3 | 8.5 | 14.0 | 11.1 | 61.7 | 7.8 | 10.2 |
| 1993-94 | 6.2 | 8.0 | 13.4 | 11.4 | 67.2 | 8.3 | 9.8 |
| 1994-95 | 7.8 | 8.8 | 13.2 | 10.8 | 65.5 | 8.3 | 11.1 |
| 1995-96 | 7.6 | 7.7 | 16.9 | 10.9 | 64.2 | 9.1 | 12.3 |
| 1996-97 | 7.8 | 6.9 | 16.1 | 10.7 | 66.1 | 8.9 | 12.7 |
| 1997-98 | 4.8 | 6.5 | 16.2 | 11.3 | 64.5 | 8.7 | 12.5 |
| 1998-99 | 6.6 | 6.5 | 14.9 | 12.3 | 63.6 | 8.2 | 11.4 |
| 1999-00 | 6.4 | N/A. | N/A. | N/A. | N/A. | 8.5 | 12.3 |

CAD: Current Account Deficit
Source: National Accounts Statistics, various issues

A look at the sectoral composition of the growth rates shows considerable volatility in agricultural growth, but less in industrial growth rates.

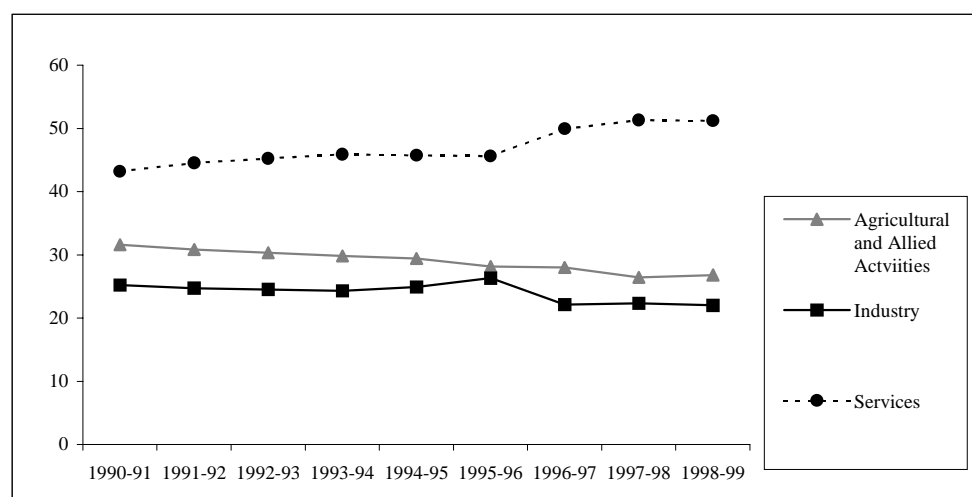
A look at the sectoral composition of the growth rates shows considerable volatility in agricultural growth, but less in industrial growth rates. High variance in agricultural growth rates reflects, *inter alia*, the preponderant reliance on monsoon rainfall, with less than 30 percent of cultivated land under irrigation. At the aggregate level, rainfall has been normal through the entire decade, but it has shown irregular distribution across regions and over time (through the rainy season). Both these factors can have a substantial impact on agricultural output.

Industrial growth was extremely robust in the first-half of the decade, but has slowed down since. Sectors such as machinery and equipment and transport grew quite rapidly to begin with, reflecting the pent-up demand for investments. Other fast growing sectors included non-metallic minerals, basic chemicals and chemical products, paper and paper products and wool silk and man-made fibres. The economic slowdown was, in part, due to the weakening of rural demand due to lower agricultural growth in

the second-half of the 1990s. With the increasing trade liberalisation, industrial growth is increasingly affected by export performance, but rural demand remains the dominant factor since almost two-thirds of the population is still rural.

In contrast to both agriculture and industry, growth in services has shown little variance, growing steadily at a robust 8-10 percent over the decade. As a result, the share of the service sector in the economy has increased steadily throughout the 1990s and currently just exceeds the halfway mark. The share of both agriculture and industry has, in turn, declined to 26 percent and 21 percent of the GDP, respectively (see Chart 1).

Chart 1: Contribution of the Major Sectors to Real Gross Domestic Product



Source: National Account Statistics, various issues.

A look at the components of the aggregate demand shows a decline in the role of the public sector, relative to that of the private sector. This is a reflection of the reforms initiated in 1991 as well as the fiscal adjustments following the macro-economic crisis. For example, the share of production accounted for by the government has come down from 0.9 percent to 0.7 percent in agriculture during the 1990s. During the same period, the share of the government in manufacturing declined from 6.2 percent to 5.7 percent and in services from 17.3 percent to 14.8 percent (see Table 3).

Table 3: Share of the Public Sector by Area of Economic Activity (% of GDP)

| Year | Agriculture | Industry | Services |
|---------|-------------|----------|----------|
| 1990-91 | 0.9 | 6.2 | 17.3 |
| 1991-92 | 0.9 | 6.3 | 18.7 |
| 1992-93 | 0.9 | 6.6 | 18.0 |
| 1993-94 | 0.8 | 6.0 | 18.2 |
| 1994-95 | 0.8 | 6.0 | 17.6 |
| 1995-96 | 0.8 | 5.6 | 14.4 |
| 1996-97 | 0.7 | 5.1 | 14.1 |
| 1997-98 | 0.7 | 5.7 | 14.8 |

Source: National Account Statistics, various issues

Similarly, there has been a steady decline in public investment as a percentage of the GDP throughout the decade (see Table 2). Since public investment has traditionally been the growth engine of the economy, this decline is an important new development, indicating a lower emphasis on the role of the state. It is also a reflection of the quality of fiscal adjustments undertaken since the 1991 crisis, which saw a relatively greater decline in the government's capital expenditures.

The decline in public investment was, to some extent, compensated by an increase in private investment (see Table 2), particularly in 1992/93 and 1995/96. This could have been due to the relaxation of industrial controls as well as trade liberalisation, allowing easier access to imports of machinery and new technology. The increased private investment was associated with a surge in GDP growth during that period. Subsequently, however, private investment too has been declining. As a result, total domestic investment, as a percentage of GDP, has declined from a high of 24.5 percent in 1995/96 to 21.4 percent in 1998/99.

With the implementation of the wide-ranging trade liberalisation at the start of the decade, both exports and imports have grown throughout the period and together now account for almost 21 percent of GDP, compared to roughly 16 percent in 1991. Despite a substantial slowdown immediately following the Asian crisis, exports grew at an average rate of 17.5 percent in rupee terms and 10.3 percent in terms of the US dollar between 1991/92 and 1999/2000.

On the whole, the growth in exports has, mostly, followed the trends in world trading volumes and has been less than the growth in imports, resulting in a steadily widening deficit on the balance of trade.

On the whole, the growth in exports has, mostly, followed the trends in world trading volumes and has been less than the growth in imports, resulting in a steadily widening deficit on the balance of trade. One of the fastest rising exports from India in 1990s has been services related to IT (Information Technology). However, earnings from exports of IT services are classified in Indian data as repatriation of earnings, appearing as factor payments rather than exports.

Despite the worsening trade deficits, the external position has been comfortable, with a current account deficit ranging from 1 to 1.5 percent of GDP, except in 1992/93 and 1995/96. The low current account deficit

Table 4: Foreign Capital Inflows

| Year (US\$mn) | FDI (US\$mn) | Portfolio Investment (US\$mn) | Non-resident Deposits (US\$mn) |
|-------------------------|------------------------|---|--|
| 1990-91 | 97 | 6 | 1537 |
| 1991-92 | 129 | 4 | - |
| 1992-93 | 315 | 242 | - |
| 1993-94 | 586 | 3649 | 1205 |
| 1994-95 | 1343 | 3579 | 172 |
| 1995-96 | 2144 | 2661 | 1103 |
| 1996-97 | 2841 | 3312 | 3350 |
| 1997-98 | 3562 | 1828 | 1125 |
| 1998-99 | 2480 | -68 | 1742 |

Source: Economic Survey: 1998-99, 2000-2001

primarily reflects a strong balance on net invisibles due to the repatriation of earnings and exports of IT services.

Finally, another remarkable development in the Indian economy during the 1990s has been the surge in foreign investment, both direct and portfolio. As shown in Table 4, the flow of FDI has increased from being virtually non-existent prior to the reforms to US\$2-3bn each year. Similarly, portfolio investments increased from virtually nothing to more than US\$3bn until 1997, when the Asian crisis and the reaction to nuclear tests caused them to fall dramatically.³ However, given the needs and the size of the economy, these amounts are inadequate, and policies need to focus on enhancing the flow of external capital to complement domestic resources in raising the economic growth rate.

2.3 Structure of the Market and Concentration

Before 1991, in spite of a policy bias against large firms (see Chapter Three), the concentration ratios in the capital goods and intermediate sectors were high. Firms were able to maintain their monopoly power by exploiting the system of licensing to obtain pre-emptive capacity and technology licences. The policies adopted during this period generated a particular type of business structure. The business groups in India consisted of legally independent business firms often operating in completely unrelated areas, but controlled by a single central decision-making authority.

Economic reforms since 1991 have reduced entry barriers and the concentration level in Indian industry is on the decline. The monopoly power once enjoyed by a few select business houses has been eroded by the entry of new firms, both domestic and foreign.

Economic reforms since 1991 have reduced entry barriers and the concentration level in Indian industry is on the decline. The monopoly power once enjoyed by a few select business houses has been eroded by the entry of new firms, both domestic and foreign.

There have been some studies analysing the trends in aggregate and product-wise concentration in Indian industry. The degree of concentration has been measured either using the Herfindahl index or the 3-firm (sometimes 4-firm or 8-firm) concentration ratio.⁴ The Herfindahl index is considered to be the most appropriate for analysing the levels of concentration, but it is not always possible to obtain the detailed data that is required. The trends in the Herfindahl indices show that industrial concentration has not increased in the 1990s. In about 31 percent of product groups, there was a declining trend in concentration levels. An increasing trend was observed only in 17 percent of product groups. In more than 52 percent of the product groups, there was no significant change in concentration levels.

Changes in the 3-firm concentration ratios also suggest that, in general, concentration has not increased between 1987 and 1998. In fact, the ratios declined for about 73 percent of product groups. In the remaining cases, an increase in concentration was observed. Despite this general decline, concentration remains extremely high in many product groups. In 1996-98, the 3-firm concentration ratio was more than 90 percent in about 15 percent of product groups.⁵

Public Policy Context

To appreciate the extent to which India's policy framework hindered competition, it is useful to start with the late 1980s, prior to the economic reforms.⁶ Subsequently, we turn to the post-1991 reform measures to analyse how policy changes have improved the competitive environment.

3.1 The Emergence of Regulated Product Markets

India entered an era of ambitious industrialisation during the mid-1950s with the Mahalanobis strategy⁷ of development as its basis. Like most other developing countries, export pessimism underlay India's development strategy. The basic emphasis was on import substitution and heavy industries and a central role was played by the public sector. The government created a highly regulated economic structure for the Indian economy.

Trade Regulation

The trade policy regime was highly protectionist. It was regulated through quantitative controls on imports and exports. Tariff rates were exceptionally high. Domestic industry, heavily insulated from international competition, was strictly regulated.

Production Regulation

Controls over production were introduced through the Industrial Policy Resolution 1956, and later through the Monopolies and Restrictive Trade Practices (MRTP) Act in 1969. The public sector was assigned to play an important role. The entry and growth of firms were subject to four sets of licensing policies: capacity licensing; monopoly control; small-scale industry reservations; and activities reserved for the public sector.

The MRTP Act was introduced in 1969 to prevent the concentration of economic power and to curb restrictive trade practices.

Capacity-licensing was used to implement planned growth of supply from different sectors to match the potential demand. The MRTP Act was introduced in 1969 to prevent the concentration of economic power and to curb restrictive trade practices. These regulations restricted the growth of firms, possibly impeding the achievement of benefits from economies of scale.

Until the early 1980s, the attitude towards foreign direct investment (FDI) was, generally, one of fear and suspicion. Foreign collaborations were permitted only in areas in which India had not developed its capabilities. Therefore, in general, India's policy towards FDI was restrictive and selective.

Prior to 1991, the government was committed to increasing the pace of indigenisation in manufacturing. Local content requirements were forced on a number of engineering and electronic industries through 'Phased Manufacturing Programmes' (PMPs). The government provided various concessions to the small-scale industrial sector, mainly with a view to creating more employment. These included tax and interest rate concessions, some degree of assured government procurement and the reservation of a large number of items for this sector only. This prevented

competition from large-scale firms and also acted as a disincentive for smaller firms to grow. Small firms were denied the benefits of economies of scale and suffered from technological obsolescence.

The public sector grew in a haphazard manner and extended itself into non-core areas which were not a part of the original plan.

The public sector in India was expected to be the engine of the economy through the set-up and development of heavy industries (basic metals and capital goods) and infrastructure (power, transport, telecommunications, etc). The expected surpluses were to be invested for further development of the economy. However, the public sector grew in a haphazard manner and extended itself into non-core areas which were not a part of the original plan. Sick private industrial units were nationalised, with a view to protect employment.⁸ Despite the social cost, huge subsidies were injected into the public sector to maintain, and even expand, its size.

Regulation of Prices and Distribution

Apart from industrial licensing and import controls, the government also attempted to control the prices and distribution of many commodities. The fully administered items included petroleum products, coal, electricity, fertilisers, iron and steel products, non-ferrous metals, drugs and medicines and paper and newsprint. The items under dual pricing schemes (partially administered prices) included rice, wheat, sugar, *vanaspati* (vegetable fat) and cement. The main objective of the administered price policy was to provide the poorer groups of the population with the necessary consumer goods at low prices, make certain crucial inputs required for the development process available at the 'right' prices and control inflation.

Regulation in Indian Labour Markets

The 'organised' sector in the context of the Indian economy, consists of industrial establishments with 10 or more workers (or 20 or more workers if no power is used) and government services. It employs a very small proportion (9 percent) of the total labour force.⁹

The process of structural readjustment of employment across the sectors of the economy is facilitated by wage flexibility in the labour market.

The process of structural readjustment of employment across the sectors of the economy is facilitated by wage flexibility in the labour market. This will depend on various regulations such as minimum wages, indexing and direct determination of wages above any statutory minimum. Institutional intervention in the labour market through labour laws, other public regulations and trade unions also make the process of readjustment difficult. Under the Industrial Disputes Act, 1947, the closure of a factory in the organised sector and the retrenchment of labour is practically impossible. Except for the regulation of minimum wages, regulations are applicable only to the organised sector, which, as noted, is small.

The long-term consequences of India's restrictive industrial and trade policies began emerging in the mid-1970s. Domestic competition was reduced and the choice of plant size, changes in product lines, reductions in the workforce and the selection of optimal locations were limited. Many production units were using outdated technologies and operating below the minimum efficient scale. The costs of traded inputs were high. Exports could be competitive only through the provision of large subsidies and other incentives. Domestic industrial regulation, combined with high tariff walls and strict import-licensing, resulted in a generally high-cost, inefficient industrial structure that was no match for world market standards in price and quality.

3.2 Economic Reforms in India since July 1991

A programme of macro-economic stabilisation was initiated by the government in July 1991, entailing a reduction of the fiscal deficit, control of the money supply and correction of the overvalued exchange rate, with a major devaluation of the rupee.

Apart from macro-economic reforms, long overdue micro-economic or 'sectoral' reforms were launched with a medium-term perspective. Major structural reforms were introduced in the industrial and trade policy regimes and the financial sector, with a view to improving the efficiency, productivity and international competitiveness of India's manufacturing sector.

Various steps were taken to create a globally competitive environment by stimulating exports and reducing the degree of regulation and licensing control on foreign trade.

3.3 Trade Policy Reforms

Various steps were taken to create a globally competitive environment by stimulating exports and reducing the degree of regulation and licensing control on foreign trade. The rupee was made partially convertible in 1992-93, fully convertible on the trade account in 1993-94 and fully convertible on current account in 1994-95. The exchange rate of the rupee is now determined primarily by demand and supply conditions in the foreign exchange markets.

It is now widely accepted that these reforms have accelerated India's transition to a globally oriented economy, by stimulating exports and facilitating imports of essential inputs as well as capital goods.

One of the main objectives of the EXIM Policy was to phase out the quantitative restrictions in the form of licensing and other discretionary controls. In 1991, imports were regulated by means of a positive list of freely importable items. Since 1992, imports have been regulated, instead, through a limited negative list. Import-licensing controls have now been virtually abolished. Almost all capital goods, raw materials, intermediate goods, etc., can now be freely imported, subject only to payment of customs duties.

Tariffs have also been reduced in a phased manner. The average applied tariff rate has been lowered from 125 percent in 1990-91 to 35 percent in 1997-98 and the peak rate of duty has declined from 335 percent in 1990-91 to 40 percent in 1999-2000.

Several steps were taken to stimulate exports. A system of value-based advance licences was introduced. This permitted duty-free imports of necessary raw materials and components up to a stipulated percentage of the value of indicated exports. Self-certification advance licences were made available for Export and Trading Houses and these organisations have been permitted a larger range of imports. Established exporters are permitted to maintain foreign currency accounts and raise external credit to finance their trade transactions. The Export Oriented Unit (EOU) and the Export Processing Zone (EPZ) schemes were liberalised and extended to agriculture, horticulture, aquaculture, poultry and animal husbandry.

The underlying philosophy of these trade policy reforms is that liberalisation will enhance the efficiency of resource allocation in the economy and improve consumer welfare.

3.4 Industrial Policy Reforms

With the industrial policy reforms launched in July 1991, licensing requirements were abolished for all, except 18, industries (reduced to 15

in early 1993). These industries were exempted because of their strategic and environmentally sensitive nature or their exceptionally high import content. All other industries were permitted to expand according to their market needs, without obtaining prior expansion or capacity clearance from the Indian Government. In the earlier licensing regime, manufacturers could produce only licensed products. Now, firms are free to manufacture any article (except for those subject to compulsory licensing) in response to market signals.

The need for separate permission for investment and expansion by firms under the 1969 Monopolistic and Restrictive Trade Practices Act (MRTP Act) was also abolished. This was expected to encourage competition by reducing barriers to entry for new firms and to enable Indian firms to become large enough to compete effectively in global markets. The amended MRTP Act gave more emphasis to prevention and control of monopolistic, restrictive and unfair trade practices, so as to provide adequate protection to consumers.

The system of “Phased Manufacturing Programmes” (PMPs) was abolished. However, various incentives that were available to manufacturing units in 1991-92, through the then existing PMPs, continued. The abolition of PMPs removed a major area of government interference in business decisions.

Reforms were also initiated in public sector enterprises. In order to permit greater participation by the private sector in core and basic industries, the number of areas reserved for the public sector was reduced from 17 to 6. The six “reserved” areas are mainly those involving strategic and security concerns. Some of the core industries which were previously reserved, and are now open to the private sector, include iron and steel, electricity, air transport, ship-building and heavy machinery industries, such as telecommunication cables and instruments.

Pressure on performance in the public sector is also mounting because the general economic environment is becoming more conducive to cost and quality considerations.

Pressure on performance in the public sector is also mounting because the general economic environment is becoming more conducive to cost and quality considerations. The government has attempted to disinvest shares of public sector undertakings, in order to raise resources and encourage wider participation of the general public and workers in the ownership of these undertakings. It also set up the Disinvestment Commission to advise the government on equity sales. The Commission recommended the sale of the majority equity stake among the 40 Public Sector Undertakings (PSUs) that it has considered. So far, however, nothing significant has happened and the commission has now been wound up.

The government appointed the Committee on Industrial Sickness and Corporate Restructuring, which submitted its report in July 1993. The Board for Industrial and Financial Reconstruction (BIFR), which was already dealing with private-sector units needing assistance, was entrusted with the responsibility of identifying public-sector enterprises for rehabilitation or liquidation. The BIFR has made some recommendations for liquidation, but none of these have been carried out. Greater emphasis was given to improving the performance of the public sector. The voluntary retirement scheme (VRS) was gradually introduced in public sector undertakings.

Reforms were also undertaken to encourage foreign investment and technology. The government has established a more liberalised foreign

investment policy. This contrasts with the previous policy of considering all foreign investments on a case-by-case basis and the ceiling of 40 percent of total equity investment, which was usually imposed. The new policy provided for automatic approval of FDI of up to 51 percent foreign equity holding in 35 specified, high-priority, capital-intensive and high-technology industries, as long as the foreign equity covered the foreign exchange requirements for imported capital goods.

With the industrial policy reforms, India has moved into an era of a more competitive industrial environment in which entrepreneurs respond to market signals rather than try to skirt around bureaucratic controls.

If a foreign company wants to produce something not in the automatic approval list, or if it wants a holding exceeding 51 percent, it must ask for permission from a new Committee called the Foreign Investment Promotion Board. The board was first set up in the Prime Minister's Office. However, in 1996, it was transferred to the Ministry of Industry. Since then, its pace has slackened and it often defers decision on applications (for instance, when the views of other ministries have to be considered). Sometimes, it also sets conditions on the approvals it gives. The procedures for investments in non-priority industries have also been simplified.

The Foreign Investment Promotion Board (FIPB) was set up to negotiate with large international firms and expedite the required clearances. The Board was empowered to consider individual cases involving foreign equity participation over 51 percent.

The Foreign Exchange Regulation Act of 1973 (FERA) was substantially liberalised to provide greater flexibility of operations to firms with foreign equity operating in India. Various restrictions on FERA companies have been removed with regard to borrowing funds and raising deposits in India, as well as taking over and creating an interest in business in Indian companies. The procedure for Indian businesses to operate abroad was also simplified. Indian companies and Indian nationals are now free to undertake joint ventures abroad and to become directors in overseas companies. India has joined with other developing nations to form the Multilateral Investment Guarantee Agency (MIGA) which aims to promote foreign investment.

With these industrial policy reforms, India has moved into an era of a more competitive industrial environment in which entrepreneurs respond to market signals rather than try to skirt around bureaucratic controls.

The basic philosophy behind and the common thread through the various industrial policy reforms has been the resolve of the government to liberate the Indian industry from the shackles of its various 'controls'.

However, the reservation policies in the small-scale industrial (SSI) sector have not undergone any major change since 1991. Recently, quite a few of the products were taken out of the reserved list; yet there are still nearly 800 products reserved for the SSI sector. Although firms producing these items are protected from competition from large domestic firms, they are also restricted from growing. Continuing the product reservation system is probably not justified.

Export and import policy for the year 2001-02 has removed QRs on the remaining 715 tariff lines. This has resulted in the paradoxical situation where reserved items can be produced by large foreign enterprises and imported into India, but large domestic firms are prevented from producing the same items by SSI production reservation. Such a policy is against the interests not only of the consumers, but also the development of the industrial sector, in general. The growth of SSIs, including service-sector activities, should be assisted by various other promotional means.

The basic philosophy behind and the common thread through the various industrial policy reforms has been the resolve of the government to liberate the Indian industry from the shackles of its various 'controls'. The 'control raj' had led to inefficiency and a high-cost structure in Indian industry, and corruption in the bureaucratic machinery had a hand in 'guiding and deciding' the path of the industrial progress in India. The thrust of reforms has been to allow for more competition, by allowing free entry of firms into different sectors of the economy. The realisation that market forces can better look after India's industrial progress has ultimately dawned. It is better late than never.

The success of the ongoing process of economic reforms depends crucially upon the existence of an efficient financial sector, which is primarily responsible for mobilising and allocating financial resources among different sectors of the economy.

3.5 Financial Sector Reforms

The success of the ongoing process of economic reforms depends crucially upon the existence of an efficient financial sector, which is primarily responsible for mobilising and allocating financial resources among different sectors of the economy. The government embarked on a process of reforming the banking system and the capital market in November 1991, following the Narsimham Committee Report.

Banks are now required to follow internationally established objective accounting standards for the assessment and recovery of credit. They are encouraged to modernise their technology and enhance managerial accountability and autonomy. Public-sector banks are now encouraged to compete with the existing and the newly entering private-sector banks (though entry is controlled), including foreign banks. Other financial institutions have also been allowed to enter into more conventional banking activities (short-term lending), to provide more competition to the conventional banking sector. Commercial banks have also increased their short-term lending activities, thus reducing the oligopolistic position of the domestic financial institutions.

The office of the Controller of Capital Issues was abolished in 1992, leading to freer pricing of issues. Private sector mutual funds and Foreign Institutional Investors (FII's) were permitted to trade in equities, increasing competition on the buyers' side of the equities market and reducing the importance of publicly owned FII's. Competition in exchanges was introduced with the set-up of the National Stock Exchange.

3.6 On Reflection

The process of economic reforms in the Indian economy has continued for more than a decade and the economy, now, has a completely different profile to that of June 1991. However, on the macro-economic front, the fiscal deficit is still worrying. While great progress has been made in reducing trade protection and enhancing industrial competitiveness, along with various tax policy reforms, a significant component of the structural reforms agenda still remains to be implemented. The process of economic reforms has a long way to go in consolidating and deepening what has already been achieved. It also needs to extend its coverage to incorporate reforms in agriculture, the financial sector, infrastructure, labour laws and the social sector pertaining to health and education. If policy-makers are able to sustain and accelerate the process of reforms, a much brighter future lies ahead.

Scope of the Existing Competition Law

4.1 Competition Law

The origin of competition law in India dates back to the establishment of the Monopoly Enquiry Commission in 1964, with the following terms of reference:

1. To inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity with special reference to:
 - i) the factors responsible for such concentration and monopolistic and restrictive practices; and
 - ii) their social and economic consequences, and the extent to which they might work to the common detriment ; and
2. To suggest such legislative and other measures that might be considered necessary in the light of such enquiry, including in particular, any new legislation to protect essential public interests and the procedure and agency for the enforcement of such legislation.

Evidently, the concentration of wealth and economic power in the country, and the controlling of monopolies were major concerns at that time.¹⁰ These concerns have figured prominently in the official policy documents of the Government of India. Thus, for example, the Industrial Policy Resolution of 1956, the Industrial Policy Statements of 1977 and 1980 and the Five-Year Plans all list these as major objectives.

The Commission was influenced by two important principles. The first was to secure the highest possible levels of production and the second was to ensure that this was achieved with the least damage and maximum benefits to the people at large.

The Members of the Commission were convinced from their study that the dangers from concentrated economic power and monopolistic and restrictive practices were significant. Therefore, the Members were of the opinion that a permanent body should be set up with the duty and responsibility of exercising vigilance and taking action to protect the country against such dangers. This view was reinforced by the general support of many of the Chambers of Commerce representing big business in the country. Thus, delegations from the Bengal Chamber of Commerce, the Engineering Association of India, the Bharat Chamber of Commerce and the Gujarat Chamber of Commerce approved the idea of setting up a permanent body to deal with complaints against monopolistic and restrictive trade practices. Even the industrialist, J.R.D. Tata, expressed his approval of such a body, though he was anxious that it should be truly independent of the government.

The Commission was influenced by two important principles. The first was to secure the highest possible levels of production and the second was to ensure that this was achieved with the least damage and maximum benefits to the people at large. These two principles raised the following important considerations for the formulation of the legislative policy:

1. Concentrations of economic power should not be restricted as such, except in cases which were a menace to optimum production or to fair distribution;
2. A constant watch must be kept by a body independent of the government;
3. Monopolistic conditions in any industrial sphere should be discouraged, if this could be done without injury to the interests of the general public; and
4. Monopolistic and restrictive practices should be curbed, except when they conduce to the common good.

In formulating the principles of the MRTP Act mentioned above, the Commission was able to give full effect to the directive principles in Articles 38 and 39 of the Constitution of India. The Directive Principles of the State Policy lay down that the State shall, in particular, direct its policy towards securing the following aims:

- The ownership and control of material resources of the community are so distributed as best to serve the common good; and
- The operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Although the nomenclature of the MRTP Act does not contain any reference to consumers or their welfare, monitoring and curbing monopolistic, restrictive and unfair trade practices have the primary aim of promoting consumer welfare.

The model for the MRTP Act, 1969, was provided by the above mentioned Commission. The provisions on restrictive trade practices, including resale price maintenance, are largely based on the UK legislation, in particular the Restrictive Trade Practices Act, 1956, and the Re-sale Prices Act, 1964. Likewise, the newly introduced provisions on unfair trade practices are influenced by the UK Fair Trading Act, 1973. Anti-trust legislations of the US (notably the Sherman Act, the Clayton Act and the Federal Trade Commission Act), Australia, Sweden and Canada have also been a guide in framing the provisions relating to monopolistic, restrictive and unfair trade practices. The thrust of the MRTP Act is directed towards:

- the prevention of concentration of economic power to the common detriment;
- the control of monopolies;
- the prohibition of monopolistic trade practices; and
- the prohibition of unfair trade practices.

Although the nomenclature of the MRTP Act does not contain any reference to consumers or their welfare, monitoring and curbing monopolistic, restrictive and unfair trade practices have the primary aim of promoting consumer welfare. The Act also seeks to create an environment that is conducive to the healthy growth of industry, fair trade and business and, above all, fair competition.

Since 1969, the Act has been amended a number of times: in 1980, 1982, 1984, 1985, 1986, 1988 and 1991. The Amendments of 1984 and 1991 were the most significant ones. The 1984 Amendment introduced a provision for the regulation of unfair trade practices and created a new authority, in the form of the Director-General of Investigation and Registration (DGIR), which was supposed to function in close liaison with the Commission. On matters relating to restrictive trade practices (RTP), unfair trade practices (UTP) and monopolistic trade practices (MTP), the DGIR has the power to make preliminary inquiries to assess the need for the Commission to initiate an inquiry. The Commission can also ask the DGIR to investigate such matters and submit reports to the Commission. Trade agreements that incorporate restrictive clauses must be registered with the office of the DGIR.

Under the 1991 Amendment, provisions relating to the concentration of economic power and restrictions with regards to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations and mergers and take-overs of undertakings were all deleted from the statute.

The 1991 Amendments also enlarged the coverage of the MRTP Act to include all public sector undertakings, industrial units with the Currency and Coinage Division, the Ministry of Finance, the Department of Economic Affairs, co-operatives and financial institutions. However, a few entities like defence undertakings, trade unions and other associations of workmen or employees, formed for their own reasonable protection, have been kept outside the ambit of the law. The provisions of the MRTP Act apply to the whole of India, except Jammu and Kashmir.

With the 1991 Amendments, the thrust of the Act became curbing monopolistic, restrictive and unfair trade practices. Size *per se* was no longer discouraged as a concentration of economic power. In brief, the Amendments have enlarged the scope of the Act by bringing Unfair Trade Practices (1984 Amendment) and the Public Sector (1991 Amendment) into its purview and reduced its scope by removing the provisions of merger & acquisition control (1991 amendment).

4.2 Anti-Competitive Practices Covered by the Competition Law

4.2.1 Restrictive Trade Practices

A restrictive trade practice is defined as one that has the effect of preventing, distorting or restricting competition. It encompasses any manipulation of prices, conditions of delivery or flow of supply in the market that may have the effect of imposing unjustified costs or restrictions on the consumer. In the MRTP Act, the following types of RTP are listed:

- refusal to deal;
- tie-up sales;
- full line forcing;
- exclusive dealings;
- concert or collusion-cartel;
- price discrimination;
- re-sale price maintenance;
- area restriction; and
- predatory-pricing.

The onus is on the entity or undertaking charged with the perpetration of the RTP to justify its actions, to avoid being indicted.

Under the Act, all restrictive trade practices are deemed to be prejudicial to public interest. The onus is, therefore, on the entity or undertaking charged with the perpetration of the RTP to justify its actions, to avoid being indicted. Under certain circumstances, the Commission may arrive at the conclusion that the RTP is not detrimental to the public interest and discharge the inquiry against the charged party. If a trade practice is expressly authorised by any law in force at the current time, then the MRTP Commission is barred from passing any order against the charged party.

Unlike in the cases of concentration of economic power and monopolistic trade practices, where the MRTP Commission can only recommend action to the government, in the case of RTPs it can pass its own orders. These orders can either require the violator to 'cease and desist' from the practice or modify it suitably.

In terms of trends in investigations regarding RTPs, most of these have pertained to vertical restraints (especially tying and re-sale price maintenance) and instances of individual consumer dissatisfaction.

Practices such as price-fixing and predation were involved only in a minority of cases, with 'inquiry closed' being the most common result.

4.2.2 Unfair Trade Practices

This category was introduced by the 1984 Amendment to cover activities such as misleading advertising and sales promotion schemes like lotteries and contests. Under the MRTP Act, the section on UTPs covers the following:

- misleading advertisement and false representation;
- bargain sale, bait and switch-selling;
- offering of gifts or prizes with the intention of not providing them and conducting promotional contests;
- product safety standards; and
- hoarding or destruction of goods.

The initial definition of an unfair trade practice placed a heavy burden on the affected consumer to prove loss or injury. Fortunately for the consumers, the definition of UTP was amended in 1991. There is, now, no requirement for them to establish loss or injury.

The aim of the Act is to protect the consumers against unfair or deceptive practices and also false and misleading representations in the media, and otherwise. The Commission can issue its own orders and has been fairly active in doing so. Under the recently drafted Competition Bill, cases relating to UTPs would be dealt under the Consumer Protection Act, 1986.

Under the recently drafted Competition Bill, cases relating to UTPs would be dealt under the Consumer Protection Act, 1986.

4.2.3 Monopolistic Trade Practices

The Act defines an MTP as any practice that 'unreasonably' increases prices, costs or profits or 'unreasonably' prevents or lessens competition. According to the Act, every monopolistic practice shall be deemed to be prejudicial to public interest. Exceptions relate to practices that are explicitly permitted by another law, a government order on grounds of national security and defence, the supply of essential goods and services or practices where the government itself is a party.

Practices identified under the MRTP Act include:

- maintaining the prices of goods or charges by limiting, reducing or otherwise controlling the production, supply or distribution of goods or supply of any services;
- unreasonably preventing or lessening competition in the production, supply or distribution of any goods or the supply of any services;
- limiting technical development or capital investment to the common detriment or allowing the quality of any such goods produced, supplied or distributed or any services rendered in India to deteriorate;
- unreasonably increasing the cost of production of any goods or charges for the provision or maintenance of any services;
- unreasonably increasing the price at which goods are, or may be, sold or re-sold or the charges at which the services are, or may be, provided or the profits which are, or may be, derived by the production or supply or distribution of any goods or by the provision of any services; and
- preventing or lessening competition in the production, supply or distribution of any goods or the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

In India, the MTP provisions have never been enforced. No inquiry on MTP matters has ever been completed. The few investigations launched have either been stayed by the courts or dropped. The inquiries instituted

In India, the MTP provisions have never been enforced. No inquiry on MTP matters has ever been completed.

by the Commission on MTPs under section 31 of the MRTP Act upon complaints made by the Central Government have been stayed, either by a high court or the Supreme Court of India. The Supreme Court also stayed one *suo moto* MTP inquiry initiated by the MRTP Commission under Section 10(b) of the Act in 1977. A few inquiries, however, are pending before the MRTP Commission at present. These are still in their initial stages and are being held up by procedural complications. MTP inquiries follow a procedure based on adversary proceedings. This causes further delays due to the time-consuming nature of such processes.

The MRTP Commission can only recommend actions (such as regulation or prohibition of a practice) to the government and penalties only follow non-compliance with government orders, not the determination of a monopolistic practice.

4.3 Dominant Market Position

Under Indian law, the basis for determining dominance is whether an undertaking has a share of one-quarter or more in the production, supply, distribution or control of goods or services. The Act contains a section, which was not amended in 1991. The section is on the concentration of economic power, which allows the government to order the division of an undertaking or the severance of inter-connections between undertakings. However, the MRTP has never invoked this section of the Act.

Under Indian law, the basis for determining dominance is whether an undertaking has a share of one-quarter or more in the production, supply, distribution or control of goods or services.

4.4 Mergers & Acquisitions

Four sets of industrial regulations have a bearing on M&As. These are: the 1956 Companies Act, the 1969 Monopolies and Restrictive Trade Practices Act, the 1973 Foreign Exchange Regulation Act (FERA) and the 1997 SEBI (Substantial Acquisition of Shares and Take-overs) Regulations.

The general law relating to mergers, amalgamations and reconstruction is embodied in Sections 391 to 396 of the Companies Act, 1956. In any scheme of amalgamation, the amalgamating company, or companies, and the amalgamated company should comply with the requirements specified in Sections 391-394 and submit details of all the formalities for consideration of the High Court. Section 391 gives the High Court the power to sanction a compromise or arrangement with creditors and members, subject to certain conditions. Section 396 deals with the power of the Central Government to provide for an amalgamation of companies in the national interest.

Before its amendment in 1991, under the MRTP Act, large business houses and dominant undertakings registered with the government were required to seek the government's permission for any merger, amalgamation or take-over. When mergers or amalgamations came up for examination by the MRTP Commission, one of its important responsibilities was to assess post merger/amalgamation dominance in the market, with reference to common good and public interest. The Commission had the power to prevent any merger/amalgamation that would result in a dominant undertaking acquiring the power to unilaterally fix prices without reference to the market or smaller units and undertakings extinguishing, thereby reducing competition.

However, most of the provisions of the MRTP Act, which dealt with concentrations of economic power, were deleted by the far-reaching 1991 Amendment. Along with the provision relating to additional investment approval for large and/or dominant firms, the requirement for approval for mergers, amalgamations and take-overs involving such firms was

removed. A section of the Act, requiring government approval for the acquisition or transfer of shares in excess of 25 percent of a firm's equity, was simultaneously moved to the Companies Act and made applicable only to acquisition by 'dominant' firms, as defined in the MRTP Act (those with a market share of one-quarter or more).

The MRTP Commission can recommend a de-merger and the process by which it should be carried out to the Central Government.

Under section 27 of the MRTP Act, if the actions of a merged undertaking are found to be prejudicial to public interest or lead or are likely to lead to the adoption of monopolistic or restrictive trade practices, a de-merger provision can be invoked. The MRTP Commission can recommend a de-merger and the process by which it should be carried out to the Central Government. It can do this if approached by a consumer organisation, a trade association, a State or the Central Government, or on its own volition.

According to section 29 of the Foreign Exchange Regulation Act (FERA), all non-banking foreign branch companies and rupee companies with foreign equity of more than 40 percent require the permission of the RBI, wholly or partly, to acquire any undertaking engaged in trading, commercial or industrial activities. However, during the 1990s, FERA was substantially altered and, ultimately, replaced by the Foreign Exchange Management Act (FEMA). These changes have removed shareholding and business restrictions on multinational companies.

The Securities and Exchange Board of India (SEBI) also regulates "substantial acquisition of shares and take-overs". However, mergers are explicitly excluded from these regulations, as are substantial acquisitions approved by a majority of the shareholders of the target firm. Foreign firms (other than institutional investors) are not allowed to buy shares in the stock market, but may negotiate a merger.

Since 1991, there has been a wave of mergers and acquisitions, involving a rising proportion of foreign acquirers. Most mergers have been 'friendly' and horizontal.

Since 1991, there has been a wave of mergers and acquisitions, involving a rising proportion of foreign acquirers. Most mergers have been 'friendly' and horizontal. MNC participation has been especially prevalent in branded non-durable consumer goods (most of which still have high rates of import protection), services (notably financial, advertising and travel), and pharmaceuticals. It is worth emphasising that in India most cases involving foreign firms have resulted in acquisitions of market shares of a magnitude that would attract the attention of competition authorities in most industrial countries, but in India all such merger and acquisition activities are beyond challenge. This is a reflection of the Amendments in the MRTP Act in 1991 that led to exclusion of mergers and acquisitions from the purview of the Act. However, the new Competition Bill does contain provisions with respect to review of mergers, although at or above a fairly high threshold of assets or turnover. In the meanwhile, mergers and acquisitions continue, devoid of any scrutiny by the existing competition authority.

4.5 Extra-Territorial Jurisdiction and its Effectiveness

An important feature of the MRTP Act is its extra-territorial scope with respect to prohibited trade practices that are perpetrated partly within India. This is similar to the "effects" doctrine followed in Europe and the United States, whereby foreign firms can be prosecuted for violations of competition law that have adverse effects in the domestic jurisdiction. Section 15 of the MRTP Act prevents the Commission from passing orders that restrict "the right of any person to export goods from India". This is also similar to the exceptions made for export cartels in other countries' competition laws.

An important feature of the MRTP Act is its extra-territorial scope with respect to prohibited trade practices that are perpetrated partly within India.

There have been a few instances where the extra-territorial jurisdiction provision has been invoked. The ongoing “soda ash” issue is a case in point. In 1996, the American National Soda Ash Corporation (ANSAC), acting as a cartel, sent a consignment of 23,000 tonnes of soda ash into India. Upon a complaint from the Alkali Manufacturers’ Association of India (AMAI), the MRTPC put an injunction on imports from ANSAC as a cartel, which was subsequently backed by the Supreme Court. But, instead of respecting Indian law, ANSAC chose to lobby with the US Government and persuaded them to treat it as a trade (market access) issue. The US is now threatening to withdraw duty-free treatment to India’s exports of certain items under the generalised system of preference, even though the import duty that India has imposed on soda ash is lower than the maximum permitted by the WTO. There is no bar on imports from the individual companies that form ANSAC.

In addition to the MRTP Act, there is a separate Consumer Protection Act (CPA) in India, which was enacted in 1986.

However, it has been shown that the enforcement of competition policy with respect to alleged predatory-pricing by foreign firms has resulted in restricted foreign competition and the protection of competitors, rather than the promotion of competition.

4.6 Consumer Protection

In addition to the MRTP Act, there is a separate Consumer Protection Act (CPA) in India, which was enacted in 1986. It has the objective of providing simplified, inexpensive and speedy remedies for the redressal of complaints by consumers with regards to defects in goods purchased by them and/or deficiency in services hired or availed of by them.

The CPA has provisions for establishment of consumer councils and other authorities for settlement of consumer disputes and matters connected therewith. It operates through District Forums, State Commissions and a National Commission. There is no court fee for the purpose of instituting a complaint in the above said consumer courts. The intention of the Parliament appears to be to ensure that the legal remedy under the Act is made available to all citizens, without distinction.

The Act seeks to promote and protect the rights of consumers such as:

- the right to be protected against marketing of goods and services hazardous to life and property;
- the right to be informed about the quality, quantity, potency, purity, standard and prices of goods and services for protection against UTPs;
- the right to assured access to a variety of goods and services at competitive prices;
- the right to be heard and be assured that consumer interests will receive due consideration in the appropriate fora;
- the right to seek redressal against UTPs or unscrupulous exploitation; and
- the right to consumer education.

The CPA appears to extend the scope of the remedy to consumers in all the matters coming under the classification of torts and arising out of wrongs to property in general.

The CPA appears to extend the scope of the remedy to consumers in all the matters coming under the classification of torts and arising out of wrongs to property in general. The remedies available to an aggrieved consumer under any other law are not affected by this Act. The CPA stipulates that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law currently in force. Any buyer of goods is entitled to seek remedy against the seller for defective goods or deficient quality of goods, either under the Sale of Goods Act or under the Indian Contract Act or under the CPA. Therefore, a wide choice is open to the consumer who, in all probability, will be persuaded to invoke the CPA, as it represents a cheap and quick legal remedy which does not involve court fees or prolonged litigation.

Individual consumers, voluntary consumer associations and other organisations are entitled to invoke the jurisdiction of the CPA and the fora set up thereunder. The Central Government or any State Government can also make a complaint against a private trader. The inclusion of the government as a complainant ensures that it can set the law in motion whenever the private citizen or consumer is not directly affected by the anti-consumer acts of private traders.

There are substantial differences between the MRTP Act and the Consumer Protection Act (COPRA) regarding the constitution of the adjudication machinery, their jurisdictions, the type of persons that can seek relief and the nature and scope of relief. The table below summarises the important differences between the two enactments.

In spite of the differences, there is significant overlap in the provisions and jurisdictions of the MRTP Act and the CPA. There is complete overlap in the jurisdiction of the MRTP Commission and the redressal agencies

Table 5: Differences between the MRTP Act and the Consumer Protection Act

| MRTP Act | Consumer Protection Act |
|--|--|
| The Commission is the sole authority | Has a three tier set up – district forum, state commission and national commission, each with its own pecuniary jurisdiction |
| Banking & insurance companies are exempted from the purview | Has no such exemption |
| The definition of an RTP is broad | A complaint can be lodged only for RTPs relating to a tie-in arrangement indulged in by a trader |
| Has specific provision for Central or State Government to make a reference for enquiry | Has no such provision |
| A separate investigation machinery exists (DGIR) | No such machinery exists |
| The MRTP Commission can initiate a <i>suo motu</i> enquiry into an RTP or UTP. | The COPRA redressal fora cannot do so |
| Definition of a good is broad ¹¹ | Definition of a good is narrow |
| Has the power for issuance of directions for corrective advertisements | Has no such power |
| Compensation can be awarded to consumers, traders, State and Central Government | Compensation can be awarded only to consumers |
| Has powers of injunction | Has no such powers |
| Has no time limit for lodging a complaint | Has a two-year period for lodging complaints |
| Has no stipulated time-frame for disposal of a complaint/appeal | Has a fixed time-frame for the national commission for disposal of cases |
| Has the power to review its order | Has no such facility |
| Has no provision for exemplary costs for frivolous or vexatious complaints | Has such a provision |

set up under the CPA with regard to curbing unfair trade practices and the definition of a UTP is identical in both the Acts. Thus, either body could be approached for redressal in this regard. Similarly, in the case of an RTP relating to tie-in sales, there is concurring jurisdiction in the MRTP Commission and the Consumer Disputes Redressal Authorities set up under the CPA.

The safeguards and protection of consumer interests under the MRTP Act have been left untouched and are not affected by the enactment of the CPA. Again, consumers are more likely to appeal to the CPA, on the grounds that it provides a less expensive and quicker remedy within the local region. Since the MRTP Commission functions at the capital city, it may not be able to find time to redress consumer grievances of lesser importance in other areas.

CHAPTER-V

Administrative Aspects of the Competition Authority

The MRTP Act arms the designated agency, the Director-General of Investigation and Registration (DGIR), with extensive investigative powers and provides for a quasi-judicial MRTP Commission to adjudicate.

5.1 Powers of the Commission

The MRTP Act provides for fines and criminal penalties for the violation of its provisions. It arms the designated agency, the Director-General of Investigation and Registration (DGIR), with extensive investigative powers and provides for a quasi-judicial MRTP Commission to adjudicate.

The powers of the Commission include powers vested in a civil court and further powers such as:

- issue summons;
- enforce attendance if any witness is to be examined on oath;
- ensure production of any document as evidence;
- punish for contempt of court;
- initiate proceedings against those indulging in MTP/RTP/UTPs;
- direct an errant undertaking to discontinue a trade practice and not to repeat it;
- pass a cease and desist order;
- grant temporary injunctions restraining an errant undertaking from continuing an alleged prohibited trade practice (including cease and desist orders);
- award compensation for loss suffered or injury sustained on account of an RTP, UTP or MTP;
- recommend to the Central Government division of undertakings or severance of interconnections between undertakings, if their working is prejudicial to public interest or has led or is leading to MTP or RTP; and
- direct parties to issue corrective advertisement/s and modify agreements which contain restrictive clauses.

The investigative and judiciary functions are sometimes separate and sometimes not. When the Director General investigates a case on his own, the functions are separate. However, when the investigation is done at the instance of the Commission or the Commission undertakes the investigation through its own officials, the functions are not separate and are done by the same agency. Any appeal against the orders of the Commission must be made to the Supreme Court, the highest court in India.

5.2 Structure of the Commission

The MRTP Act provides for a Chairman and a maximum of eight members for the Commission. The Chairman must be, or have been qualified to be a judge of the Supreme Court or a high court. The Commission has its headquarters in New Delhi, though it may conduct its sittings in any other place, as required. English is the official language of the Commission, though efforts have been made for progressive use of Hindi.

The Commission is accountable to the Parliament. Its functions are investigative, prosecutorial and adjudicative. Under the Commission's

secretariat, there are three separate wings, an administrative wing, a research wing and a legal and technical wing. These have clearly defined functions.

5.3 Procedure

Under the law, as it stands, a complaint can be lodged at the MRTP Commission by any one of the following:

1. private individuals;
2. registered associations of consumers;
3. on its own knowledge or information received by the Commission by any source;
4. trade associations;
5. State or Central Government Departments/organisations; or
6. the Director General of Investigation and Registration.

The MRTP Commission carries out investigations of all complaints lodged, provided they fall under the purview of the Act and they are properly filed and signed by the party. Investigations upon 'information received' are carried out, provided the aggrieved party files a proper complaint upon being requested to do so by the MRTP Commission and, of course, if the information falls under the purview of the Act.

However, the Commission has the authority to throw out a complaint when there is no basis for the allegation/s and the decision to undertake investigations is taken on a case-by-case basis. There is no automatic trigger for the initiation of an investigation. In a majority of the cases, the parties concerned file all the relevant documentation and there is no need for a separate investigation. In cases involving compensation, which are the most common and numerous, there is no investigation, as a rule. In other cases, there is the possibility that out-of-court settlements may be reached between the contending parties. However, the MRTP Commission has no role to play in such cases.

5.4 The Commission and other Regulatory Authorities

During the 1990s, a number of sectoral regulatory authorities have been formed, such as Securities & Exchange Board of India (SEBI), Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission (CERC), etc. The question of overlapping jurisdictions between the Competition Authority and the other Authorities has not been settled and is expected to resolve itself over time. The view of the MRTP Commission on the issue of overlapping regulatory jurisdictions is that the MRTP Act predates the Acts setting up the new regulatory authorities and there is no explicit provision in the laws establishing the new regulatory authorities that exempts them from the authority of the MRTP Commission.

It is important to remember that the current CA will soon be replaced, with the enactment of the new competition law in India. No new cases of substance have been filed with the MRTP Commission for a while. In addition, Section 4(1) of the MRTP Act declares that the provisions of the Act have to be applied harmoniously with the provisions of other enactments. Thus, if anything is expressly provided in the MRTP Act, it would override other laws. But, the provisions of other statutes will continue to apply with full force, where the said provisions are not in conflict with the MRTP Act.

CHAPTER-VI

Capabilities of the Competition Authority

The MRTP Commission is currently understaffed. Thus, apart from the Chairman, the Commission has four members, against a sanctioned strength of eight. Similarly, there are seven members of professional staff and 87 members of support staff, whereas 10 and 95 have been sanctioned, respectively. Of the seven members of the professional staff, three have technical backgrounds in economics/commerce/finance, two have backgrounds in law and the rest are from general administration. The professional backgrounds of two of the Commission members are in general administration; one has a legal and the other economic/commerce/finance background. Half of the existing Commission members and about a quarter of the professional staff have a general administrative background.

The Commission has, typically, been staffed by retirees from the judiciary and the government and government officials on deputation for appointments as chairman/members/professional staff.

The Commission has, typically, been staffed by retirees from the judiciary and the government and government officials on deputation for appointments as chairman/members/professional staff. Support staff, on the other hand, was selected by the panels of the Staff Selection Commission (SSC). The service rules of the Central Government are followed for dismissal of the members and the other staff. Central Government procedure is also followed for evaluating staff performance. The salaries and benefits of the Commission members are equivalent to the additional secretary level of the government, while those of the professional staff are equivalent to the joint director level. The salary of support staff is comparable to that of clerical staff in the Central Government. The turnover rate of Commission staff is low, about 2 percent per annum. This is probably because there is still high demand in India for government jobs due to their permanent nature.

The budget of the Commission is provided by the Department of Company Affairs of the Ministry of Law, Justice and Company Affairs. The budget and the actual expenditure incurred over recent years are shown in the following table.

| Year | Actual Expenditure (Rs in billions) | Budget (Rs in billions) | Budget of Central Govt. (Rs in billions) | (3) as % of (4) | GDP (Rs in billions) | (3) as % of (6) |
|------|--|----------------------------|---|-----------------|-------------------------|-----------------|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 1996 | 10.48 | 11.08 | 2010.07 | 0.0005 | 13682.08 | 0.00008 |
| 1997 | 14.363 | 14.399 | 2320.68 | 0.0006 | 15224.41 | 0.00009 |
| 1998 | 16.724 | 17.728 | 2793.60 | 0.0006 | 17582.76 | 0.00010 |
| 1999 | - | 17.605 | 2980.84 | 0.00059 | 19569.97 | 0.00009 |

It is clear from the table that the budget of the Commission is a negligible percentage of the Union Budget and the GDP. Moreover, resources available to the Commission have remained, by and large, unchanged over recent years. Notwithstanding the resource stagnation, in 1998, actual expenditure was much less than the budgeted amount. The Commission manages the budget, but has to seek permission from the Ministry to incur expenditure beyond a certain limit. Like any other government organisation, the Auditor-General of India audits the expenditure. Thus, the Commission has access to extremely modest resources and has little autonomy over funding, both in terms of the total resources available and large expenditures.

Of the total expenditure incurred, nearly 66 percent goes towards wages and salaries. The other major areas of expenditure are establishment costs (31 percent) and travel costs (two percent). Given that the Commission has a single location in the capital, low expenditures on travel suggest a fairly centralised adjudication machinery, with most parties to complaints travelling to the Commission.

The Commission has chosen to maintain a rather rudimentary infrastructure for the acquisition and management of information and knowledge.

The Commission has chosen to maintain a rather rudimentary infrastructure for the acquisition and management of information and knowledge. It has at its disposal a total office space of about 16,000 square feet, of which the library occupies only 450 square feet. As a result, the library does not have enough space to keep all of its material on the premises. There is no facility for news scanning/clipping in the library, nor is there any facility for maintaining a database of industries. At present, the library subscribes to 17 newspapers and 21 periodicals. Of the 21 periodicals, almost all are general-purpose magazines such as India Today, Sarita, Computer Today, etc. The only exception is a technical periodical that publishes the major rulings of the MRTP Commission.

Similarly, though the Commission has 17 telephone lines, it has only 10 computers with printers, which is inadequate for an organisation like the MRTP Commission. There are no regular training programmes in the MRTP Commission for staff, at any level. Nor is the staff routinely sent out for training. However, one training programme on computer use was held in 2000.

The Commission does not keep a track of the trade agreements made in the country. It is not compulsory for parties to register trade agreements with the Commission.

The achievements of the Commission with regard to the disposal of cases relating to MTPs are indicated in the table below.

| | 1997 | 1998 | 1999 |
|--|-------------|-------------|-------------|
| Brought forward | 7 | 8 | 8 |
| New cases | 1 | 0 | 0 |
| Disposed off | 0 | 0 | 0 |
| No. of enquiries pending at the end of year | 8 | 8 | 8 |

Since 1997, not a single new investigation relating to an MTP has been launched by the Commission. There are only a few enquiries pending before the Commission at present. The procedure to be followed by the Commission for an MTP enquiry is based on adversary proceedings, which are by their very nature time consuming.

| | 1997 | 1998 | 1999 |
|--|-------------|-------------|-------------|
| Brought forward | 6016 | 5666 | 6250 |
| New cases | 1447 | 1024 | 749 |
| Disposed off | 1791 | 440 | 4695 |
| No. of enquiries pending at the end of year | 5666 | 6250 | 2404 |

The MRTPC Commission has been successful in dealing with cases relating to Restrictive and Unfair Trade Practices (see Table 8). It disposed of nearly 4700 cases in 1999 and only 2404 cases were pending at the end of 1999. One can see from the above table that the number of new cases has declined sharply in recent years. The MRTPC Commission now has about 5000 cases pending relating to RTPs, UTPs and MTPs. Of these, only eight cases relate to MTPs. Of the rest, about 3000 cases are of a compensation nature, while the remaining 1990 relate to UTPs. UTP and RTP cases account for about 55 percent and 45 percent of cases, respectively.

There have been cases in which a restrictive or unfair trade practice is adopted against an individual consumer unintentionally or due to ignorance of the provisions of the MRTPC Act. In such cases and also in some other cases, the complaints of consumers or other aggrieved persons are sent to the respondent for comments. It has been noticed that in a large number of such cases, the respondent satisfies or redresses the grievance on the intervention of the Commission, and since the complainant gets the needed relief, no further action is taken.

In this way, relief has been received by an innumerable number of consumers. Such cases pertain to refunds with respect to scooter bookings, cars, repair or replacement of refrigerators, television sets, repair of cars during the warranty period and other common items use and consumer durables. Similarly, there have been cases of successful interventions related to renting of flats and other disputes relating to property.

As mentioned earlier, the DGIR can carry out investigations relating to RTP/UTP cases. The following table shows the positions of the investigations referred to the DGIR in the years 1997-1999. The DGIR does not suffer from any serious backlog of cases pending.

| | 1997 | | 1997 | | 1999 | |
|--|-------------|------------|-------------|------------|-------------|------------|
| | RTP | UTP | RTP | UTP | RTP | UTP |
| Brought forward from | 89 | 49 | 72 | 108 | 67 | 78 |
| New cases | 45 | 145 | 15 | 33 | 6 | 35 |
| Disposed off | 62 | 86 | 20 | 63 | 4 | 14 |
| No. of enquiries pending at the end of year | 72 | 108 | 67 | 78 | 69 | 99 |

The time taken to complete the adjudication of cases pending with the MRTP Commission (from the date the complaint is lodged) varies from case to case. At present, there are two cases pending with the Commission in which the complaints were filed before 1983. There are about 125 cases pending which were initiated between 1983 and 1990.

The New Competition Law

The existing competition law was enacted several decades ago with a focus on curbing monopolies and concentration of economic power. The law itself was quite consistent with contemporary intellectual fashions and, perhaps, the needs of the economy.

Over time, however, the wording of the existing law has been considered inadequate by numerous judicial pronouncements. An analysis of the MRTP Act will show that certain offending trade practices are either not included or properly defined. Some of these are:

- abuse of dominance;
- cartels, collusion and price-fixing;
- bid-rigging;
- boycotts and refusal to deal; and
- predatory-pricing.

It has been argued that Section 2(o) of the MRTP Act, defining RTP as trade practice that prevents, distorts or restricts competition, is quite general and can be used to capture all complaints relating to anti-competitive practices. Consequently, while anti-competitive practices like cartels, predatory-pricing, bid-rigging, etc., are not specifically mentioned in the existing competition law, MRTPC has sometimes made attempt to take up such cases under some section or another, but without much success. More broadly, the absence of specification of different anti-competitive practices may leave room for different interpretation by different courts and in different cases. While a general definition is important, it is also necessary to identify specific anti-competitive practices and define them to ensure clarity, due process, consistency and certainty in administration of the law.

Another factor underlying the desire for a new competition law in India stemmed from the changes in the economic environment, both domestically, due to policy reforms, and externally, with the conclusion of the Uruguay Round of trade negotiations and the establishment of the WTO. Many countries like Canada, Australia, United Kingdom and South Africa have already adopted new competition laws to move with changing times.

7.1 The High Level Committee

Recognising these, in October 1999, the Government of India appointed a Committee to examine the provisions of the MRTP Act and to propose a modern competition law in line with international developments to suit the circumstances in India. The Committee was to submit its reports within three months and its terms of reference were to recommend:

- a) A suitable legislative framework, in light of international economic developments and the need to promote competition, relating to competition law, including law relating to mergers and demergers. Such a legislative framework could entail a new law or appropriate amendments to the MRTP Act, 1969;

- b) Changes relating to legal provisions in respect of restrictive trade practices, after reviewing the existing provisions and ensuring clear demarcation between the jurisdiction of the MRTP Commission and the Consumer Courts under the Consumer Protection Act, 1986, so as to avoid any overlapping of jurisdiction; and
- c) Suitable administrative measures required in order to implement the proposed recommendations, including restructuring of the MRTP Commission and the location of Benches outside Delhi for expeditious disposal of cases pending before the Commission.

Instead of the three months allotted to it, the Committee took six months, during which it was named the 'High Level Committee on Competition Policy and Law'. Its report, released in May 2000, was quite remarkable for the lack of consensus among the members. The Report was accompanied by a note of dissent from one member, another comment of dissent from three other members, and supplementary notes by two members. The Chairman of the Committee also expressed considerable sympathy with the dissenters.

The debate within the Committee was not limited to only the matters of details of the proposed competition law but also on the very necessity of a competition law in India. Questions were also raised whether the purpose of the Committee was to suggest a new law or an amendment to the existing law or take an overall perspective and look into whether there should be a competition law at all. However, a closer look at the office order to constitute the Committee, as well as the terms of reference, indicate that there was no intention of scrapping the competition law altogether.

A central concern in the discussions on competition law in India lay in the extent of powers to be vested in the competition authority.

A central concern in the discussions on competition law in India (as yet unresolved) lay in the extent of powers to be vested in the competition authority. On the one hand, it is true that modern competition law – and the authority that enforces it – has to be discretionary in its essential characteristics. At the same time, a genuine apprehension in the Indian context is that an authority vested with enormous discretionary power could function in such a way that it may start coming in the way of entrepreneurship rather than promoting competition. Removal of discretionary power through more *per se* provisions may be even worse. A way out suggested in this context by a member of the Committee was wide public debate on this issue, along with the notion that the competition authority not take up any cases during some initial period but, instead, confine itself to purely an advocacy role.

The disagreement within the Committee was reflected outside, with considerable debate in public policy discourse on the report, in particular, and competition law and policy, in general. The draft Bill of a new competition law following the Committee's report has been placed in the Parliament. It is with a Parliamentary Sub-committee now, and the debate is still ongoing. The debate covers various aspects of competition law, from fairly broad ones such as whether competition law is necessary at all and whether a new law should be enacted or the old one modified, to more specific issues such as how dominance and the abuse of dominance should be defined. Another contentious issue is whether the law should have pre-merger notification provision or not.

7.2 The Proposed Competition Bill

The Competition Bill aims to promote and sustain competition in markets by preventing anti-competitive practices. Further, it aims to protect the interests of consumers while ensuring freedom of trade. A comparison

with the new Competition Law (draft) shows that many aspects of the previous law stay unchanged, although, as would be expected, there are important differences.

Major changes that can be viewed as an improvement over the previous act are:

- registration of business agreements has been dropped;
- four anti-competitive agreements, namely, price-fixing, output restriction, market allocation and bid-rigging have been prohibited *per se*;
- mergers and acquisitions have been brought within the ambit of the competition law, but with a light regulatory hand: regulations apply only above a threshold and prior notification is optional; and
- emphasis on competition advocacy.

The problems with the existing regime were a lot more in the domain of implementation than of the “black letter” law. It is expected that the establishment of the new Competition Commission will be accompanied by a serious increase in resources. This is needed so that the new Commission can be adequately staffed with trained professionals, as opposed to civil servants. However, the new competition law still provides opportunity for retired members of the judiciary or government service to be appointed as members or Chairperson of the new Competition Authority.

The problems with the existing regime were a lot more in the domain of implementation than of the “black letter” law. It is expected that the establishment of the new Competition Commission will be accompanied by a serious increase in resources.

In a related vein, the new law does not provide adequate safeguards for the autonomy of the new Competition Authority, as the latter would be required to adhere to the policy guidelines of the Central Government from time to time. In addition, “exemptions” from the new law have been left to the discretion of the Central Government without any transparent guidelines, leaving the possibility of misuse open. It would be better if such exemptions were made only after consultation with the Commission and an advisory council, following a public debate on the same.

7.3 ACPs, Abuse of Dominance and M&As **Anti-Competitive Agreements**

The new law does not provide adequate safeguards for the autonomy of the new Competition Authority, as the latter would be required to adhere to the policy guidelines of the Central Government from time to time.

The new Bill prohibits both horizontal and vertical agreements that cause, or are likely to cause, an appreciable adverse effect on competition in India or any part thereof. Four types of horizontal agreements are presumed to have such effects and are, therefore, prohibited *per se*. This approach seems to be in line with international best practices in this regard.

Despite the increasing importance of anti-competitive behaviour through the exploitation of Intellectual Property Rights (IPRs), the new Bill excludes agreements relating to IPRs from the scrutiny of the Competition Law. Hence, certain pharmaceutical licensing agreements, however anti-competitive they may be, cannot be investigated by the new Commission.

Abuse of Dominance

Under the proposed Bill, enterprises are prohibited from abusing their dominant position. The Bill identifies the instances that constitute abuse and it provides the Commission with the factors that it has to take into account when determining whether an enterprise enjoys a dominant position or not. In general, a dominant position is defined as a position of strength that allows the enterprise to operate independently of competitive forces in a relevant market or allows it to affect competitors or consumers in its favour.

The Bill calls for the application of a two-step test and does not frown on dominance *per se*.

Only mergers and acquisitions above a certain size-threshold are regulated. This threshold is very high;¹² hence, some mergers and acquisitions that may have anti-competitive effects would go unregulated.

Merger Control

Only mergers and acquisitions above a certain size-threshold are regulated. This threshold is very high;¹² hence, some mergers and acquisitions that may have anti-competitive effects would go unregulated. The Bill does not require mandatory notification and only provides for the regulation of combinations on the Commission's own motion. Though a complaint can induce the Commission to form the requisite opinion, it does not give rise to any obligation on the part of the Commission to act. There is no window for any complaint from a competitor or consumer in cases where they feel that a competition concern has arisen, or is going to arise, with respect to a combination, which obligates the Commission to act.

Concluding Remarks

The Monopolies and Restrictive Trade Practices Act was enacted in India in 1969, with a focus on curbing monopolies and concentration of economic power. Since then, there have been many changes in the economic environment in India and the structure of its markets. Structural reforms were initiated in 1991 to reduce pernicious government controls and lower barriers to international trade. This deregulation process has, generally, increased the scope of competition in the economy. In addition, the global economy has undergone wide-ranging changes, involving far greater integration of markets and economies. In the light of these developments, it was deemed necessary to update the existing policy regime in India.

Our review of the Competition Authority has shown that too few resources were provided for enforcement and that little concern was shown for the efficient use of these meagre resources.

This report has examined the existing Competition Law and its effectiveness to draw out some lessons for the new regime. The problems with the previous regime were as much in the implementation as in the 'letter' of the law. For instance, the enforcement of sections dealing with monopolistic and restrictive trade practices has been limited in its effectiveness. The MRTP Act has failed to keep a check on the abuse of market dominance. Furthermore, since the Act does not declare monopolistic, restrictive and unfair trade practices illegal and *ipso facto* void, its ability to promote competition, consumer welfare and industrial growth is limited.

Our review of the Competition Authority has shown that too few resources were provided for enforcement and that little concern was shown for the efficient use of these meagre resources. Appointments to the Commission were made with little regard for the technical skills and expertise that would be necessary for the effective functioning of the Commission. Several people with general administrative backgrounds were used to staff the Commission, and it became a vehicle to provide post-retirement benefits to retirees from the judiciary or government service. Not surprisingly, commitment to professional knowledge acquisition, management and skill development have all been absent in the Competition Authority in the past.

The proposed Act does not satisfactorily take into account the changes following from the WTO negotiations that may potentially undermine the authority of the Commission and the integrity of the competition policy.

The new Competition Bill would make some important improvements to the competition regime, for example, by extending its coverage to mergers and acquisitions and the *per se* prohibition of certain anti-competitive practices. It is also important that the new body has financial autonomy, without which its effectiveness will be severely eroded. The new law is likely to propose substantial enhancement of resources available to the new Competition Authority. It is important to ensure that these resources are forthcoming. If the new authority is to be successful, it is imperative that these inadequacies are redressed and its resources are substantially enhanced and efficiently used.

At the same time, the proposed Act does not satisfactorily take into account the changes following from the WTO negotiations that may potentially undermine the authority of the Commission and the integrity

of the competition policy. In particular, the law does not include within its scope IPR licensing agreements. A competition law must provide for the regulation of IPRs, since the global environment is shifting towards a knowledge-based economy in which they acquire more significance. The allocation of authority in competition aspects between the competition authority and the statutory regulators is another area of ambiguity that, perhaps, will clarify over time. Finally, the new law allows the government to undermine the independence of the Competition Authority in circumstances that are not clarified unambiguously. Strong independence of the Competition Authority from government intervention is desirable in effective implementation of any competition law.

There is no doubt that if the Competition Commission is allowed to become a resting ground for retired people, as in the past, its effectiveness in the new regime would be severely eroded.

Aside from regulatory independence, the new Competition Authority under the new law will also have to undertake a balancing act between two competing concerns. On the one hand, the new Competition Authority should not merely become another “super-regulator” with strong powers that can be abused by adopting indiscriminate control. On the other hand, a competition authority without teeth would be ineffective. This also makes decisions made as to the staffing of the new competition authority, in terms of the skills of the members, and the appropriate minimum and maximum ages critical. There is no doubt that if the Competition Commission is allowed to become a resting ground for retired people, as in the past, its effectiveness in the new regime would be severely eroded.

SUMMARY OF NRG DISCUSSIONS

NRGs were formed to deliberate on the inputs prepared in each country and conduct the advocacy part of the Project.

One of the objectives of the 7-Up Project was to form a National Reference Group (NRG) in each of the project countries. NRGs were formed to deliberate on the inputs prepared in each country and conduct the advocacy part of the Project. The results of the fieldwork done by the project partners were first tested at a local meeting of the NRG. On the basis of the inputs and suggestions given by the members of the NRG, the results were, then, discussed at a larger meeting where all the stakeholders of the Project participated. They comprised of representatives of the following category of organisations/persons:

- consumer organisations, where existing and having the capacity;
- other civil society organisations with demonstrated interest in economic issues,
- research institutions, academia, experts (economists and lawyers);
- chambers of commerce;
- the media;
- the competition authorities;
- external trade departments;
- internal trade and/or consumer affairs departments;
- politicians and/or parliamentarians; and
- regulatory authorities.

The meeting provided a good platform to bring together several experts and have deliberations on various aspects of competition law, besides discussing some Project-specific issues.

During the first phase of the Project, two NRG meetings were organised in India. The meetings involved participation from representatives of various stakeholder groups as mentioned above.

The meeting provided a good platform to bring together several experts and have deliberations on various aspects of competition law, besides discussing some Project-specific issues. The phase-I country report and case-studies to be taken up during Phase-II of the Project were discussed in detail and finalised after a general consensus.

Since India is considering a new competition law, the discussions were mainly focused on the existing regime, i.e., the MRTP Act, 1969, the MRTP Commission, and the draft Bill, to debate upon “what’s there that should not have been” and “what’s not there that should have been.” The highlights of the discussions can be summarised as follows:

It was felt that the existing competition regime was ineffective in today’s liberalising and globalising economy. Thus, the introduction of the Competition Bill was a welcome move.

It was felt that the existing competition regime was ineffective in today’s liberalising and globalising economy. Thus, the introduction of the Competition Bill was a welcome move. However, several lacunae were pointed out in the draft Bill also. It was suggested that the new law should provide for high fines and criminal liability, coupled with leniency programme for firms and protection to the whistleblowers in order to prevent and crack cartels. The participants were also critical about the high retirement age for the Chairperson and other Commissioners, which could open doors for appointment of retired judges and civil servants.

It was also felt that the IPR provisions in the competition law need reconsideration. Flexibility provided under TRIPs could be optimally used through competition law. Provision in the Competition Bill regarding policy

intervention from the Central Government should be withdrawn. Some of the other drawbacks of the existing regime such as lack of independence, no clear definition of competition offences, non-proactive authority, lack of flexibility, lack of teeth, etc., surfaced during the discussions.

It was opined at the meeting that there was very little understanding in the developing countries on the issue of competition

It was opined at the meeting that there was very little understanding in the developing countries on the issue of competition and, for this, consumer organisations, governments and regulators should undertake the task of disseminating information relating to competition in a simple manner. More participation by the civil society is also required.

It is of utmost importance that the competition law establishes a balance between consumer interests and business interests. Definition of consumers in the competition law should be broadened; education and accounting should be included in services and shares before allotment should be considered as goods.

It is of utmost importance that the competition law establishes a balance between consumer interests and business interests. There is a need to have a mix of technical and judicial people in the Competition Authority.

There is a need to have a mix of technical and judicial people in the Competition Authority. In fact, two bodies should be set up for implementing competition law; one for investigation/prosecution and the other for adjudication. This is essential in order to separate administrative and prosecutorial and judicial functions.

During the discussions on the need of a Multilateral competition policy, the following suggestions surfaced at the meeting:

- enhance bi-lateral co-operation with relevant competition authorities in order to combat cross-border abuses;
- give more teeth to the competition authority vis-à-vis M&As having international spill-overs and other cross-border competition abuses; and
- multilateral competition rules are needed, with or without WTO, to curb cross-border abuses where bilateral arrangements fail or are difficult to enter into.

Synopsis of the Synthesis Report

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project. This synopsis provides a summary of the Synthesis Report.

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. It brings together the results and findings from the individual country reports that provide details of the structure, functioning and efficiency of the institutional framework for enforcing competition law in the country.

The synthesis compares the experiences of the seven countries, providing a benchmark by which countries can evaluate their own progress and offering an opportunity for them to learn from developments elsewhere. This synopsis provides a summary of the Synthesis Report.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. They are also at different stages in terms of the development of their competition regimes. While India has had competition legislation in place since 1969, Tanzania and Zambia first enacted competition laws in 1994 and 1995 respectively. Accordingly, the countries have different levels of experience as regards the implementation of competition policy.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries. This process has involved liberalisation of the economy, including a reduction of barriers to international trade and reduced state involvement in commercial enterprises.

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Large state-owned enterprises have been privatised and replaced by profit-driven bodies. In this context, competition policy is extremely important in order to ensure that a smooth transition towards a well-functioning market occurs, and to avoid the danger of transferring dominant market positions to private enterprises. This would ensure a broader choice of goods at cheaper prices for consumers, and an efficient allocation of the economy's resources.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws. As with other policy changes, this represents a shift in emphasis away from government control (e.g. price controls) towards the encouragement of market-driven efficiency, through competition.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws.

However, some of the laws include objectives that are not directly related to the promotion of competition; for example one of the objectives of the South African Competition Act, 1998, is to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons", and the Sri Lankan Fair Trade Commission takes the control of inflation into consideration in its activities. In general, the key objectives are efficiency and consumer welfare, with a recognition that there may be a trade-off between static and dynamic efficiency.

Three main areas are generally considered to be the core concerns of competition policy in any country:

- i) Restrictive trade (or business) practices;
- ii) Control of monopoly power or a dominant position; and
- iii) Mergers and acquisitions.

While each of these is covered under all of the 7-Up country laws, the manner in which they are covered differs somewhat.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition.

Most countries identify specific actions that constitute an RTP; the others give a more general definition. In several of the 7-Up countries the definition of restrictive trade practices (RTPs) is related to the idea of a horizontal or vertical agreement between firms that restricts competition. In other countries RTPs also include restrictive actions by single enterprises.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition. All countries include a 'rule of reason' provision whereby some practices can be justified either in the public interest, or on efficiency, technological progress or export grounds. The onus is usually on the offending party to make a case for itself, though in Sri Lanka the burden of proof is reversed. It is difficult to determine the precise criteria on which 'rule of reason' decisions will be based, but this process should develop over time to provide more predictable outcomes for enterprises, while allowing competition authorities the necessary flexibility to support developmental needs and other public policy aims.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions. Firstly, they must establish that a position of dominance exists, and secondly, they must establish that this position is being abused. A prerequisite for this process is identifying the relevant market, in terms of its 'geographical' and 'product' dimensions. Most of the laws do not provide a clear prescription for how this should be done. India's new Competition Bill, although not yet in force, will be the only competition law to specify which factors should be taken into consideration in this regard.

Once the relevant market has been determined, dominance is assessed. The major factor for determining this in all countries is market share. Although there is no one-to-one relationship between a high market share and market dominance, which makes it difficult to set a threshold, this method is used as an important indicator in jurisdictions all over the world. The levels above which dominance is presumed in the 7-Up countries fall between 30 and 50 percent. India's new Bill takes a more behavioural approach, taking into account other factors such as the size and importance of competitors, technical advantages and the overall structure of the market. It is not yet clear how much weight will be allocated to each factor.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused. Dominant firms are subject to the same prohibitions as other firms, while in some cases behaviour that is legitimate for non-dominant firms is also not allowed.

The only country that does not follow the two-step approach is Pakistan. Here, once market dominance is determined it is up to the dominant enterprise to justify its position on the grounds that it contributes substantially to efficiency, technological progress or the growth of exports.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes. However, the division of authority between the competition agency and the sector-specific regulator is often unclear.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties.

In addition, the economic circumstances that prevailed in the country in 1970, when the MRTPO was enacted, led the law to prohibit excessive 'personal' market power per se. At that time there was a vast concentration of the country's wealth into the hands of 22 business families. The MRTPO set a threshold of 300 million Pakistani Rupees, above which an individual's assets are deemed to constitute an undue concentration of economic power. The remedy in these cases is divestiture of ownership.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ; Pakistan requires that all mergers are notified to the authority; Kenya, Tanzania and Zambia require that all horizontal combinations are notified and approved (this limits their scope to deal with cases of vertical mergers with anti-competitive implications); South Africa requires pre-notification above a certain threshold; and India requires no pre-notification in either the existing Act or the proposed Bill. In Sri Lanka all mergers are notified, though the law actually only requires this in cases where combinations result in either the acquisition of a dominant position, or the strengthening of an existing one. The policy towards pre-notification has significant implications for the workload of competition agencies. In South Africa, this was part of the motivation for the amendment that introduced the threshold below which notification is not required.

In addition to the three main areas, some of the laws include provisions on unfair trade practices or consumer protection. In other countries these are covered under separate consumer protection laws, although Kenya and South Africa do not have any legislation covering either area.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes (this applies to many utilities, which are regarded as natural monopolies), however, the division of authority between the competition agency and the sector-specific regulator is often unclear. Both the Kenyan and the Indian governments have wide powers to exempt any enterprise that performs a 'sovereign duty'. Pakistan's Monopolies and Restrictive Trade Practices Ordinance specifically exempts all state enterprises. In South Africa firms can apply to the Competition Commission for exemption for a specific practice on various grounds, including the maintenance or promotion of exports or preventing the decline of an industry.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction. However, as in the rest of the world, even where specific provisions for extra-territorial abuses are included this is not a guarantee that they will be effective in dealing with them. The South African Competition Commission and Tribunal have both recognised that they are unlikely to oppose a large international merger that has already been approved in the US or the EU, given the relative size of the South African economy. The second phase of the 7-Up project will examine these issues in more detail.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties. The fines are often very low; in Kenya the maximum fine is approximately US\$1,300 and in Tanzania it is approximately US\$3,750. Such fines will not deter large

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body.

enterprises from anti-competitive practices. The South African and the new Indian legislation may be more effective since they relate the maximum fine to the size of the enterprise involved.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body. The South African set-up with a 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law. However, such a set-up might not be constitutional in countries that provide for final Supreme Court jurisdiction in all cases, as is the case in India.

The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff.

After the introduction of the new law in Tanzania, the Kenyan authority will be the only one that is administratively part of a government department. However, this does not mean that the other authorities have sufficient autonomy from central government. In Pakistan for example, an attempt to curtail cartelisation and collusive pricing in the cement industry resulted in government intervention to fix prices at a 'mutually acceptable level'. Several factors influence the level of an authority's autonomy, including the method by which funds are allocated. In addition to funds from central government, Sri Lanka and South Africa receive some of their income from the filing fees that they receive. This increases their independence.

In most cases the authorities' budgets are extremely low. The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff. The largest portion of the budgets is usually spent on salaries, with very little on research and investigations, or meetings and conferences.

In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff.

Many of the authorities are understaffed. There has been some difficulty in finding appropriate candidates to fill positions, and many research positions remain vacant. Though India has a large staff, this is dominated by support staff and there are few professionals. In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff. In addition, authorities do not have access to adequate information on market structure; several of the countries have no industry database. In conjunction with the lack of experience and suitably qualified staff this will make complex tasks like assessing market dominance very difficult.

In many respects South Africa is better equipped than the other countries to carry out its functions. The office has a fully electronic information resource centre, and all reference material is available online. The Commission also uses a case management and tracking system, which allows users to keep track of the progress of cases. The Tribunal also has continuous training and development programmes and provides funding for staff to pursue higher study. However, even the South African authorities have difficulty in attracting high-calibre staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour. Despite this need, the advocacy and outreach programmes of the competition authorities have been limited and most countries spend very little on publications and raising awareness.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture. The main problems, however, are in the effective implementation of the laws. On the whole, the main barrier to this lies in the weakness in the capacities of the competition authorities, and their inexperience. Overcoming these difficulties will be much easier if governments and civil society are educated on competition issues.

7-UP COUNTRY PROFILES

| | India | Kenya | Pakistan | South Africa | Sri Lanka | Tanzania | Zambia |
|---|-------------------|-----------------|-----------------|--------------------|------------------|--------------------|----------------|
| Population¹ Millions (1999) | 998 | 29 | 135 | 42 | 19 | 33 | 10 |
| GDP Millions US\$ (1999) | 459,765 | 10,603 | 59,880 | 131,127 | 15,707 | 8,777 | 3,325 |
| GNP/Capita US\$PPP (1999) | 2,149 | 975 | 1,757 | 8,318 | 3,056 | 478 | 686 |
| Adult Illiteracy (1998): | | | | | | | |
| % Male (>15) | 33 | 12 | 42 | 15 | 6 | 17 | 16 |
| % Female (>15) | 57 | 27 | 71 | 16 | 12 | 36 | 31 |
| Poverty² | | | | | | | |
| % <National poverty line | 40.9 | 42.0 | 34.0 | - | 40.6 | 51.1 | 68.0 |
| % <\$1/day | 44.2 | 26.5 | 31.0 | 11.5 | 6.6 | 19.9 | 72.6 |
| Exports % GDP | | | | | | | |
| 1990 | 7 | 26 | 16 | 24 | 30 | 12 | 36 |
| 1999 | 11 | 25 | 15 | 25 | 36 | 20 | 29 |
| Imports % GDP | | | | | | | |
| 1990 | 10 | 32 | 23 | 19 | 37 | 35 | 58 |
| 1998 | 13 | 35 | 21 | 25 | 42 | 27 | 34 |
| Currency | Indian Rupee | Kenyan Shilling | Pakistani Rupee | South African Rand | Sri Lankan Rupee | Tanzanian Shilling | Zambian Kwacha |
| Exchange Rate Currency / US\$ (2000) | 43.3 ³ | 76.2 | 51.7 | 6.9 | 75.1 | 800.4 | 3,110.80 |
| Annual budget of CA US\$ (2000) | 406,582 | 235,892 | 325,919 | 7,742,678 | 97,870 | 162,056 | 193,005 |
| Annual Govt Budget Millions US\$ (2000) | 68,840 | 3,230 | 13,560 | 23,270 | 3,395 | 1,010 | 340 |
| % Government Budget | 0.00059 | 0.00731 | 0.00240 | 0.03327 | 0.00288 | 0.01604 | 0.05619 |
| Pattern of expenditure -% share (2000) | | | | | | | |
| Salaries & honoraria | 66 | 54 | 33 ⁴ | 41 | 43 | 18 | 81 |
| Establishment cost | 31 | 36 | 16 | 21 | 53 | | 0 |
| Books, periodical etc | 2.21 | - | 0.49 | | 0.80 | | 0 |
| Research & investigation | | - | | 7.1 | 0.39 | | 11 |
| Printing/publications | | - | | | 2.33 | | 1.98 |
| Meetings/conferences | 0.66 | 0.33 | | 3.6 | 0.18 | | 5.87 |
| Other | | 0.27 | | | | | |
| Staff (2000/2001) | | | | | | | |
| Full time members | 4 | 1 | 3 | 1 | 1 | 5 | |
| Part time members | 0 | 0 | - | 8 | 5 | - | 12 |
| Professional | 7 | 24 | 5 | | 7 | - | 5 |
| Support staff | 85 | 6 | 25 | | 7 | - | 6 |
| Total | 96 | 31 | 33 | 78 | 20 | 5 | 23 |

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.

2 Latest available year.

3 Budget and exchange rate figures for India are for 1999 (2000 not available).

4 Pattern of expenditure for Pakistan is for 1999.

ANNEXURE-1

Exchange Rates

– Units of National Currency/US Dollar

| | 1980 | 1990 | 1999 | 2000 |
|------------------------------------|-------------|-------------|-------------|-------------|
| Rs/US\$ | 7.9 | 17.9 | 43.3 | 45.7 |
| <i>Source: World Bank, (2001).</i> | | | | |

ANNEXURE-2

ABOUT 7-Up

The 7-Up Project is a two- year research and advocacy programme being conducted by the Consumer Unity & Trust Society (CUTS) with the support of Department for International Development (DFID), UK for a comparative study of competition regimes in seven developing countries of the Commonwealth.

The countries selected for the Project are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, which have similar legal systems, and are at similar levels of economic development.

Main Objectives

The project primarily aims to:

- Evaluate the existing competition law and its implementation on a few basic principles: budgets, autonomy, composition and structure of the competition regime and authority;
- Identify typical problems and suggest solutions, including on the basis of good practices elsewhere;
- Suggest ways forward to strengthen existing legislation and institutions dealing with competition and consumer protection issues;
- Assess capacity building needs of the government, its agencies and the civil society;
- Develop strategies for building expertise among the competition agency officials, practitioners and civil society to deal with anti-competitive practices, including cross-border abuses more effectively; and
- Help build constituencies for promoting competition culture by actively involving civil society and other influential entities during this exercise.

Project Implementation

The project is being implemented by CUTS Centre for International Trade, Economics & Environment (CITEE) under the close supervision of an international advisory committee who are experienced in competition and related issues. The research and advocacy work of the project at country level is being done by local partners/ research institutions in the relevant countries. The following institutions have been involved in the project as partners:

- *India*: National Council of Applied Economic Research, New Delhi and CUTS, Jaipur
- *Kenya*: Institute of Economic Affairs, Nairobi
- *Pakistan*: Sustainable Development Policy Institute, Islamabad and The Network for Consumer Protection, Islamabad
- *South Africa*: Institute for Global Dialogue, Johannesburg
- *Sri Lanka*: Law & Society Trust, Colombo and Institute of Policy Studies, Colombo
- *Tanzania*: Economic and Social Research Foundation, Dar-es-Saalam and Christian Council of Tanzania, Dodoma
- *Zambia*: CUTS Africa Resource Centre, Lusaka and Zambia Consumers Association, Kitwe

The Project comprises of two phases, where Phase-I studied the institutional framework for enforcing the competition law in the project countries and Phase-II deals primarily with cross border competition issues.

The project, implemented under the close supervision of an international advisory committee, has two components: research and advocacy.

The research output of the project is designed to be based on:

- Study of relevant existing literature
- Field study, and
- Consultation with local stakeholders

The advocacy component of the project includes raising awareness among the various groups of stakeholders through meetings and publications and building constituencies that would help shaping a healthy competition culture. In this regard a National Reference Group, involving various stakeholders, has been formed in all the project countries.

It is expected that the project will be extended to implement some of the results of the project including providing capacity building and technical assistance to governments and civil society, as well as advocating for a healthy competition culture at different levels.

ENDNOTES

- 1 See Table 2.
- 2 The fiscal year in India starts from 1st April .
- 3 Another important source of capital inflows are the bank deposits in foreign currency held by Non-resident Indians, which have been in excess of US\$1bn in recent years.
- 4 If there are n firms in the market of a particular product and the market shares of those firms are given by $p_1, p_2, p_3, \dots, p_n$; then the Herfindahl Index is given by $H=(p_1^2+p_2^2+p_3^2+ \dots +p_n^2)$. The 3-firm concentration ratio is the combined market share of the three largest firms in terms of market share.
- 5 Calculated from Basant, R, and Morris, S, (2000).
- 6 Some of the discussion in this section is based on Joshi and Little (1994, Ch. 2).
- 7 The strategies for second five-year plan were based on the planning model developed by P.C. Mahalanobis, who is a noted statistician of India.
- 8 Ahluwalia, (1993)
- 9 Economic Survey, 1995-96
- 10 By contrast, the terms of reference of the recent Committee on competition law focused, inter alia, on the need to “promote competition”.
- 11 For instance, ‘goods’ under the MRTP Act cover shares and stocks, including issue of shares before allotment, while the CPA does not cover shares and stocks. Similarly, ‘services’ in the MRTP Act cover a Chit Fund but do not in the CPA and real estate is covered under ‘services’ in the MRTP Act, whereas only housing construction is covered under the CPA.
- 12 For example, the joint asset value of the post-combination enterprise must exceed 10bn rupees in the national market for it to come under the Commission’s purview.

BIBLIOGRAPHY

- Agrawal, G.D, (1999). *A New Competition Law*, Chartered Secretary, December 1999.
- Ahluwalia, Isher Judge, (1993). "Industrial Policy Reform of Public Sector Enterprises and Privatisation in India", paper presented at the conference on 'India – the Future of the Reforms, Merton College, Oxford, June 1993.
- Basant, Rakesh and Morris, Sebastian, (2000). *Competition Policy in India*, Indian Institute of Management, Ahmedabad.
- Basant, Rakesh, (2000). "Corporate Response to Economic Reforms", *Economic and Political Weekly*, March 4th 2000.
- Bhattacharjea, Aditya, 2000. *Trade, Foreign Investment and Competition Policy – Some Insights from "New" Trade Theory and Recent Indian Experience*, October 2000.
- Ghose, Ajit K, (1996). "Current Issues of Labour Policy Reforms in India", *The Indian Journal of Labour Economics*, Vol. 39, No. 3, 1996.
- Government of India, (1996). *Economic Survey 1995-1996*.
- Government of India, Department of Company Affairs, (2000). *Report of the High Level Committee on Competition Law and Policy*.
- Government of India, Department of Company Affairs, (1969). *Annual Report pertaining to the Execution of the Provisions of the MRTP Act, 1969*, various issues.
- Joshi and Little, (1994). *India - Macroeconomics and Political Economy, 1964-1991*, World Bank and Oxford University Press.
- Khanna Sushil, (1999). "Financial Reforms and Industrial Sector in India", *Economic and Political Weekly*, November 6, 1999.
- Korde, V.T, (1999). *Amendments to the MRTP Act – An OPPI Analysis*, Chartered Secretary, April 1999.
- Krishnamurthy, N, (1990). *The Consumer Protection Act, 1986: Features and Legal Analysis*, Chartered Secretary, October 1990.
- National Account Statistics, various issues.
- Sandesara, J.C. (1994), *Restrictive Trade Practices in India, 1969-91*, paper reprinted in Uma Kapila (ed.) *Indian Economy since Independence, 1999-2000*.
- Srivastava, Vivek, (1999). *India's Accession to the GPA: Identifying Costs and Benefits*, Paper prepared for the World Bank-NCAER WTO 2000 South Asia Workshop, New Delhi, December 20-21, 1999.
- World Bank, (2001). 'India at a Glance', <http://www.worldbank.org/data/>.

NOTE: Paragraphs have to be broken on the basis of the hard copy.

NATIONAL COUNCIL OF APPLIED ECONOMIC RESEARCH

National Council of Applied Economic Research (NCAER) is an independent, non-profit research institution that is committed to assist government, civil society and the private sector to make informed policy choices.

Established in 1956 as a registered society, NCAER is a premier applied economics research institute in the country. It is committed to enhance public awareness of policy issues in business and economics and to facilitate solutions that will contribute to overall national development.

A broad theme that permeates the Council's current research activities is the progress of India's economic reform programme and its impact on agriculture, industry and human development. An emerging focus is rigorous evaluation of major government public expenditure schemes in the social sector, at both state and union levels. New areas being considered include analysis of social security and social protection issues; health economics; and the economics of the "new economy", particularly information technology and biotechnology. The Council also has an emerging specialisation in gender issues.

CUTS CENTRE FOR INTERNATIONAL TRADE, ECONOMICS & ENVIRONMENT

Established in 1983, Consumer Unity & Trust Society (CUTS) started off as a consumer protection organisation in Rajasthan. Since then it has been working in several areas of public interest at the grassroot, national, subcontinental and international levels.

CUTS launched the CUTS Centre for International Trade, Economics & Environment in 1996. Its aim is to become a premier institution for research and advocacy on issues of trade and development that impact countries in the South. The mission of the centre is "pursuing economic equity and social justice within and across borders by persuading governments and empowering people." The Centre's goals are as follows:

- Enable, empower and facilitate representatives of the civil society, from developing countries in particular, to analyse, articulate and advocate on emerging and relevant issues in the international trading and economic system at the appropriate fora.
- Create an informed society through empowerment of people and civil society representatives thus enhancing transparency and accountability in the international trading and economic system.
- Promote equity between and among the developed and developing countries through well-argued research and advocacy on issues of international trading and economic system.

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