PULLING UP OUR SOCKS

- A STUDY OF COMPETITION REGIMES OF SEVEN DEVELOPING COUNTRIES OF AFRICA AND ASIA: THE 7-UP PROJECT

#0303

कट्स CUTS
Twenty Years of
Social Change

1984 to 2003

PULLING UP OUR SOCKS

-A Study of Competition Regimes of Seven
Developing Countries of Africa and Asia
under the 7-Up Project

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Published by:

कट्स ✠ CUTS

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Sustainable Development Policy Institute
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The Network for Consumer Protection
Pakistan

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Economic and Social Research Foundation
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Zambia

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AFRICA RESOURCE CENTRE

CUTS - ARC
Zambia

This report has been published as a part of the 7-Up Project, which is supported by:

DFID
Department for International Development, UK

Printed by:
Jaipur Printers P. Ltd., Jaipur 302 001

ISBN 81-87222-74-3

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ACKNOWLEDGEMENTS

During the implementation of the Project, significant contributions were made by country researchers, partner organisations, members of the Project Advisory Committee, CUTS staff and many other outside experts. It may be difficult to list all of them but some need special mention.

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Foreword

Since the second part of the nineties, the role of competition law and policy has been debated in many fora throughout the world with renewed intensity. Three major economic developments explain this renewed interest for competition:

- The failure of centrally planned economies in the former Communist bloc has contributed to the realisation that market forces, if properly channelled, play an essential role in economic growth (even though some developing countries are not yet fully convinced that competition law is an adequate instrument for them);

- The deregulation movement and the opening up of new sectors to private initiative (such as in telecommunications, electricity, airlines etc….) has created a need for new forms of market governance to avoid widespread abuses of market power. Competition law enforcement together with sectoral regulations has thus developed to fill the void left by state intervention.

- The internationalisation of the world economy, thanks to trade and foreign investment liberalisation, has led to the recognition of an increasing discrepancy between the ever expanding scope of economically relevant markets and the limited area of jurisdiction of national competition agencies. Because recent evidence suggests that trans-national anticompetitive transactions or practices are numerous and cause great harm to developed and developing countries alike, the issues of cooperation between competition authorities and of convergence or harmonisation of national competition laws came to the fore.

These elements have contributed to changing the nature of the competition law debate. Whereas until the late eighties, competition law matters were mostly discussed from a narrow technical point of view by the competition enforcers or practitioners of a few select developed countries, the recent debate has involved officials of developed and developing countries alike and has focused largely on the relationship between competition law, international trade and economic development. New ideas such as the fact that "there is no one size fits all competition law" or that "competition policy is not a stand alone policy" are now widely accepted by the international community. Rather than promoting the adoption of a competition law model which has succeeded elsewhere, competition experts now try to better understand the legal and economic specificities of the countries to which they give advice so as to determine if and how competition law enforcement could contribute to economic development. Also, rather than trying to promote convergence of national laws, they seek to find ways to create an interface between countries having different laws and enforcement systems in order to tackle trans-national anti-competitive practices or transactions.

In this context, the 7-Up Project is remarkable for a number of reasons. It is centered on the difficult, and still little known, issue of competition law and competition law enforcement in developing countries. It uses comparisons between the national experiences of seven developing countries which have adopted, with varying degrees of success, a competition law instrument and explores the reasons for their successes and failures. It addresses the issues of competition law enforcement in the wider context of the political economy of economic development in each country. Finally, it also addresses cross border issues. The wealth of observations gathered in each country for this project, and the use of this information for the purpose of making international comparisons make this project unique and one of the most useful contributions to the evaluation of the usefulness and the limits of competition law for economic development.

The importance of this project in the current debate on the possible adoption of a multilateral agreement on competition is considerable. On the one hand, the proponents of such an agreement need to better take into consideration the specific concerns of developing countries with respect to the competition law instrument. On the other hand, developing countries, some of which have expressed reservations about the usefulness of this instrument for economic development, need to better understand how it can be adapted to reinforce their wider economic and societal goals.

The project starts from the premise that competition law at the national level should be looked at in the context of local economic, legal, sociological and political considerations and it offers illuminating insights into the public policy debate regarding competition in the seven African and Asian developing countries under examination.

Based on its observations, the impact of characteristics often found in developing economies - such as a high level of concentration of domestic industry, income inequality, the preponderance of the public sector and of agriculture in the GDP, the importance of imports and the possible displacement through the competitive process of domestic firms by TNCs, imperfections in the financial sector and the fact that capital is scarce and more expensive for SMEs than for larger firms on competition, concerns for the promotion of employment and price stability etc…- on the scope and goals of competition law are extensively discussed. The report explores in details the extent to which differences in the scope or the goals assigned to domestic laws as well as variations both in the substantive provisions and in the legal standard applied to specific practices or transactions are attributable to differences in local conditions. This part of the report provides invaluable insight in how to fine tune a competition law instrument and make it more relevant in developing economies.

The report also addresses the issue of competition law enforcement in the seven countries studied.

The first lesson from this part of the investigation is that the level of enforcement varies considerably from country to country, reflecting in part different levels of awareness of the potential benefit of such an instrument in the seven countries. The development of a competition culture in government, business and the general public is clearly one of the most important factor for the success of competition law enforcement in developing countries.

The second lesson is that appropriate institutional design is also of great importance to allow the competition authority to have the level of independence necessary for it to be considered a credible and impartial enforcer of the law. The first dimension taken into account is that of the composition of the enforcement body and its relationship with the executive branch of government and the business community.

A second dimension is that of whether the same body should deal simultaneously with antitrust matters and related matters such as consumer protection and/or unfair trade practices. Too wide a mandate for a competition authority can result in its being overwhelmed and unable to prioritise its actions; Too narrow a mandate can lessen the credibility of competition law. Other dimensions of the institutional design of competition authorities which matter are their relationship with the courts, their relationship with sectoral regulators (and a clear delineation of the respective responsibilities of the competition law enforcer and the sector specific regulators to avoid duplication or conflicts).

Finally, the amount of resources devoted to competition law enforcement is of considerable importance for the quality of enforcement, as is shown in the seven countries studied. In several countries resources are clearly inadequate to sustain the institution and its workload. In those countries where there has been a more obvious commitment to using the competition law enforcement mechanism to achieve the developmental goals of the country, the level of resources seem to be more adequate, resulting in a more efficient and timely enforcement.

One of the primary values of this report is that by comparing the situation of seven Asian and African countries with respect to competition law and competition law enforcement, it offers us the possibility of establishing benchmarks relevant for developing countries. This is extraordinarily valuable to dispel the notion that competition law is of interest only for developed countries. It is also extremely valuable to dispel the notion that competition law enforcement is necessarily too expensive for developing countries.

This extremely pedagogical report comes at an appropriate time to contribute to the debate on the internationalisation of competition law enforcement at the multilateral level.

Frederic Jenny
Professor, Ecole Superieure des Sciences Economiques et Commerciales (ESSEC), Paris
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Preface

The title of this research report: "Pulling Up Our Socks" is rooted in our philosophy and credo of promoting a healthy competition culture around the world, so that consumer welfare is enhanced. And the consumer is not shortchanged in the marketplace, and has access to justice when her rights are violated. Further, as is important for economic development and growth, markets have to be allowed to function effectively and efficiency promoted. These are but the goals of a competition law, which this report is all about. The report lays out the strengths and weaknesses of the competition laws in seven countries, including what made them enact one and how they have been implementing it over the past few years. As this is the first CUTS' major project on competition law, a little journey down the memory lane will help the reader to get a better sense of things.

Our interest in competition law issues began just about the time when CUTS was founded in 1984, when the Indian competition law: Monopolies & Restrictive Trade Practices Act, 1969 was amended to cover Unfair Trade Practices (UTPs). Before this, the law covered only restrictive trade practices and monopolies. In fact this amendment was one of the motivating factors for establishing CUTS. Until then there was no consumer protection law in India. We were the first consumer organisation to take up a case of 'bait and switch' by a garment sale organiser at the MRTP Commission. We succeeded in stopping the rogue in fooling consumers and also getting the newspapers to stop accepting such advertisements. Thus our tryst with competition law began with faith and hope.

Over time, we filed several cases of both RTP and UTP at the Commission, and won many. In the meanwhile, we were a part of the consumer coalition in India to lobby for and get a very unique Consumer Protection Act, which too covered UTPs and RTPs at retail level. Thus our interest in competition law deepened over time, and we started looking at the framework of the law, as well as training others to use it. Soon a host of publications were also done to reach out.

As part of our work programme, we organised several meetings on competition law issues both nationally and internationally, and started getting known in competition circles in India and abroad. Our first major international conference on competition law & policy was organised at New Delhi in February 1995, when we had the privilege of stalwarts like Frederic Jenny and Allan Asher participating in the conference. Said Jenny: "It was a small conference but there were very influential people present and I was particularly impressed both with the level of sophistication and with the intensity of the discussion. I realised that CUTS was well informed, well connected in India, influential and a formidable advocate for competition and consumer policy".

UNCTAD helped us in this first international meeting, by nominating various experts from the region. They too were impressed by our capacity, interest and devotion on the issue. Thus another deep, and mutually beneficial, friendship began with UNCTAD's competition team headed by Philippe Brusick. This relationship was buttressed by the resolve of UNCTAD IX to cement relationships with civil society actors in pursuing their agenda. Thus I was invited by UNCTAD to their meetings on several occasions as a civil society expert, and their representatives participated in several of our meetings. As a sequel, UNCTAD asked us to organize an Asia regional seminar in April 2000 at Jaipur alongwith the MRTP Commission of India. Two representatives from the investment and competition team of the UK Government's Department for International Development also attended the meeting. They too were quite impressed with our interest and attitude on competition law and policy issues and our organizing skills.

Our proposal for the 7-Up Project was discussed with the two DFID representatives: Val Imber and Melinda Robson alongwith Philippe Brusick of UNCTAD; Rob Anderson of the WTO and Shyam Khemani of the World Bank. All of them agreed to serve on the advisory committee and following the discussions, DFID approved our project. The 7-Up project was not the first one. Earlier, we had done a project covering India, Bangladesh and Pakistan on trade and investment liberalisation and its relationship with poverty reduction, with which DFID was very happy. Wrote John Burton, Senior Economic Adviser of DFID-India: "CUTS has impressed me in terms of its ability to bid for work and deliver a professional output within budget and on time. CUTS is unusual as a southern NGO, in its ability to work across continents, thereby building capacity of research and advocacy institutions in other developing countries". Thus began a deep relationship with DFID, which resulted in many collaborative ventures.

The project involved seven countries, and thus got the title of 7-Up; also because we were looking at how to raise the performance of the existing competition regimes in these countries. We actually dove into the deep end of the pool

without much experience in the processes of doing an international project involving comparative study. We had the gumption and the ardent desire, which perhaps were sufficient elements to manage such a unique project. To that extent, we admire DFID's unflinching confidence in CUTS, which has now been vindicated too.

In fact this confidence built up steadily due to close cooperation with the DFID's Investment Climate and Competition Team in the Private Sector Policy Department who worked shoulder to shoulder in implementing the project. Working under the leadership of the departmental head: Ms Vicki Harris, the team was headed by Roger Nellist, alongwith economic adviser: Christian Rogg and competition consultant: John Preston. Their assistance, guidance and strong support helped us to execute the project successfully in spite of all odds. At the conclusion of the project, the DFID Team expressed their considerable satisfaction with what CUTS and its partners had achieved, emphasising the project's usefulness in raising the competiton policy agenda in developing countries onto another plane and in a truly joined-up international way.

Reverting to the beginning, we went about talking with potential research and advocacy partners in each of the seven countries after being awarded the project, without too many contacts in those countries. Expectedly, there were a few glitches in the beginning, but we were able to sort them out over time. It was an extremely interesting learning experience. As would be expected from a project of this magnitude, there were problems which were overcome. Not only problems, but friction too. The problems related mainly to process, and to an extent on contents.

Some of the problems dealt with the availability of information from the competition agencies; availability of researchers; understanding of the issues etc. In two countries the project researchers quit, and efforts to find replacements did succeed. We even had to change the core researcher for the project, and do the synthesis in house. DFID's staff were very understanding and accommodative to the changes. Our advisory team was also of great help, in guiding us with great dedication.

Stand alone reports of each country[1] have also been published, and are available from us.

Frankly, the project hugely built capacities of CUTS and all those people associated with our research and advocacy partners. By itself, the research was very interesting[2] as it was the first time that such a project was being carried out in the developing world. It also helped to develop networks, as well enable many others to build new friendships and thus expand the whole competition community in the world.

In executing the project, the signal contribution by my colleagues at CUTS and by our research partners[3] is worth mentioning.

In terms of concrete outputs, there are many. Firstly, this report: "Pulling Up Our Socks". Secondly, an advocacy document: "Towards a Healthy Competition Culture…". Thirdly, few other publications:

- "Friends of Competition" a manual on capacity building in developing and transition economies;
- "Competition Policy and Law Made Easy", a manual for a common person to on the anti-competitive practices in the market place;
- Handbooks on dealing with Restrictive Business Practices; Price Collusion and Tied Sales; and
- Briefing papers on Competition and Sectoral Regulation Interface; and International Cooperation and Competition Policy.

All the above and many more publications on competition policy and law are available at CUTS, and can be sought by anyone interested in pursuing further readings in this exciting and most desirable area of good governance.

Jaipur
February, 2003

Pradeep S Mehta
Secretary General

1 Reorienting Competition Policy and Law in India; Promoting Competitiveness & Efficiency in Kenya – The Role of Competition Policy & Law; Competition Regime in Pakistan – Waiting for a Shake-Up; Competition Policy & Law in South Africa – A Key Component in New Economic Governance; Towards a New Competition Law in Sri Lanka; Competition Law & Policy – A Tool for Development in Tanzania; and Enforcing Competition Law in Zambia.

2 See Frederic Jenny's Foreword to this report.

3 See Annexure-2

Executive Summary

Introduction

Transition from a command-control regime to a market economy is a difficult process for any country, especially owing to the need for structural changes and new policy regimes. There are innumerable problems in establishing new policy regimes and making them efficiently functional, not to speak of the inherent conflicts in the objectives of one policy with those of another. In this context, competition policy is a particularly interesting subject to analyse.

By now there is a near universal consensus among economists and other proponents of the free-market philosophy that, left to its own devices, a market economy could give rise to the most undesirable outcomes. Anticompetitive practices are a case in point. Economic theory provides eminently tenable arguments to curb such malpractices. Their effective regulation is a major challenge for any economy. Most typically, the solution comes in the form of a formal competition regime with a competition law and a well-functioning policy environment for its enforcement.

At this stage, it is pertinent to ask the question: Why has competition policy and law suddenly become a subject of such overwhelming interest to one and all, given that anticompetitive practices have prevailed since as far back as living memory goes and there are countries that have handled competition without a formal regime? The answer becomes obvious the moment we take note of the fact the number of countries having a competition regime has risen from 35 in 1995 to over 100 today with another 30 odd countries in the process of adopting a competition law. This phenomenal rise could be ascribed to the recent trend, gaining momentum in the 1990s, of a large number of developing economies going for trade liberalisation, deregulation and privatisation.

From the foregoing discussion, the current surge of interest in competition policy and law should be obvious. As a matter of fact it is to many people in the business of policymaking who have responded or are responding by adopting a competition law and establishing a formal competition regime. What is not immediately obvious is how to create the right institutional environment and provide adequate resources for the effective implementation of competition law and policy. Admittedly, despite a formal competition regime in place, many developing countries have little or no competition culture. By competition culture is meant awareness of competition issues among consumers and the practice of behaving competitively among producers.

The reasons are not far to seek. Traditionally, in developing economies, competition policy has been overshadowed by the more pressing needs of industrial policy such as creation of a strong and viable industrial base. Public enterprises were given utmost priority for this task and huge investments were made in them. As a consequence, competition policy was often low in the policy priorities of these countries, especially because private business never constituted a sizeable proportion of their economies.

Institutional changes brought about in the wake of economic transition have significantly altered the scenario. Private business has begun to thrive and foreign interest in domestic markets has started to grow. Besides, the newly found freedom of operation in a deregulated environment has widened the scope for seeking self-interest with guile. As a result, the threat of anticompetitive practices has become more credible.

However, governments' policy preferences have taken more time to adjust to the changing reality, the effect of which shows in the performance of the competition regimes of various developing countries. Although the arguments for competition law and policy have been well taken by almost all countries adopting a competition law, their commitment to maintaining the competition regime has been seriously lacking.

The 7-UP Project

Against this backdrop, the CUTS Centre for International Trade, Economics and Environment took up the 7-Up project with a view to understanding and analysing the problems of the competition regimes of seven developing countries of the Commonwealth, namely Kenya, Tanzania, Zambia, South Africa, Sri Lanka, Pakistan and India. The project was supported by the Department for International Development (DFID), Government of the United Kingdom. The name 7-Up was adopted for three reasons:

I. There were 7 countries in the project;
II. The project had 7 objectives; and
III. The project aimed to pull UP the socks of the competition authorities in the project countries.

Objectives

The stated objectives of the project were to:

1. conduct an evaluation of the existing competition legislation and its implementation in the target countries;
2. identify typical problems and suggest solutions based on practices prevalent elsewhere;
3. suggest ways forward to strengthen the existing legislation and institutions dealing with competition issues;
4. assess the capacity-building needs of the governments, their institutions and civil society;
5. develop strategies for building expertise among competition-agency officials, practitioners and civil society at large;
6. help build constituencies for the promotion of a competition culture;
7. create an advocacy group both at national and international levels to pursue the necessary reforms.

Methodology and Findings

The project was divided into two phases. Phase I was meant to conduct a research study of the existing competition regimes, while Phase II involved an analysis of their functioning by a case study approach.

The distinguishing feature of the 7-Up project is the inclusion of countries of different sizes at varying levels of economic development. While the two least developed countries Zambia and Tanzania have enacted their competition laws only recently (in 1995 and 1994 respectively), probably under pressure from international lending institutions, the two large developing countries India and South Africa have had competition laws in place for a much longer period (since 1969 and 1979 respectively). In fact, the latter have framed new laws in 2003 and 1998 respectively in order to cope with changing times. The remaining three developing countries Kenya, Pakistan and Sri Lanka are in the process of adopting a new law.

The findings of the quantitative-cum-qualitative analysis of the competition regimes of the selected countries are quite revealing. What follows is a brief discussion on them.

Budgets

- The size of funding varies considerably within the 7-Up group, both in absolute and relative terms.
- In general, the budget of each competition authority is low in absolute terms, the only exception being that of South Africa. South Africa's competition regime appears to be the best funded. Its budget was US$7.74mn in absolute terms and 0.033 percent of the annual government budget in the year 2000. It would

Figure A: CA's Budgets as % of Government Expenditure

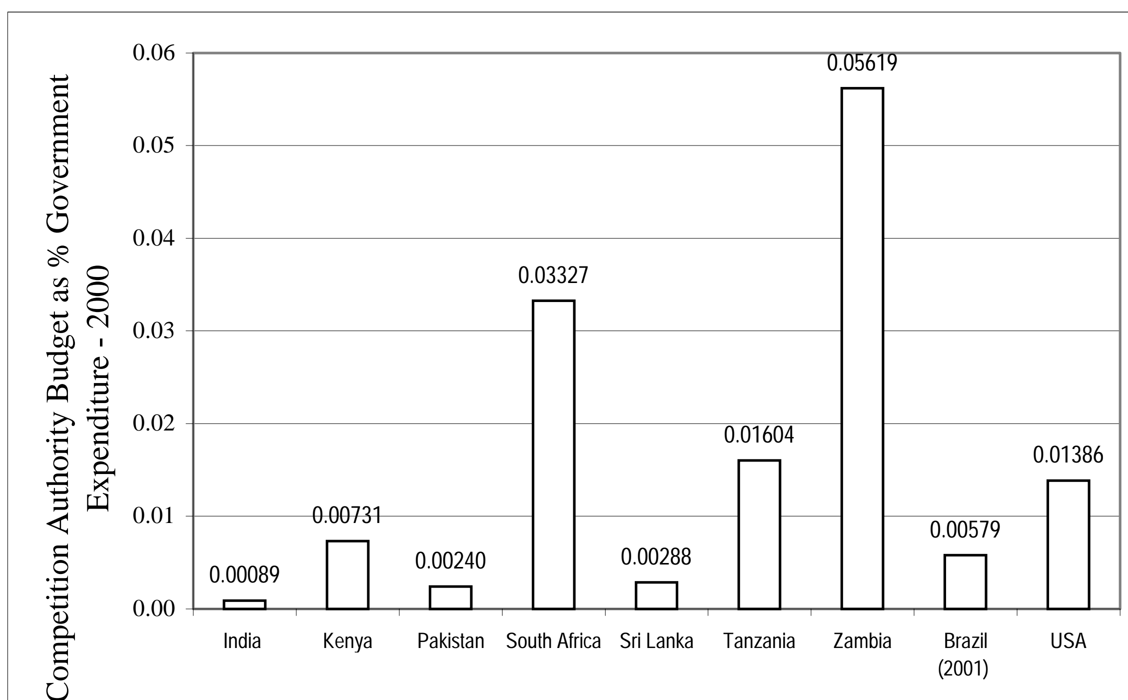


Table A: Human Resources in the Competition Authorities

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Staff (2000/2001)							
Full time members	4	1	3	1	1	1	0
Part time members	0	0	0	8	5	0	12
Professional	23	24	5	37	7	2	5
Support staff	125	6	25	32	7	3	6
Total	152	31	33	78	20	5	23

be interesting to note that 49 percent of the budget (1999/2000) of the South African Competition Commission was obtained from filing fees paid by companies seeking a merger.

- The budgets of the three South Asian competition authorities, as a percentage of the respective government's total expenditure, are much lower than those of the African countries in the project. In relative terms, India's competition authority has the smallest budget and the Zambian and South African competition regimes have the largest. Figure A provides the details.

Personnel

- The competition authorities find it very difficult to attract and retain competent and qualified staff. Most of them maintain a skeleton staff. In countries where the numbers are higher, the staff mainly comprises support staff and not professionals. For details, see Table A.
- The professional staff of all the seven competition authorities is dominated by economists. There is a general shortage of lawyers. Besides, even where the professionals have an economic or legal background, their skills are not of the required standard.
- The process of recruitment is not systematic and is not taken very seriously in most of the countries. Lack of training facilities available to the professional staff aggravates the problem.
- Lack of funds and proper salary scales are two key reasons why the competition authorities have been unable to attract top quality economists and lawyers. Except in Zambia and South Africa, the salaries paid are considerably lower than the salaries paid in the private sector. Even the agencies of Zambia and South Africa have difficulties in attracting and retaining competent staff. In Sri Lanka, the professional staff members are paid salaries that are lower than even those in the government sector.

Case Handling

- Adequacy of legal provisions is the most important aspect of a competition regime determining its effectiveness. The inadequacy or lack of legal clarity in dealing with cases, though prevalent in all countries, was most prominent in the case of India. The lack of research and investigative capacity in the seven countries makes it very difficult for the competition authorities to deal with cases judiciously.
- In most of the competition regimes, competition cases take unusually long to deal with. This can be partly explained by the lackadaisical attitude of the staff, especially in the authorities of the South Asian members.
- Further, the authorities in some countries are not manned by the right kind of people. In such situations, dealing with cases with an international dimension is an even greater problem, as the authorities are oblivious of the activities and prosecution of international cartels in developed countries and hence do not take action such cartels in their own countries. Moreover, little attempt is made to communicate with the competition authorities of developed countries for information and cooperation to handle international cases. Notably, the losses inflicted by such cartels are substantial in developing countries as evident in Table B that provides estimates of losses in the 7-Up countries due to the notorious vitamins cartel.
- The autonomy of a competition authority is of crucial importance for the effective handling of cases. In all 7-Up countries, except in Kenya and Tanzania, competition authorities are *de jure* autonomous. Yet government interference is quite evident. In Sri Lanka, although government interference permeates the system, it is not apparent so far as handling of cases is concerned.
- There are other kinds of external influence on the competition authorities as well. Sometimes, they get swayed by public opinion/emotions or national sentiments and take decisions not in the best interests of competition.
- Lobbying by different interest groups can make a difference in many jurisdictions. It was generally observed that businesses are more active in lobbying and consumer movements are

Table B: Estimated Losses in 7-Up Countries due to the Vitamins Cartel

Country	1. Estimated losses in US$mn	2. Purchasing power parity ratio	3. Effective losses in PPP$mn (1X2)	4. Ideal budget* for the CA in US$mn
India	25.71	5.19	133.43	8.13
Pakistan	36.82	4.17	153.53	1.35
Sri Lanka	N/A	3.98	N/A	0.33
Kenya	1.79	2.80	5.01	0.32
South Africa	99.93	3.03	302.78	2.32
Tanzania	0.16	1.89	0.302	0.10
Zambia	0.06	2.50	0.15	0.03
*The ideal budget is calculated at 0.01% of the annual government expenditure.				

weak in these countries. Except for in Zambia and South Africa, political will is lacking badly in these countries and they are lagging considerably in the enforcement of many reasonably adequate laws.

Conclusions

The salient conclusions of the 7-Up project may be summed up under the following heads:

Poor competition culture: On an average, the 7-Up countries have a poor competition culture. The problem is as much in the letter of law as in its implementation. When it comes to the applicability of competition law, it varies considerably from country to country depending upon the economic situation. Secondly, awareness of competition issues is quite insignificant and whatever of it exists is mostly found among businesses and bureaucrats. Few in the media, academia and civil society are cognisant of competition matters. However, a desire to improve the competition regime is quite palpable in all the member countries.

Focus on Structure Rather than Conduct: The laws of most of the countries deal with structure rather than conduct, except in the case of South Africa. India had structure as its main plank for regulatory action in the 1969 law, but the new 2003 law has shifted focus entirely to conduct. Dealing with conduct will be a big challenge for all developing countries, as it is more complex than structure. Especially meeting the resource requirements of the conduct approach will be a formidable task.

Limited budgets: Budgetary constraints make the functioning of competition authorities extremely difficult and pose a problem in attracting staff with the desired qualities. Besides, the available professional staff in most competition authorities is not well trained. Moreover, it is difficult to recruit well-trained people in these countries. The need for training cannot be overemphasised. It is necessary to ensure that competition authorities are headed by well-informed and dynamic people.

Lack of consumer movements: There is considerable need to strengthen the capacity of consumer organisations and similar NGOs to conduct research and bring forward complaints before the competition authority. The project study has revealed that while India and Pakistan have well-funded consumer organisations, consumer movements in Sri Lanka and South Africa are very weak. Tanzania does not have even a single consumer group. In Kenya and Zambia there are dedicated activists struggling to establish a strong consumer group. In South Africa, which has apparently the best competition regime among the seven countries, a weak consumer movement has led to undesirable outcomes, as the competition authority has not adequately addressed concerns of the lay people. In developed countries like the USA and the UK, consumer and other specialised advocacy groups are quite active in highlighting anticompetitive issues. A similar approach may be helpful in the developing countries also.

To conclude, there is a general need to build capabilities of the competition authorities. The task is not an easy one and the competition authorities would need to take help of outside agencies.

The 7-Up project hopes to establish a healthy and dynamic competition culture in the countries involved. Such a culture is indeed an essential prerequisite for deriving the benefits of competition and its contribution to the furtherance of economic development.

Chapter-1

Introduction: The 7-Up Project

In the past, most developing countries were characterised by large state-owned sectors in highly concentrated industries and inefficient firms operating in domestic markets that were insulated by trade barriers. Since the early 1970s many of these countries have adopted new policies of trade liberalisation, de-regulation and privatisation. While these processes are taking place and developing countries are remodelling their state-dominated economies into market economies in much the same way as the so-called *economies in transition* are doing, new challenges arise from these same processes. Developing countries are seeking instruments to control and strengthen the functioning of market forces to cater to their own specific development needs. More and more developing countries recognise the importance of implementing an effective competition policy and law, to achieve the maximum benefit from the process of liberalisation.

There are, however, divergent views on both the need and appropriateness of competition law and policy for developing countries. Some argue that the promotion of competition in the domestic market may not always be conducive to industrial growth and international competitiveness.[1] Others suggest that the liberalisation of international trade is sufficient to promote competition and therefore the formulation of a competition policy and law is unnecessary. Still others argue that even if competition law is desirable in the abstract, the probability of improper enforcement, misuse of bureaucratic power or regulatory capture is so high in developing countries that the expected costs of such legislation outweigh the possible benefits.

In order to find out and analyse the realities of having and implementing competition legislation in developing countries, CUTS, Jaipur, India, has implemented a two-year research and advocacy project entitled *'A Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth'*. The project has been undertaken in seven countries, supported by the UK Government's Department for International Development (DFID) and carried out in association with local NGOs and research organisations as partners.[2]

1.1 The Project: Objectives and Process

Work on the project, popularly known as the 7-Up project, started in September 2000. It was formally launched during a meeting on December 20/21, 2000, organised in Jaipur, India. The seven countries that have been selected for the project are: India, Pakistan and Sri Lanka in South Asia; and Kenya, South Africa, Tanzania and Zambia in Southern and Eastern Africa. These countries were selected on the basis that they had all enacted competition legislation and had some experience in its implementation.

The main objectives of the project are to:

(i) conduct an evaluation of existing competition legislation and its implementation;
(ii) identify typical problems and suggest solutions, *inter alia*, based on practices prevailing elsewhere;
(iii) suggest ways forward to strengthen existing legislation and institutions dealing with competition issues;
(iv) assess the capacity building needs of the governments, their institutions and civil society;
(v) develop strategies for building expertise among the competition agency officials, practitioners and civil society at large;
(vi) help build constituencies for the promotion of a competition culture; and
(vii) create advocacy groups at both national and international levels to pursue the necessary and required reforms.

1 The argument is that the restriction of competition in the domestic market might be necessary for companies to achieve economies of scale which will enable them to compete with foreign firms that have already achieved such economies of scale in international trade.

2 See Annexure-2 for details on Project Partnership Arrangement.

The project is divided into two phases. The purpose of Phase I was to conduct a research study of the existing competition regimes and broadly encompassed the first four objectives. In each of the seven countries the local project partner conducted the research. This was done through research and analysis of the existing legal provisions, as well as analysing information obtained from questionnaires sent to the competition authorities.

As part of a bottom-up approach to the research, National Reference Groups (NRG) comprising all the relevant stakeholders[3] were constituted and meetings thereof were organised regularly. A country report that compiles and analyses this research has been written by each of the partners and has been published by CUTS.

During Phase-II, a case study approach was adopted. Three cases involving either a case or a sector as a whole were selected for making case studies. While selecting the cases or the sector, care was taken to adopt a general approach and take similar cases and sectors in all the seven countries so that a comparative analysis could be made to see how similar cases are dealt with by different competition authorities. The case studies involve an international merger (such as Coca-Cola/Cadbury-Schweppes or GlaxoWellcome/SmithKline Beecham), an analysis of the cement industry in each country and a country specific case, preferably in the service sector.

The project will, therefore, contribute to help developing countries build and strengthen their competition laws to deal with national and international restrictive business practices, so as to enable them to reap the benefits of globalisation. The study will look specifically at the level of effectiveness of competition authorities in dealing with domestic and international restrictive business practices. Its aim is to identify gaps and constraints in the administrations arising from a lack of technical capacity and a lack of resource (both human and financial). Similarly, the project hopes to strengthen the culture of competition through the bringing together of national competition officials and experts in country meetings, so that they can contribute to and learn from the studies' conclusions.

1.2 This Report: A Synthesis

This report contains an analysis and synthesis of the information gathered and research done during the implementation of the project. The main sources of information for this report are the individual country reports, case studies and the deliberations in the NRG meetings and the review meetings. However, when deemed valuable, comparisons are also made to the competition regimes of other jurisdictions, specifically those of the United States and the European Union. This is not done to necessarily imply that these systems can act as models for the competition regimes in the 7-Up countries, but given the fact that these have the most active competition systems and played a large role in the theoretical development of competition policy in the world, they can act as useful references. Similarly, the UNCTAD and OECD-World Bank Model Laws are used as reference points.

The rest of this report is divided into seven chapters. Chapter two provides a socio-economic overview of the project countries and points out the differences and commonalities within the group. Chapter three provides the background and objectives of the competition legislation in each of the 7-Up countries and puts competition policy and law into the relevant public policy context. The actual legal provisions that deal with the different sorts of competition issues are contained in chapter four that deals with scope and coverage. In chapter five an analysis is made of the powers and capabilities of the competition authorities. Chapter six is essentially a synthesis of the case studies and deals with the implementation of competition law. Chapter seven deals with handling of cases of an international nature. Finally, chapter eight provides the conclusions and recommendations that arise from the 7-Up project.

3 The stakeholders comprised representatives of: consumer organisations; academia; media; business and chambers of commerce; competition and regulatory authorities; government, trade union leaders and parliamentarians.

Chapter-2

Socio-Economic Context of the 7-Up Countries

The 7-Up countries have a number of common features. The most important one is that all of them have initiated economic reforms opening up their economies to international trade over the past ten years, except Sri Lanka, which started reforms in 1970s. These reforms have introduced a wide variety of liberalisation initiatives, involving de-control, de-regulation and privatisation. Thus, the project countries are not only developing economies but also share a number of features that are common to what are called economies in transition. These features include high market concentration levels and significant importance of the 'public' or 'state' sector.

However, there are also important differences in their socio-economic circumstances. These are partly due to the specific characteristics of a country's society and/or historical context. Whereas South Africa was governed by a white minority regime focused on racial segregation, Tanzania had a Marxist political culture, while others followed a socialist command and control economy. There are also considerable differences in growth rates among the project nations, the patterns of growth rate and the influx of foreign investment for example. All these factors influence the nature of competition in a market and are thus important in designing a competition policy and law.

2.1 Socio-Economic Indicators

Within the 7-Up group there are significant differences among the socio-economic factors that mark them. In terms of population they range from a mere 10 million inhabitants in Zambia to about a billion in India. They also differ significantly in terms of size of the economy, per capita incomes, and human development. These features will have implications for the content and implementation of competition law and policy in these nations.

In terms of development there are major differences between and within the project countries. Although all of them are considered as developing countries, Tanzania and Zambia are designated as Least Developed Countries (LDC), and South Africa and

Table 1: Socio-Economic Indicators

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Population[4] Millions (1999)	998	29	135	42	19	33	10
GDP Billions US$ (1999)	459.8	10.6	59.9	131.1	15.7	8.8	3.3
GNP/Capita US$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
Adult Illiteracy (1998): % Male (>15) % Female (>15)	 33 57	 12 27	 42 71	 15 16	 6 12	 17 36	 16 31
Poverty[5] % <National poverty line % <$1/day	 40.9 44.2	 42.0 26.5	 34.0 31.0	 - 11.5	 40.6 6.6	 51.1 19.9	 68.0 72.6

4 Data in the table come from the World Development Report 2000 and the Country Reports.

5 Latest available year.

Sri Lanka are classified as middle-income countries. In South Africa, however, the distribution of income is very unequal because a small part of the population achieves a standard of living that is broadly comparable with the second rank of industrialised nations, whereas the majority live in poor conditions. Even though Zambia is a low-income country, it has a similar inequality in wealth distribution with over 72 percent of the population having to live on less than US$1 a day. Even when this is adjusted to the more representative domestic poverty line the share is still 68 percent. India and Pakistan have high illiteracy rates, whereas Sri Lanka has been relatively successful in tackling illiteracy.

2.2 Economic Structure and Growth of the Economies

Except in Pakistan, whose GDP growth seems to be static during the 1990s, the importance of the services sector as a percentage of GDP has grown in all project countries over the past decade. In most countries the services sector now accounts for around half of the GDP. This increase has been most notable in Zambia, where the process has gone hand in hand with substantial decline of both the industrial and manufacturing sectors. [6] In Tanzania and Kenya the increasing importance of the services sector is mainly due to tourism.

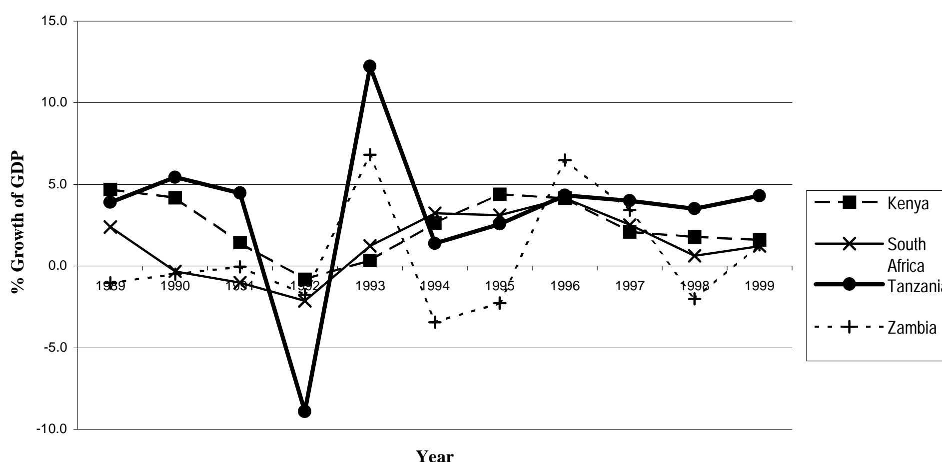
Although, the agricultural sector continues to be an important contributor to GDP in all project countries (with the exception of South Africa), the extent of the contribution varies. In Tanzania the sector accounts for almost half of GDP, whereas it accounts for only a quarter or a fifth in the other countries. The importance of the agricultural sector in Tanzania is coupled with a very thin industrial sector. [7]

When it comes to the countries' openness to international trade, a more diverse pattern emerges. By all accounts India has the least open economy, and although both import and export ratios have gone up during the 1990s, import penetration remains relatively low. In both Tanzania and Zambia import penetration has fallen substantially, whereas in Tanzania this was accompanied by an increasing export ratio. Zambia also witnessed a drop in the value of its exports as a percentage of GDP. Nevertheless, its import penetration level still remains amongst the highest in the group. The other project countries have generally seen an increase in import penetration.

The level of success of the trade liberalisation programmes that the 7-Up countries have embarked on has also varied considerably with regard to GDP growth over the last decade.

For the African project countries 1992 was an exceptionally bad year as all these countries recorded a negative growth rate. After that things seemed to have improved for most countries. There are, however some crucial differences in the growth trends of these nations. Both Zambia and Tanzania propelled from a negative growth rate in 1992 to an

Figure 1: GDP Growth of the African Project Countries



6 The country paper on Zambia suggests that the structural adjustment programme (SAP) and import competition have contributed to the decline of the manufacturing sector and making the country a 'trading nation'. The rates of growth of agriculture and industry during the 1990s were negative.

7 Import competition is also high here and has damaged the textile sector. Only beer and tobacco are able to face import competition despite high utility and capital costs. See CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 2.3.

Table 2: Industrial Structure

		India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Industrial Structure (Value as a percentage of GDP)								
Agriculture	1990	31	29	26	5	26	48	18
	1999	28	27	26	4	21	48	17
Industry	1990	27	19	25	40	26	16	45
	1999	25	17	25	32	28	14	26
Services	1990	42	52	49	55	48	36	37
	1999	46	56	49	64	51	38	57
Trade (Value as a percentage of GDP)								
Exports	1990	7	26	16	24	30	12	36
	1999	11	25	15	25	36	20	29
Imports	1990	10	32	23	19	37	35	58
	1998	13	35	21	25	42	27	34

admirable GDP growth in 1993 of 6.8 and 12.2 percent respectively. However, in the next year GDP growth plummeted back to (–)3.4 percent for Zambia and 1.2 percent for Tanzania. After that Tanzania's GDP growth has steadily increased and stabilised around the four percent mark, while Zambia's has continued to fluctuate.

GDP growth rate increase in South Africa and Kenya has been much less fluctuating with a steady increase to four percent in 1996. Since then it has steadily gone down to around 1.5 percent.

The South Asian project countries have witnessed much more stable growth rates that have been continuously on the positive side.

In the first two years of the decade Pakistan was doing better than both India and Sri Lanka. However, after 1992 this scenario changed and India became the fastest growing economy, witnessing GDP growth of around eight percent in 1994 and 1995. The three South Asian countries now seem to converge together in the four to six percent bandwidth.

2.3 Role of FDI and Cross-border Mergers

Apart from exports and imports, another important aspect of an economy's 'openness' is the role of cross-border mergers & acquisition (M&A) activity and foreign direct investment. All countries have seen a spurt in cross-border M&A activity in recent years. While in terms of absolute values of these transactions, South Africa, India and Pakistan are

Figure 2: GDP Growth of the Asian Project Countries

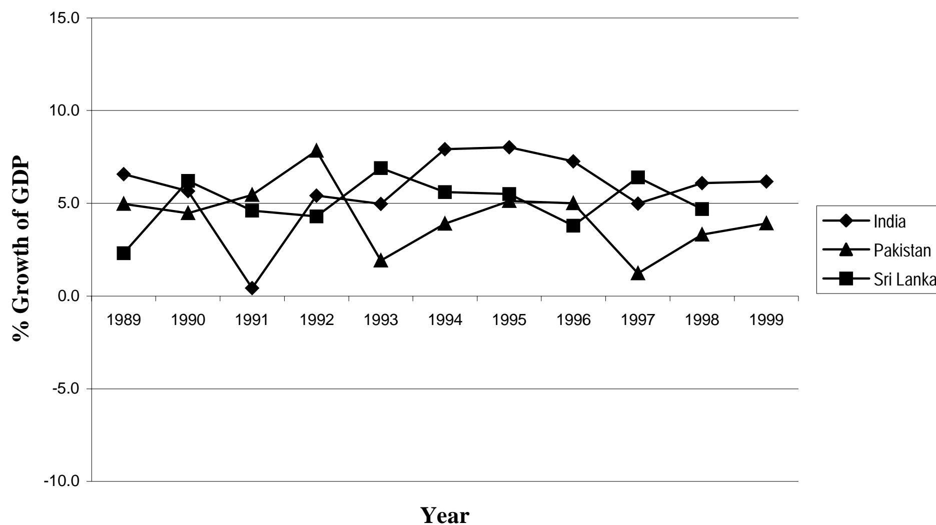


Table 3: M&A Activity and FDI Flows of the 7-Up Countries

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Mergers & Acquisitions (US$ millions)							
Cross border M&A sales by country of seller (1990-99)	3660	25	3491	9821	591	76	370
Cross border M&A sales by country of purchaser (1990-99)	1760	-	NA	19543	36	NA	15
Foreign Direct Investment (US$ millions)[9]							
Annual average FDI inflows (1990-99)	2320.5	28.8	634.5	1365.5	201.2	143.7	137
Annual average FDI outflows (1990-99)	127.8	17.4	-2	1162.3	3.3	NA	NA
FDI inward stock as of 1998	19416	826	9778	19048	2273	987	1932
FDI outward stock as of 1998	1061	186	468	30115	41	NA	NA
Average annual inward FDI flows as a percentage of gross fixed capital formation (1994-98)	2.6	1.7	6.72	5.8	5.6	12.2	27.7
Average annual outward FDI flows as a percentage of gross fixed capital formation (1994-98)	0.1	0.5	-0.1	7.7	0.1	NA	NA
Inward FDI stock as a percentage of GDP (1998)	3.4	7.6	14.4	13.4	13.2	9.9	52.8
Outward FDI stock as a percentage of GDP (1998)	0.2	1.5	0.7	24.8	0.2	NA	NA

way ahead of the others, as a proportion of GDP these transactions seem to be quite important in Zambia and South Africa and not so much in India.[8] The pattern that emerges from the figures from table 3 is that the enterprises from the 7-Up countries are targets for cross-border M&As rather than being predators. The only exception is South Africa, where the cross-border M&A activity by local firms is more significant in terms of purchases than in terms of sales.

FDI flows follow roughly the same pattern as M&A activity. While quantum of inward FDI flows & stock is the largest in India and South Africa, its share in investment and GDP is highest in Zambia. The share in India is actually the least. Again South Africa is the only country that has a large outward flow of FDI.

2.4 Importance of the Public Sector

A striking feature of the countries in the 7-Up group, which puts them in a comparable situation with the former socialist economies of Eastern Europe, now referred to as *economies in transition*, is the importance of the public sector. It is clear that in all countries, except South Africa, the role of public sector in different segments of the economy has been significant. While privatisation is taking place in all

8 Compare tables 1 and 3.

9 World Investment Report, 2000

countries, state-owned enterprises (SOE) or 'parastatals' remain important in many sectors.

In Tanzania, for instance, even though the private sector seems to slowly dominate the supply of social services at the secondary and tertiary levels, the public sector still plays an overwhelmingly dominant role in the provision of these services at the primary level. When sectors are not dominated by SOEs, they remain heavily regulated, as is the case in the health, education, natural resources, agriculture, water and energy, and communications sectors.[10]

In India the number of areas reserved for the public sector was reduced with the industrial policy reforms undertaken since 1991. Yet, six areas, mainly involving strategic and security concerns, remain reserved.[11]

In Zambia the government adopted an economic reform programme to reduce the government's direct involvement in the economy. Although there has been a considerable reduction in red tape and bureaucracy, the government's programme to recast its role to end duplication and competition with the private sector has been slow on implementation. In 1997, the government identified 31 departments for commercialisation, yet by the end of 2001 none were commercialised.[12] Progress in privatisation of parastatals in Zambia has of course been quite satisfactory.

The Kenyan government established a committee to oversee the divestiture of SOEs as early as 1983. The committee continued to operate till 1987 but failed to divest any SOE. In fact, the parastatal sector continued to expand during the 1980s rather than shrink. A new programme of reform and privatisation was announced in 1991 which identified 207 out of a total of 240 SOEs for divestiture. This programme has moved in fits and starts as exemplified by the lethargy in selling off the government's stake in *Telkom Kenya*.[13]

Following the global wave of privatisation, the Pakistani government started to reduce its direct role in managing industries. The overall share of the public sector in large-scale industry declined considerably. In 1991 the Ministry of Industry and Production controlled 101 industrial units, whereas in 2001 this number had dropped to 40. Nevertheless, the government still retains nine holding corporations in important sectors such as fertilisers, cement, shipping and telecommunications.[14]

Sri Lanka's economic liberalisation process started in 1977 and at that time the state sector played a dominant role in production, distribution and financing of the economy. Although full-scale privatisation initiative did not start until 1987, these two policies led to the fact that, currently, the private sector plays the dominant role in most sectors of the economy. The public sector only retains a significant role in chemicals, petroleum, rubber and plastic products, where its share is 34 percent.[15]

2.5 Levels of Market Concentration

The levels of market concentration are generally high in the 7-Up countries. This might be a reflection of the relatively small markets in some of the project countries, such as Zambia or Tanzania, but may also be the result of a historically grown disparity as is the case in Pakistan and South Africa.

In Pakistan the corporate sector's growth during the 1960s led to the concentration of wealth in the hands of twenty-two families. These families dominated Pakistan's economy through a web of holdings and cross-ownerships. It was estimated that in 1974 the average four firm concentration ratio[16] was 70 percent for 82 Pakistani industries. Although, more recent research is needed, the absence of structural changes suggests that the economy is still highly concentrated.[17]

10 CUTS, 2002, Competition Law & Policy – A Tool for Development in Tanzania, chapter 2, chapeau.

11 See CUTS, 2002, Reorienting Competition Policy and Law in India, section 3.4.

12 CUTS, 2002, Enforcing Competition in Zambia, section 2.7.

13 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 2.3.

14 The government has partially divested two of the nine holdings: Pakistan International Airlines and the Pakistan Telecommunication Company. Also see CUTS, 2002, Competition Regime in Pakistan-Waiting for a Shake-Up, Ch-Two.

15 In all other industries the public sector's share is below seven percent and often nil. Also see CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 2.6 and table 7.

16 The four firm concentration ratio is the combined market share of the four largest firms operating in a particular market.

17 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 1.2.1.

In Sri Lanka, there are no studies that detail the market concentration of particular sectors of the economy. Thus, it is difficult to determine the overall level of concentration in the Sri Lankan market. Yet, a 1998 survey into the number of establishments in Sri Lanka, conducted by the Department of Census and Statistics, indicates that there are high levels of concentration in sectors like petroleum refining, beverages, steel and iron, and the slaughter and meat preservation sector.[18]

No formal analysis has recently been published on Kenya's market concentration in terms of four firm concentration ratios or using the Hirschman-Herfindahl Index.[19] However, several sectors of the Kenyan economy are highly concentrated. The petroleum, banking and cement sectors are all oligopolies. Both the petroleum and cement sectors were previously public monopolies. Many of the major industrial groups have close relationships with each other, either through direct equity holdings or cross directorship. This indicates a further concentration of power or control. The high levels of concentration are the result of the relatively small market size combined with high entry barriers.[20]

In Zambia and Tanzania the combination of a large public sector (public monopolies) and small markets has led to highly concentrated markets. With the privatisation of the public sector, many of the public monopolies were transformed into private monopolies. Another reason is the small size of the manufacturing sector, making it highly amenable for inter locking directorships.[21]

Corporate ownership and control is highly concentrated in the South African economy. The 1996 Manufacturing Census[22] shows that in 46 percent of the 57 main product groupings the largest four firms account for more than half of output, while in a further 36 percent the four firm concentration ratio is between 25 and 50 percent. Based on control, concentration is even greater. Five main conglomerate groupings accounted for 54.7 percent of the Johannesburg Stock Exchange's (JSE) market capitalisation in 1998 and are under the control of a small number of families. Although, this concentration is still high, it has decreased since 1995, when the 'top five' still accounted for 82.3 percent of the JSE's capitalisation.[23]

The economic reforms that were adopted by India in 1991 have reduced entry barriers and the concentration level in the Indian industry is on the decline. Analysis on the basis of Hirschmann-Herfindahl indices shows that in about 31 percent of product groups there was a trend decline in concentration levels. In over 52 percent of product groups there was no significant change in concentration levels. Nevertheless, concentration remains high in some sectors. In about 15 percent of the product groups the three firm concentration ratio was more than 90 percent.[24]

18 CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 2.5.

19 The index calculates the sum of the squares of the market shares of the firms in a market. A Hirschmann-Herfindahl Index value of 0 denotes perfect competition, and a value of 10.000 denotes pure monopoly. In a market where five companies each have a market share of 20 percent, the Hirschmann-Herfindahl Index would be ($20^2+20^2+20^2+20^2+20^2$) 4000. For comparison the US merger guidelines consider a value above 1800 as highly concentrated and a value below 1000 as weakly concentrated.

20 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 2.2.

21 CUTS, 2002, Enforcing Competition in Zambia, section 2.6. Also see CUTS, 2002, Competition Law & Policy – A tool for Development in Tanzania, section 2.2.

22 Statistics South Africa.

23 CUTS, 2002, Competition Policy & Law in South Africa - A Key Component in New Economic Governance, section 2.2.

24 CUTS, 2002, Reorienting Competition Policy and Law in India, section 2.3.

Chapter-3

Background and Objectives: the Public Policy Context

Most scholars recognise that there is a complex link between competition policy and economic development. Competition policy seeks to prevent restrictive business practices and regulate market structures that significantly lessen competition. The objective of such a policy is to maintain and encourage competition in order to foster greater efficiency in resource allocation and promote consumer welfare. These objectives are achieved through interaction with other economic policies affecting competition. The related regulatory policies include those relating to infrastructure (where natural monopolies are likely to occur), international trade, foreign direct investment, intellectual property rights, financial markets and privatisation. Depending on its design and implementation, competition law can play an important role in determining which markets are accessible to firms and their pricing, output and other business strategies.

Competition law and policy are not stand-alone issues, but are part and parcel of a country's overall economic/development policy, which also includes privatisation, trade and investment policies. Therefore, the listed objectives of a competition law may reflect some key concerns of a nation and the 7-Up countries provide us with an interesting variety.

3.1 Background and Public Policy Context

One of the most striking features of the past 10-15 years has been the increasing reliance on market mechanisms in order to promote economic progress. This is evident in the widespread trend towards privatisation, deregulation, reduction in the scope of industrial policy intervention etc. The 7-Up nations have been no exceptions to this trend.

Virtually all project countries saw significant government involvement in the promotion of national economies during the 1960s and 1970s. A variety of instruments (price control, planning, participation in the economy via state-owned enterprises (SOEs), public procurement, control of foreign direct investment, regulation of entry, public subsidies, industrial policy etc.) were used for this purpose. These instruments also shaped industry structures and/or protected national firms from the rigours of domestic and international competition. Large fiscal deficits, the high costs and poor economic performance associated with most government interventions and a variety of other 'government failures' resulted in pressures to downsize the public sector in most of these economies.

Although, in recent years, the project countries have adopted similar directions in their policy shifts, the degree to which these countries have adopted liberal policies seems to vary considerably. Given the links among different policies, this will obviously mean that these countries may have different competition policy requirements.

Trade Policy

All 7-Up countries have followed a trade liberalisation policy[25] in a very consistent manner. The changes have typically included conversion of non-tariff barriers into tariffs and reduction and rationalisation of tariff rates. In many countries (e.g., India[26], Tanzania, Sri Lanka[27] and South Africa[28]), the reduction in peak and base tariff rates has been significant. Consequently, in the tradable sector, contestability would have increased in all these countries.

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25 Annexure 3: Table 2 provides an overview of the evolution of economic policies that the project countries have undertaken.

26 The average applied rate has been lowered from 135 percent in 1990-91 to 35 percent in 1997-98 and the peak rate from 335 percent to 40 percent in the same period. See CUTS, 2002, Reorienting Competition Policy and Law in India, section 3.3.

27 A two-tier duty regime operates in Sri Lanka, with tariff lines of zero, ten percent duty and a maximum of 25 percent. Also see CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 3.2.

28 The previously differentiated tariff rates have been standardised to six rates between zero and 30 percent. See CUTS, 2002, Competition Policy & Law in South Africa - A Key Component in New Economic Governance, section 3.1.

Trade liberalisation has serious implications for the level of competition in the domestic market. Previously shielded enterprises now face tough import competition. The mortality of domestic enterprises due to import liberalisation and the subsequent increase in import competition has been an important issue in Zambia.[29] In fact, the increase in import competition has led Zambia, as well as India and Pakistan, to extensively use anti-dumping measures in recent years. In the case of Pakistan, an anti-dumping law was enacted in the 1990s as the fear of dumping increased with a decline in tariffs and removal of non-tariff barriers.[30] The use of anti-dumping measures might have reduced contestability of the market.

In India, South Africa and to an extent Kenya, the increased import competition has led to some kind of consolidation with firms opting out of unrelated areas and focusing on certain core activities, as well as to an increase in the number of mergers and acquisitions. Thus, while contestability has generally gone up, it needs to be re-emphasised that the exposure to world markets through exports and imports differs considerably across the project nations.

Financial Sector Reforms

While trade liberalisation has made significant progress, financial sector reforms have not made adequate progress in most of the project countries. The financial sector reforms are extremely important as the access and cost of capital are among the most important entry barriers, especially in developing economies. Once these barriers decline, contestability and the level of competition in these economies could increase in a very significant manner. The policies linked to financial sector reforms include foreign exchange restrictions, the control on capital and the current account of the balance of payments (the convertibility issue), as well as controls on exchange and interest rates.

Zambia introduced full convertibility and removed restrictions on exchange/interest rates in 1992. However, interest rate spread increased considerably after liberalisation and the credit availability from the domestic banking sector (as a proportion of GDP) declined.[31] This may be due to Zambia's high inflation, but it is nevertheless an important issue. If domestic interest rates are too high, then foreign firms have an advantage because of their access to international capital, which is available at much lower rates.

Similarly, the introduction of banking sector reforms in Tanzania has removed the monopoly of state owned financial institutions and many private banks have entered the market. Despite this the interest rate spread continued to be high and domestic producers (especially small ones) had limited access to finance. At the same time, participation of foreign investors in the domestic stock exchange remains limited in Tanzania despite liberalisation of policies relating to the securities market. This is partly due to the fact that the capital and current accounts have not been fully liberalised.[32]

The liberalisation of the financial sector in Sri Lanka opened up the current account, however, restrictions on the capital account remain. A tight monetary policy combined with an inefficient banking sector has kept the interest rates high and credit availability low for the domestic producers, especially those who are small and/or located in rural areas.[33]

In Pakistan financial liberalisation was undertaken to facilitate the repatriation of capital, profits and dividends. There are also no restrictions on FDI flows in the banking sector. Despite the substantial liberalisation of the financial sector leading to full convertibility of both capital and current accounts, entry barriers related to the availability and cost of capital remain important in the country. Many domestic enterprises, especially SMEs, claim that the financial sector remains non-supportive of their activities. Moreover, lending by public sector financial institutions is politically influenced.[34]

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29 CUTS, 2002, Enforcing Competition in Zambia, sections 2.10 and 3.2.

30 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 3.1.

31 The interest rate spread increased from 9.5 to 20.5 per cent during 1990-99 and domestic credit/GDP ratio declined from 42 to 33 per cent during the same period.

32 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 2.3.4.

33 CUTS, 2002, Towards a New Competition Law in Sri Lanka , section 3.4.

34 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, sections 3.4 and 3.5.

In Kenya, most transactions in the current and capital accounts have been fully liberalised and the interest rates have been more or less freed.[35] Apparently, the large-scale formal sector does not face major problems vis-à-vis accessing credit; they even procure it at rates lower than the benchmark Treasury bill rate. However, SMEs still have serious problems in accessing credit.[36]

Significant financial sector liberalisation seems to have taken place in South Africa. Firms, insurance companies, unit trusts etc. can now invest in foreign portfolio holdings. Foreign companies have also invested heavily in the equity and bond markets in South Africa. Historically, major financial institutions have been linked to large conglomerates in the country through cross-holdings. While these links are gradually breaking down, credit availability remains a problem for SMEs.[37]

Many reforms relating to the banking sector and the stock market have been introduced in India during the 1990s. Despite these liberalisation measures (capital account is not yet fully convertible) in the financial sector, the cost of capital and its availability remains a concern for domestic firms. These firms have also been highlighting the fact that they pay much higher interest rates than their foreign competitors. Although it is now possible to access international capital markets, few domestic firms can utilise that opportunity. Besides, their ability to raise capital in the international markets will remain inadequate vis-à-vis the foreign competitors. Consequently, in any entry or restructuring related (especially M&A) activity in the liberalising markets, foreign firms will have the odds in their favour.

The equity markets have not matured in any of the project countries except perhaps South Africa and India. Zambia has only eight listed companies and the Dar es Salaam stock exchange was set up only in 1998. In India, while stock exchanges have operated for many years, controls on capital issues have kept the equity market partially imperfect until recently when the controls were lifted. It is difficult to assess from the available information, the relative ease of raising capital from the equity markets in the project countries. However, it is doubtful if such opportunities are significant in countries other than India and South Africa.

Overall, the degree of financial sector liberalisation and its maturity determine the availability and cost of capital for the market players. Moreover, macro-economic policies that lead to financial repression (e.g., in highly monetarist regimes) may result in high cost of capital even in those countries where financial markets are less imperfect. Broadly, imperfections in the capital market create differential entry barriers for different types of local entrants (small vs. large, established vs. new) and between domestic and foreign players.

Policies Relating to Privatisation and FDI

As stated above, all 7-Up countries saw significant government involvement in their economies and were therefore marked by large public sectors and state-owned enterprises. As part of their economic restructuring programmes they have all adopted disinvestment or privatisation policies. One reason for the privatisation of the public enterprises is to attract greater flows of FDI.

If the economic structure resulting from the liberalisation of these policies is different across countries, the competition policy challenges may also differ. For example, South Africa, where privatisation initiatives have been most pervasive and where FDI flows are large, may face different competition policy challenges than most other project countries where privatisation efforts have made slow progress and the role of foreign and domestic capital is not that big. These together with cost of capital concerns will bring into sharper focus the role of competition policy in dealing with firms facing different entry/market conditions that are either induced by policies or are a result of capital market imperfections.

35 While this statement is still valid, in August 2001, interest rates were pegged to a maximum of 4% above 3 month T-bill rate for Banks' lending, and minimum of 75% of same T-bill rate for deposits in the Banks. It is not being implemented since the Kenya Bankers Association has sought a declaration that the Central Bank of Kenya, CBK (Amendment) Act 2000, Act No 4 of 2001 published as Gazette Supplement No 62 on August 7, 2001 is null and void on various constitutional and legal grounds. The Court ruling in respect of Section 77 (4) of the Constitution (which makes it unlawful to hold a person guilty for an act or omission that did not, at the time it took place, constitute an offence) was that retrospective application of the law to charge new interest rates was illegal. Hence a new commencement date for the law is still to be determined by Parliament. (Communication from David Ong'olo).

36 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 3.4.

37 CUTS, 2002, Competition Policy & Law in South Africa - A Key Component in New Economic Governance, section 2.2.1.

Prior to 1992, the state owned sector in Zambia accounted for 80 percent of GDP. In 1992 the government enacted the Zambia Privatisation Act and the programme went into full swing in 1996/97, beginning with small enterprises. By the year 2000, 248 out of 280 SOEs had been sold.[38] Zambia's FDI related policies initiated in 1992 did not impose any export requirements or import restrictions on foreign investment.

In fact, the government provided incentives to foreign investors through tax holidays and special conditions for import of inputs (raw materials as well as intermediate goods). While tax holidays have now been abolished, the special import conditions for foreign investors continue. Moreover, since the privatisation process initiated in Zambia, the trend was not to distinguish between foreign and domestic firms; many erstwhile parastatals are now foreign-owned private sector monopolies or dominant firms. This shows that there is a need to apply competition rules in a non-discriminatory manner, giving due recognition to the policy-induced advantages available to foreign entities.[39]

In Sri Lanka the main objective of the privatisation programme was not so much to promote a more competitive economy but to earn revenue and to reduce the fiscal burden of subsidising the inefficient public enterprises.[40] Consequently, the emergence of the Fair Trading Commission (FTC) was not linked to the privatisation programme. It was only in the early 1990s that abuse of market dominance by some of the privatised enterprises came to light and the role of FTC in curbing such acts became obvious.[41] In recent years, the garments and service sectors have attracted most of the FDI in Sri Lanka.[42] Some TNCs like Caltex, Shell, NTT-Japan, Prima etc. were given special monopoly status for a limited time period to make it more attractive for them to invest in the country**.** The term of these arrangements has either come to an end or is going to in the near future. A proper regulatory framework has to be in place to ensure that the TNCs do not abuse their market dominance.

While FDI flows have declined in recent years, TNCs constitute an important segment of the Kenyan economy. A few TNCs control banking and it is estimated that the top four banks control 65 per cent of the annual credit and assets for the sector. Similarly, 8 firms also control imports of petroleum. Of these four are TNCs that control almost 80 per cent of the market.[43] Privatisation in Kenya has essentially focused on the parastatals in the agricultural sector. But the privatisation process has only moved in fits and starts.

FDI in Tanzania is concentrated in mining and tourism. Privatisation in the country has reduced the number of monopolies, especially in transportation, media, communication, agriculture and petroleum trade. In some sectors, however, private sector monopolies and oligopolies have emerged.[44]

FDI flows into Pakistan have declined in recent years, partly due to the economic sanctions imposed by the United States and some other countries. Moreover, since the competition law puts a ceiling on the size of privately owned firms, it may have created a disincentive for TNCs. Although this section has been suspended and no action has been initiated under this section in recent years, its presence in the Act may discourage FDI. About 109 enterprises have been privatised in Pakistan so far. The process of privatisation has not been transparent and the government has not ensured a more competitive situation; private monopolies have replaced state owned monopolies.[45]

38 CUTS, 2002, Enforcing Competition Law in Zambia, section 3.4.

39 Ibid sections 3.3 and 3.4.

40 By the year 2000, about 42 privatisation initiatives have been completed. During late 1980s and early 1990s, the focus of privatisation was industries like cement, tyres, textiles, hotels etc. The current focus is on infrastructure privatisation. So far Telecom, Shell Gas, Air Lanka and certain terminals within the Colombo port have been privatised. (Based on communication from country researchers)

41 See Dr. S. Kelegama, *Competition Policy in Sri Lanka: An Overview*, mimeo (2001) for more on this.

42 CUTS, 2002, Towards a New Competition Law in Sri Lanka.

43 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, sections 2.2 and 2.4.

44 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 2.2.

45 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 3.2 and 3.5 and chapter two.

In India, engineering services, electrical equipment and computers were the main sectors receiving FDI in 2000/2001. White goods, finance, food & dairy products which were important sectors attracting FDI in the early 1990s, saw a downtrend in the latter half of the 1990s. The inflow of FDI into computers increased from six percent in 1999-2000 to 16 percent in 2000-2001.[46] India's privatisation policy, however, has no thrust on FDI.

3.2 Background and Objectives

3.2.1 Background

The tradition of competition legislation varies considerably within the 7-Up group of countries. Where India enacted the Monopolies and Restrictive Trade Practices Act in 1969 to prevent the concentration of economic power and to curb restrictive trade practices[47], the basic foundation for competition law and policy in Tanzania was laid as recently as 1994 with the enactment of the Fair Trade Practices Act.[48]

In order to reflect the changing needs, most of the countries have just recently enacted new legislation replacing the previous competition laws, or are in the process of doing so. The South African Competition Act of 1998 replaces the Maintenance and Promotion of Competition Act of 1979, which was widely regarded as inefficient.

The government of India appointed a High Level Committee on Competition Policy and Law, in October 1999, to shift the focus of the (existing) law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments to suit Indian conditions.[49] A new competition law has just been passed by the Indian parliament. On the lines of the new UK law, the new Indian law will be implemented in three phases. During the first year, the first phase will involve advocacy and public education about the new law, while the second year will be devoted to checking restrictive business practices, and the third year will encompass merger reviews. The existant law will continue to operate during the first phase of the new law, and then will stand repealed when the new law comes into operation.

At the same time an amendment has been tabled in the Tanzanian parliament which will also change the name of the young Fair Trade Practices Act of 1994 into the Fair Competition Act. It is not clear when this amendment will be passed and further amendments are expected.[50] The Kenyan Restrictive Trade Practices, Monopolies and Price Control Act came into force on February 1st of 1989[51], but is reportedly undergoing revision.[52] Zambia enacted its Competition and Fair Trading Act in 1995, as a step forward in its transition from a government controlled-economy to a free market-economy. In Sri Lanka the Fair Trading Commission Act was passed in 1987 to set the boundaries of acceptable market behaviour. However, the process in this regard is still evolving.[53] Meanwhile, the Sri Lankan parliament has passed a new law in January 2003 that covers both competition and consumer protection issues.

Pakistan still relies on its Monopolies and Restrictive Trade Practices Ordinance (MRTPO) that came into force on August 17th 1971. The only amendments to this law seem to have been inflation-inspired adjustments to the set thresholds. There are, however, serious questions as to whether the Ordinance is adequate to deal with today's economic realities. Therefore, a new law has been drafted and this is currently with the Ministry for vetting.[54] What is very incongruous with the Pakistan legislative process is that the MRTPO has never been enacted, and continues to remain on the statute books as an ordinance. Similarly, their income tax law is also an

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46 Report of the Steering Group on FDI, Planning Commission, Government of India, August, 2002, p.18

47 CUTS, 2002, Reorienting Competition Policy and Law in India, page 22.

48 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, page 14.

49 Terms of reference of the High Level Committee on Competition Law and Policy, Department of Company Affairs, Government of India, see the Report of the Committee (2000).

50 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, p.8.

51 The Laws of Kenya, Chapter 504 chapeau.

52 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya – The Role of Competition Policy & Law, paragraph 1.1.

53 CUTS, 2002, Towards a New Competition Law in Sri Lanka, paragraph 1.3.

54 Saleem Asghar Mian, *Country Experiences – The Need for a Competition Framework in the Context of a Globalising and Liberalising World Economy*. Paper presented at the UNCTAD Regional Seminar on Competition Policy and Multilateral Negotiations, Hong Kong, 16th-18th April.

ordinance. This type of anomaly exists because of authoritarian practices in Pakistan due to frequent military regimes.

3.2.2 *Objectives*[55]

Historically and across nations, the objectives of competition policy have varied. The most common objectives are to maintain and encourage competition in order to promote efficient use of resources and consumer welfare. However, other "public interest" objectives are also included within the ambit of competition policy. These may include equity/fairness, protection of small businesses, equality of opportunity, freedom of economic action, decentralisation of economic decision making/power and so on. This is done by including employment, regional development and growth of small and medium sized enterprises etc. among the objectives of competition law. In general, efficiency, consumer welfare and at times fairness are seen as the key objectives and competition law as an instrument to achieve these objectives.[56]

Broadly speaking competition law and policy (CLP) has to deal with many tradeoffs in its objectives and instruments. These include efficiency vs. fairness and static vs. dynamic efficiency. Competition is often seen as a means of attaining efficiency and fairness, but this is not always the case. For example, a perfectly competitive market with many small firms is believed to achieve equality of opportunity (fairness) but may not necessarily achieve efficiency as the existence of too many firms may obstruct them from taking advantage of economies of scale. On the other hand, a concentrated market runs the risk of abuse of market, predatory pricing, boycott etc., and hence fails in ensuring fairness in the market.

A competitive market structure that is statically efficient may not be dynamically efficient and the reverse is also true. A statically efficient market protects the consumers against being charged excessive prices in relation to current levels of cost and technology. But only large organisations which are protected from the full impact of competition, are capable of managing sufficient resources which permit them to bring innovations as well as to bear the risks of introducing them. Without the high profits, which their monopoly or dominance enables them to earn, the incentives and the means to innovate would be lacking.[57] However, absolute monopoly again can be a serious dampener to a firm's innovative efforts as without any competitive pressure it will not have any incentive to innovate. Thus, the simultaneous pursuit of dynamic and static efficiency involves difficult tradeoffs.

Given these concerns, it is widely recognised that in order to ensure a competitive process for the promotion of economic efficiency and maximisation of consumer welfare, CLP needs to create sufficient (existing or potential) competition. This implies that CLP needs to focus on the business conduct of firms as well as on the economic environment in which the firms operate. And the focus on the environment requires an understanding of the impact of various other economic policies on the process of competition. Thus, over and above the substantive provisions of competition law, public policies provide potential instruments to maintain and encourage competition. It is argued, therefore, that harmonisation and linkages between competition law and other government policies are essential for meeting the objectives of CLP. The manner in which an optimal interface between competition law and other policies can be achieved remains a debatable issue.[58]

Price control was a key political and development issue in many countries and was seen as the major 'monopoly' related problem. Consequently, in many economies competition law was preceded by price control legislation. Alternatively, price control was one of the key objectives of competition law.

In Tanzania, the Regulation of Price Act (1973) was promulgated to check monopolies. The competition law to regulate the liberalising economy subsequently replaced this. The Kenyan competition law

55 Annexure 3: Table 1 summarises the objectives of each of the 7-Up countries' competition laws, as well as the proposed objectives of both the UNCTAD and OECD model laws.

56 See the World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy*, 1998.

57 Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York (1942).b

58 For more on this debate see R. Basant and S. Morris, *Competition Policy in India: Issues for a Globalising Economy*, Indian Institute of Management, Ahmedabad (2000) and R.S. Khemani and M.A. Dutz, *The Instruments of Competition Policy and their Relevance for Economic Development*, PSD Occasional Paper No. 26, The World Bank (1996).

promulgated in 1988 had 'control and display' of prices as one of the key areas. This was subsequently dropped. The case was similar in Sri Lanka. In Zambia, reduction of inflation levels remains one of the objectives of competition law. In countries like India where price control was not explicitly mentioned as an objective in the competition law, other laws and regulations have been created to perform this task in different sectors like pharmaceuticals, food and a variety of packaged commodities etc. Such institutions exist(ed) in other countries as well.

Apart from price control, several other developmental needs get reflected in the objectives of competition laws in the 7-Up countries. Zambia, for example, hopes to encourage innovation, ensure fair distribution of income and reduce unemployment through the competition law. The criteria, provided in the Tanzanian Act for evaluating mergers, explicitly state that the impact of mergers on employment (capital vs. labour intensive production), competitiveness in export markets and ability to face import competition needs to be considered.

The adoption of competition policy and law is often a response to existing market realities. One of the effects of the liberalisation process that the 7-Up countries have embarked upon has been an increase in the competitive pressures faced by their domestic firms. In the pre-liberalisation days many of these economies had seen significant unrelated diversification by large firms. The inefficiencies resulting from such diversification could only be sustained due to protection. Once the competitive pressures increased there was a need for corporate restructuring.

As stated above, in India, South Africa and to an extent Kenya, this has led to some kind of consolidation with firms opting out of unrelated areas and focusing on certain core activities, as well as to an increase in the number of mergers and acquisitions. One of the objectives of competition policy and law could therefore be to properly regulate this process.

The structure of the market has evolved in such a way that there is a need to redress this by strengthening the proper functioning of market forces. In Pakistan, for instance, it was the history of its corporate sector's growth during the 1960's that made competition policy interventions essential. The problem was that growth led to the concentration of wealth in the hands of twenty-two families. Therefore, the main objective of the competition law that came into force in 1971 was to prevent the undue 'concentration of economic power'.[59]

A similar situation prevailed in South Africa, where the five main (white owned) conglomerate groupings accounted for 83.7 percent of the Johannesburg Stock Exchange's (JSE) market capitalisation in 1994.[60]

One of the objectives of the new South African Competition Act that was passed in 1998 and came into force in 1999, was to further the increase in the spread of ownership, especially amongst historically disadvantaged persons. In fact the South African law makes the most striking statement of development needs as objectives of competition policy:

a) To promote the efficiency, adaptability and development of the economy;
b) To provide consumers with competitive prices and product choices;
c) To promote employment and advance the social and economic welfare of South Africans;
d) To expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;
e) To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[61]

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59 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, page 19.

60 1994 witnessed the first democratic election in South Africa and is therefore taken as a benchmark. The ANC-led government has since undertaken a broad legislative programme to address the legacy of apartheid. The top five's share in JSE market capitalisation has dropped to 54.7 percent in 1998. See CUTS, 2002, Competition Policy & Law in South Africa - A Key Component in New Economic Governance, chapter 2, for more on this.

61 Section 2 of No. 89 of 1998: Competition Act, 1998, published in the Government Gazette of the Republic of South Africa, Vol. 400, Cape Town, 30 October 1998.

Such an explicit emphasis on 'adaptability and development of the economy'; employment generation; participation in world markets; equitable opportunities for SMEs, promotion of historically disadvantaged persons; and competitiveness of domestic firms in the economy is peculiar only to South Africa. Thus, South Africa's competition law incorporates specific objectives of social and other public policies into its own objectives. None of the laws in the other project countries contain such a clear statement linking competition policy with other public policies, besides consumer welfare enhancement.

There has, however, also been much discussion and criticism on the broad scope of the objectives of South Africa's competition law.[62] In fact, it has been argued that multiple objectives create possibilities of lobbying by different stakeholders in the economy and can lead to inconsistent application of competition law, so that governments end up protecting some firms from competition. And this may undermine long-term competitiveness, economic growth, and jobs.[63] Comments on this subject from different stakeholders represented in the National Reference Group (NRG) meetings reflected the different interests represented in the objectives. Some stakeholders were critical of the lack of clear prioritisation of efficiency and consumer welfare over concerns such as the promotion of employment. Others (notably labour representatives) disagreed.[64]

This issue of black empowerment came up at the Competition Tribunal in a case[65] involving a merger between Tepco Petroleum (Pty) Ltd and Shell South Africa (Pty) Ltd. It was the first of its type of case which came up. The South African Competition Commission concluded that while the proposed merger does not raise competition concerns, the wholesale acquisition of Tepco by Shell would result in the removal from the market of an independent firm owned and controlled by historically disadvantaged individuals. The tribunal, however, disagreed with the Commission's decision, and approved the merger without conditions, after taking into account and persuaded that Tepco was failing.

While competition laws in the other 7-Up countries prioritise enhancing efficiency and consumer welfare, their competition policies and laws must be seen in conjunction with other public policies, which aim to enhance overall welfare and economic growth. These objectives reflect, to an extent, the differing pressures on policy-makers, and their prioritisation depends on the development of precedents from cases.

62 See for example D. Reekie, *The Competition Act, 1998: An Economic Perspective*, South African Journal of Economics 1999, Vol.77, No.2, pages 257-288.

63 Supra note 9.

64 CUTS, 2002, Competition Policy & Law in South Africa- A Key Component in New Economic Governance, page 20.

65 On the basis of a written communication dated 17th January, 2003 from Ms Vani Chetty, Director, Edward Nathan and Friedland (Pty) Ltd, a firm of corporate law advisers and consultants based in Sandton, South Africa

Chapter-4

Scope and Coverage[66]

4.1 Introduction

The scope of competition law and the framework of its implementation vary significantly across countries. The project countries are no exception to this. Given the variety of objectives and policy needs, it stands to reason that different countries will emphasise different approaches to the law's coverage.

Competition law seeks to prevent restrictive business practices and regulate market structures that significantly lessen competition, and deal with three general areas. Indeed most of existing competition laws of the eighty or so countries in the world do likewise. These three areas are accepted to be the core operational concerns of competition law. They are:

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

However, the fact that these areas are covered in all the laws of the 7-Up countries does not mean that all competition laws take the same approach towards dealing with them. Not all countries prohibit restrictive trade practices *per se.* They might follow a *rule of reason* approach. A similar difference in approaches exists when it comes to dealing with monopoly power or a dominant position of market power. When it comes to reviewing mergers and acquisitions (M&As) some countries require pre-notification and approval of all mergers, while others need such approval only for horizontal mergers & acquisitions and still others do not need approval from the competition authorities at all.

Apart from these three core areas, there are other (related) issues that have relevance for competition policy and law. These include the question whether all enterprises are subjected to the provisions of competition legislation. Some countries exempt certain enterprises (state-owned) from the purview of the competition law or some provisions thereof. Certain sectors might also be shielded from the rigours of competition law, either because of strategic concerns (such as the defence and military sector) or because they fall under a sector specific regulatory regime (like many utilities).

Certain types of practices might also be exempted, either because they help achieve a public policy objective or because their beneficial effects are generally considered to outweigh their negative effects.[67]

Another issue is how the competition authorities deal with extra-territorial abuses that might impinge on competition in their market. Their laws could have specific clauses that provide for extra-territorial jurisdiction, but a lack of such provisions in other countries' competition laws does not necessarily mean that their competition authorities are unable to address these issues. They could also rely on the so-called 'effects-doctrine'[68] At the same time, it cannot be said with certainty that laws that have specific provisions for extra-territorial abuses are effective in dealing with them.[69]

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66 Annexure 3: Tables 1 and 2 provide an overview of the scope and coverage of competition laws in the 7-Up countries.

67 These might include the promotion of the economic ability of historically disadvantaged persons or R&D-agreements.

68 The 'effects-doctrine' provides that when a practice has effects in a particular market, the competition law of that country is applicable, regardless of whether the practice is takes place in that country or not. This doctrine is followed by, *inter alia*, the European Court of Justice. There are, however, also governments that contend that 'effects-doctrine' breaches international law. See infra section 4.3.

69 This has to do with the capabilities of competition authorities, lack of international co-operation etc. See infra chapter 5 for more on these possible problems.

4.2 Substantive Provisions

4.2.1 Restrictive trade practices

Although all the 7-Up countries address restrictive trade practices or RTPs in their legislation, their approaches differ. In Pakistan and South Africa RTPs are related to the concept of 'agreement'. The competition laws in these countries divide RTPs in those that are the result of a 'horizontal' agreement and those that result from a 'vertical' agreement.[70] India's new competition law makes the same division. Therefore, in order to cover a particular practice under the competition law it has to be a resultant effect from an agreement. However, the fact that these countries make a similar division does not mean that their approach towards such practices is the same.

Pakistan's Monopolies and Restrictive Trade Practices Ordinance (MRTPO) prohibits unreasonably restrictive trade practices outright and then proceeds by giving a list of practices that shall be deemed unreasonable RTPs, such as price-fixing, market division or sharing between competitors, conditional supply, tied sales, etc. The MRTPO furthermore gives the authority, entrusted with its enforcement, the power to prescribe other unreasonable RTPs by General Order.[71] So in order to be prohibited, the practice has to be specified either in the Ordinance itself or in a General Order.

Although these practices are prohibited, the law provides for a 'rule of reason' that is applicable to all such agreements. This rule states that none of these practices shall be deemed unreasonably restrictive if it is shown that it contributes substantially to efficiency, technical progress or exports. Furthermore it must be shown that this could not have been reasonably achieved by less restrictive means and that the benefits clearly outweigh the adverse effects on competition.[72] The onus of establishing such a justification will be on the persons or companies involved in the arrangements.[73]

The South African Competition Act of 1998 contains a general prohibition of agreements (vertical and horizontal) that have the effect of substantially preventing or lessening competition in a market. Four RTPs (three horizontal, one vertical)[74] are prohibited *per se,* while all other agreements are subject to a 'rule of reason' approach. If a party can prove that any technological, efficiency or other pro-competitive gains resulting from the practice outweigh its negative effect, it is not prohibited. The onus is again on the parties.[75]

Apart from this 'rule of reason' in which a comparison must be made between the effects on competition and the economic impact of a practice, enterprises can also apply for exemptions from the Act. The grounds for such an exemption are focused more on the 'public interest' rather than on economic impact. The grounds cover the following:

- the maintenance and promotion of exports;
- the promotion of small businesses or firms controlled or owned by historically disadvantaged persons; and/or
- to stop the decline of an industry and the economic stability of an industry.[76]

The new Indian Competition Act, 2002 prohibits all agreements that cause or are likely to cause an appreciable adverse effect on competition in India. Therefore, no agreement is prohibited outright and thus the 'rule of reason' applies. Nevertheless, four types of horizontal agreements are presumed to have an appreciable adverse effect on competition. It is not yet clear whether this means that these agreements are prohibited *per se*, or that there is still a possibility to justify them with the onus even more on the parties.

70 A 'horizontal' agreement is an agreement between actual or potential competitors, in other words between enterprises that are at the same level of the production chain, such as between manufacturers. 'Vertical' agreements, on the other hand, are agreements between enterprises at different levels of the production chain, for instance between a supplier and a dealer.

71 MRTPO articles 3, 6 and 7 respectively.

72 Ibid, Article 6 (2).

73 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 4.2.6.

74 These are (i) price fixing; (ii) market allocation; (iii) collusive tendering; and (iv) resale price maintenance.

75 CA 1998, Clauses 4 and 5.

76 CA 1998, Clause 10.

Sri Lanka's Fair Trading Commission Act (FTCA) does not identify specific RTPs but gives a general prescription of instances where such a situation occurs. Meeting this broad definition alone does not make such a practice prohibitory. It has to be established that such a practice is against the 'public interest'.[77] In this situation it is upto the Fair Trading Commission to prove that the practice was against the public interest. Compared to other countries, the law in Sri Lanka reverses the burden of proof and does not consider any RTP by definition detrimental to the public interest. Even the new law in Sri Lanka follows more or less the same approach.

For the purposes of the Zambian Competition and Fair Trade Act, RTPs can also be the result of the abuse of a dominant position of market power. Such abuse can either be in collusion through some 'vertical' arrangement[78] or the acts of a single enterprise.[79]

In any case the Zambian law prohibits any category of agreements, decisions or concerted practices, which have as their object the prevention, restriction or distortion of competition to an appreciable extent in any substantial part of the market.[80] It is clear from this language that a 'rule of reason' approach is usually called for. There are, however, a number of horizontal agreements that are prohibited *per se*.[81]

A particular feature of the Zambian competition law (in comparison with the other 7-Up countries) is the fact that it prohibits practices that have as their 'object' the prevention, restriction or distortion of competition,[82] whereas the other project countries only prohibit practices that have or are likely to have such 'effect'.

The Zambian provision in this regard may appear to be more stringent. However, there can be situations where some practices indulged in by the enterprises may produce anti-competitive outcomes even when the object of the practices might not have been so. Moreover, ascertaining the real objective behind a firm adopting a particular practice may not be an easy task. The requirement that the practices concerned need to effect the entire Zambian market or any substantial part may not be a good approach as there might be anti-competitive practices at local levels which individually may not affect any substantial part of the market but their aggregate impact on the economy could be quite significant.

The Fair Trade Practices Act 1994 of Tanzania and Kenya's Restrictive Trade Practices, Monopolies and Price Control Act 1989 have similar provisions and define RTPs as acts that either reduce or eliminate the opportunities of competitors or reduce or eliminate the opportunities of buyers to acquire certain goods or services. These acts can be performed by either one or more persons engaged in the production or supply of goods or services.[83]

Both these laws enumerate a large number of practices as RTPs. These include all sorts of agreements and the abuse of dominance. The laws do, however, make a distinction between those agreements and practices that are prohibited and those that are are considerd to be RTP but not prohibited *per se.*[84] Interestingly, for a 'predatory trade practice' to be prohibited it is not necessary for a certain outcome to actually occur. In comparison with Zambia, the competition authorities of both Tanzania and Kenya have a limited scope for preventive action.

Predatory practices (including creation of entry-barriers), collusive tendering and bid-rigging are prohibited *per se*, while for other RTPs, investigation can be launched if there is a complaint that the said

77 FTCA, section 14 and section 15(1)(a).

78 These include tied-sales agreements. Others are also specified in Section 7 (2) (c), (d) and (e) of the CFTA.

79 This includes predatory behaviour towards competitors including the use of cost-pricing to eliminate them. Section 7 (2) (a) of the CFTA

80 CFTA, section 7 (1).

81 These agreements relate to (i) price fixing; (ii) collusive tendering; (iii) market or customer allocation; (iv) quota allocation; (v) collective enforcement action; (vi) refusal to supply; and (vii) collective denial of access to an arrangement crucial to competition. Also see Section 9 (3) of the CFTA.

82 The European Union's competition rules contain similar language. See for example Article 81 of the Treaty of Amsterdam. Also Section 2 of the Sherman Act, 15 U.S.C § 2.

83 Section 15 of Tanzania's FTPA and Section 4 of Kenya's RTPMPC Act.

84 See, Sections 20, 21 and 22 of the FTPA and Sections 10, 11 and 12 of the RTPMPC Act respectively.

RTP has caused damage to any party and action can be taken if the CA comes to the conclusion that the damage has actually been caused.[85]

It is clear that there are different ways of dealing with RTPs. Nevertheless there are a few patterns that emerge from all project countries. None of the countries prohibit all RTPs *per se.* They all apply a 'rule of reason' approach on at least certain practices. This enables them to take account of other needs as well, and is thus a reflection of the interface between competition law and other public policies. Sri Lanka's law is the most far fetching in that respect, because it is up to the authorities to prove that a certain practice is against the 'public interest'.

In the other project countries the onus is on the enterprises engaged in RTPs to justify them for their economic benefits. Whether the onus is on the authorities or on the enterprises involved, it remains difficult to distil the precise criteria that will determine the outcome of a 'rule of reason' analysis. These will simply have to evolve from case to case. This might lead to less predictable outcomes for the enterprises, but will ensure the flexibility that is needed to do justice to the development needs and policies of the project countries.

Those practices that are prohibited *per se* are generally considered to be the most serious restrictions on competition and the result of 'horizontal' agreements or abuse of dominance. The reasons why a distinction is made are not always clear however.

The Tanzanian law, for instance, prohibits predatory pricing and collusive tendering *per se* (i.e. persons engaged in these practices shall be guilty of an offence), whereas agreements to divide markets or refusal to sell, which can be equally or even more damaging to competition and consumers, are considered to be legally unenforceable in a court of law. Persons committing these kind of restrictive trade practices are only guilty of an offence after they refuse to comply with orders from the Commission to stop the practices.[86]

The Kenyan law has similar divisions and this has caused much confusion even among enforcement agencies.[87]

In South Africa, even when a practice is prohibited *per se*, enterprises can apply for exemptions on certain grounds. However, regardless of the broad policy objectives that are stated in the Act, economic efficiency seems to be the overriding principle in weighing all criteria. Even though employment concerns have been taken into account in some cases (which were merger cases) this is reinforced in case law.[88]

4.2.2 Control of monopoly power or the abuse of dominance[89]

Controlling concentrations of market power is part of the competition legislation in all project countries. Part of this is done through merger control[90], while another part is to check existing concentrations of power and make sure that these are not abused. With one exception, all of the 7-Up countries apply a two-step test to determine the abuse of dominance. First, the competition authority has to determine the existence of a dominant position of market power and, secondly, whether such a position is misused to restrict competition.

The exception is Pakistan, which seems to prohibit market dominance *per se*. The prevention of undue economic or monopoly power was one of the main objectives of the MRTPO when it was enacted in 1970. This was because of the specific economic circumstances that prevailed in Pakistan at that time.[91] This becomes all the more apparent in the remedies that the Ordinance provides. The remedy against such undue concentrations is not the divestiture of the dominant or monopolist enterprises, but the divestiture of their ownership. Therefore, the Pakistani

85 See, Sections 23-29 of the FTPA and Sections 13-21 of the RTPMPC Act.

86 FTPA, Sections 16 and 20 in conjunction with Sections 24, 25, 26 and 29.

87 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 4.3.

88 This seems to reflect the fact that the South African Act drew heavily from Canadian and Australian legislation. During the NRG meetings the representatives of the competition institutions highlighted that this was in line with international 'best practice' as reflected in industrialised country legislation. Therefore this emphasis on economic efficiency might not be pursued by some of the other 7-Up countries.

89 Annexure 3: Table 3a provides a general overview of the 7-Up countries' approaches towards this.

90 See infra section 4.3.3.

91 See supra section 4.1.2.

competition law doesn't frown so much on market power in the 'traditional' sense, but rather on 'personal' or 'family' market power.[92] The existence of 'traditional' market power is also prohibited, but the law provides that such power is justified if it contributes substantially to efficiency, or technological progress or the growth of exports.[93] The question is whether this approach still adequately reflects the needs of Pakistan or the current economic reality.

Dominance

As stated above, all of the other countries take a two-step analysis in assessing abuse of dominance. First, they have to establish that a position of dominant market power actually exists. In order to do this the competition authorities must first define the 'market'. This market is not simply the entire world-market for all products. The authorities must determine what is the 'relevant' market. The relevant market has, mainly, two dimensions: a 'geographical' dimension and a 'product' dimension.[94]

The geographical market could generally be the entire territory of a country or any part thereof. For some purposes it could even extend beyond the territory of a country.[95] In Sri Lanka, however, in order to determine market power (the existence of a monopoly) the supply of goods or services by one or the same person has to be of a prescribed percentage of all those goods supplied in Sri Lanka.[96]

To define the 'product' dimension the FTC Act takes a similar approach. The products and services have to be identified and gazetted by the Government to fall under the purview of the law's monopoly rules.[97] If a product is not detailed in the Gazette the Fair Trading Commission cannot intervene. In such cases the Commission does not even get around to applying the second step. This test requires that the Commission has to prove that the monopoly is against the 'public interest'.[98]

The laws of the other countries (Kenya, India, South Africa, Tanzania and Zambia) do not have such clear description of the 'relevant' market. India's new Competition Act is the only competition law (although not yet in force) that provides the competition authority with specifications as to which factors to take into consideration when determining the relevant market.[99] In other 7-Up countries these factors will simply have to evolve on a case-by-case basis in order to do justice to both the flexibility needs of their economies and the need for reliability of the law for the enterprises.

After the relevant market (both geographical and product) is determined, the next step is of course to find out whether or not a dominant position of market power exists. All these project countries have adopted a 'behavioural' approach[100] towards dealing with monopolies or dominant enterprises. Nevertheless, in analysing the existence of dominance they still rely heavily on the 'structural' approach, since the major factor to take into consideration is the size of an enterprise's market share.

The South African law stipulates that a firm is considered to be dominant if its market share is at least 45 percent. If the firm's market share is between 35 and 45 percent there is a presumption of dominance that is to be rebutted by the enterprise in question. The law provides that an enterprise can still be dominant if its market share is lower than 35 percent, but in that case the onus is on the competition

92 For establishing the existence of such power the MRTPO sets a threshold that considers an undue concentration of economic power to exist if the assets of an undertaking amounts to or exceeds 300 million Pakistani rupees. Public companies are excluded from this threshold. See CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 4.2.3 for more on this.

93 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 4.2.4.

94 The relevant market can also have a 'functional' and 'temporal' dimension, but since none of the 7-Up countries include these in their analysis, these dimensions are not dealt with here.

95 See infra section 4.3.3 on mergers and acquisitions and section 4.3.4 on extra-territorial jurisdiction.

96 This 'prescribed' percentage is set by the Minister for Internal and International Trade and Food and is considered a rather arbitrary cut off point that varies between 40 and 50 percent. Also see CUTS, 2002, Towards a New Competition Law in Sri Lanka, chapter 4 for more on this. The Sri Lankan FTCA also covers monopsonies since a monopoly is also deemed to exist if a prescribed percentage of all supplied goods or services are supplied to one and the same person. FTCA, Clause 12.

97 Currently there are 47 identified and gazetted products and services with prescribed percentages applicable to section 12 of the FTCA.

98 See CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 4.1.1 for more on this.

99 Indian Competition Act, 2003, Clause 19 (6) and (7).

100 Under this approach monopolies or dominant positions are not prohibited *per se*, but should refrain from certain business practices that renders them against the public interest.

authority to prove that the enterprise has market power. This market power is defined as being the ability to control prices, exclude competition or to behave to an appreciable extent independent of competitors, customers or suppliers.[101]

India's Monopolies and Restrictive Trade Practices Act (MRTPA) also defines a market share threshold for dominance[102], but the new Competition Act has moved forward by taking a different, more behavioural approach. The new law prescribes that in assessing the dominance of a particular enterprise a number of factors have to be taken into account including:

(i) market share,
(ii) size and importance of the competitors,
(iii) technical advantages including intellectual property rights (IPRs),
(iv) dependence of consumers on the enterprise and
(v) the overall market structure and size of the market.[103]

It is not clear what importance market share will have when considering all these elements.

The Zambian law does not provide for a specific definition of a dominant undertaking, but in general an undertaking is considered to be dominant if it has a degree of market power that allows it to behave independently of competitive pressures. Market share is an important but not conclusive factor in determining if this market power exists. Depending on the circumstances of the case the Zambia Competition Commission uses, as a guideline, that a firm is unlikely to be dominant if its market share is less than 40 percent. The other main factor is what level of competition the undertaking faces from new entrants to the market. Therefore, it also looks at entry barriers that would give a firm already in the market an advantage over new entrants.[104]

Both the Kenyan and Tanzanian law set a market share of one-third of all goods or services supplied in the relevant market as one of the factors that have to be taken into account when identifying a situation of concentration of economic power.[105] Such concentrations/dominant positions are deemed *prima facie* anti-competitive and it is therefore up to the competition authorities to determine the existence of a net 'public benefit' to justify them.[106]

It is clear that determining dominance requires a complicated economic analysis. Jurisdictions all over the world use market shares as an important indicator of dominance and very large market shares can in themselves, save exceptional circumstances, be evidence of a dominant position. The question is when does a market share become so large that it would constitute such a situation?

The South African law prescribes that a 45 percent market share is evidence enough of a dominant position. For comparison, the rule of thumb followed by United States is that 33 percent of the market is certainly not enough for finding monopoly power, 60 percent is 'doubtful', but 90 percent is certainly enough.[107] On the other hand, the European Court of Justice has found that a market share of 50 percent can in itself be evidence enough of a dominant position.[108] It is clear that different countries take different approaches. This might reflect their economic realities as well as their general public policies.

It is not entirely clear if a threshold for coming under the purview of an investigation into abuse of dominance should be defined, as there are no clear determinants of what constitutes dominance. The advantage of having a threshold is that firms with smaller market shares with limited impact on the market fall outside the purview of 'abuse of

101 CA 1998 Sections (1)(xiii) and (7). Also see CUTS, 2002, Competition Policy & Law in South Africa - A Key Component in New Economic Governance, section 4.3.

102 The threshold is 25 percent of total goods or services provided in India. See MRTPA Clause 2 (d).

103 *CA, 2003, Clause 19 (4).*

104 CUTS, 2002, Enforcing Competition in Zambia, section 4.4. Also see Zambia Competition Commission, *Competition Rules in Zambia*, ZCC mimeograph, Lusaka (undated), page 4.

105 RTPMPC Act Section 23 and FTPA Section 31 respectively.

106 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 5.1.7.

107 This rule of thumb was developed in the famous *Alcoa*-case. See *United States v. Aluminium Co. of Am.*, 148 F.2d 416, 426 (2nd Cir. 1945).

108 After the ECJ had set out the doctrine that very large market shares are in themselves evidence of a dominant position, save for exceptional circumstances in the *Hoffman-La Roche* case (Case 85/76 *Hoffman-La Roche v. Commission* (1979) ECR 461, paragraph 41), they found that this was the situation where there is a market share of 50 percent in the *Akzo* case (Case C-62/86 *Akzo v. Commission* (1983) ECR I-3359 paragraph 60).

dominance' investigations, focusing the investigations on a specific segment of firms. The World Bank-OECD model law suggests a threshold of 35 percent while the UNCTAD Model Law is silent in this regard.

Abuse

After determining that an enterprise has a dominant position of market power, the question is whether or not this enterprise is 'abusing' that position. This second step is necessary to do justice to the concept that 'big isn't necessarily bad'[109], but that it is certain behaviour in combination with a dominant position that should be prevented.

Apart from the fact that dominant firms have to refrain from restrictive trade practices that are prohibited for any enterprise, the Tanzanian law prohibits those concentrations of economic power that are 'unwarranted' because they are 'prejudicial to the public interest'. For this purpose the detrimental effect on the economy must outweigh the efficiency advantages of economies of scale. This is the case when the effect of the concentration of economic power would be to:

(i) increase the costs of production or distribution;
(ii) increase the price at which goods or services are sold;
(iii) reduce or limit competition; or
(iv) result in the deterioration of the quality of any good or in the performance of any service.[110]

Kenya uses a similar approach[111] and as already stated above the same broad 'public interest' test as is applied to RTPs, is required in Sri Lanka.

The South African Competition Act of 1998 prohibits dominant firms from:

(i) charging excessive prices;
(ii) refusing access to an essential facility;
(iii) exclusionary acts (unless pro-competitive, technological or efficiency gains that outweigh the negative effects can be demonstrated); and
(iv) price discrimination.[112]

The new Indian Competition Act states that the abuse of a dominant position is prohibited and then gives a number of practices that are deemed to be an abuse, which is similar to the South African law.[113] One of these is the use of a dominant position in one relevant market to enter into, or protect, another relevant market. While using a dominant position in one market to protect a position in another market is undoubtedly anti-competitive, the use of a dominant position to enter into another market is not necessarily anti-competitive, especially if this is done only temporarily. The other relevant market could also be highly concentrated and it might be necessary to temporarily cross-subsidise in order to enter that market. An extra competitor would in that case only increase the level of competition.

The Zambian law prohibits dominant firms from predatory behaviour, price discrimination, tied sales and quantitative restrictions. But apart from these practices, all decisions that have as their object: the prevention, restriction or distortion of competition to an appreciable extent in Zambia are also prohibited. Thus, the Zambia Competition Commission does not have to limit itself to the enumerated practices.[114]

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109 The 7-Up countries have adopted this concept. The opposing so-called 'structuralist' view argues that it is inevitable that a monopolist will act in an economically inefficient way; it will raise prices and restrict output and this allocative inefficiency is reason enough to condemn them. In the US the courts came close to adopting this approach completely in the *Alcoa*-case (see supra note 103, at p.427) when it determined that the Sherman Act did not condone 'good trusts' and condemn 'bad ones', but forbade all. Later the courts gave more latitude and in the *IBM* case (*Transamerica Computer Co. v. International Business Machines Corporation*, 481 F.Supp. 965, 1022 [N.D. Cal. 1979]) it allowed a monopolist to restrict competition as long as it did not do so 'unreasonably'. The 'structuralist' view seems to have lost out all over the world and therefore the 7-Up countries are in line with international practice in taking this 'behavioural' approach.

110 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 5.1.7.

111 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 4.4

112 CA 1998, Sections 8 and 9. Also see CUTS, 2002, Competition Policy & Law in South Africa- A Key Component in New Economic Governance, section 4.3.

113 CA, 2003, Section 4.

114 CFTA Section 7.

In general, dominant enterprises are under closer scrutiny than other firms. Because of their dominant position, behaviour that is legitimate for non-dominant enterprises may constitute abuse if engaged in by a dominant firm.

4.2.3 Control of mergers & acquisitions

Mergers and acquisitions can be efficiency enhancing and since optimising allocation is one of the objectives of competition policy, they can be good for competition. However, it can also lead to a bundling of economic power that can or will diminish competition in a market. In general, combinations that are likely to result in situations where competition will get restricted are prohibited. All 7-Up nations have provisions to this effect.[115] There are, however, some important differences.

Notification

One aspect that varies across nations relates to pre-notification of mergers and acquisitions. The UNCTAD Model Law recommends pre-notification in cases where the combination may lead to market power especially in markets where concentration or entry barriers are already high. The World Bank-OECD Model Law is silent on the pre-notification issue.

India's MRTPA did not require any pre-notification as the provisions for the review of mergers was abandoned in an amendment in 1991. Interestingly the dilution of the merger review provisions did not affect the power of the MRTP Commission to order a demerger, should the merged entity engage or is likely to engage in monopolistic practices, but the same provision was never invoked.

However, the new Competition Act has an elaborate financial threshold for pre-merger review, but makes pre-notification optional. It is up to the parties to the merger or acquisition to decide whether to give notice to the Commission and request approval.[116] Further, the provisions regarding merger review in India would be applicable subject to specified threshold limits in terms of the asset value.

The South African law requires M&As, only above certain thresholds, to be notified and approved. These thresholds, are not set in the Competition Act itself, but have to be set by the Minister of Trade and Industry after consultation with the Competition Commission.

Mergers that have to be notified are separated into (i) *intermediate mergers* and (ii) *large mergers*.[117] Whereas the Commission can make an independent determination on intermediate mergers, on large mergers it can only undertake an investigation and present a position.[118] The ruling has to be made by the Tribunal. The Commission's decisions on intermediate mergers can of course be appealed at the Tribunal as well.

The laws of Kenya, Tanzania and Zambia require that all mergers between two or more enterprises that are engaged in manufacturing or distributing substantially similar goods or services (horizontal mergers) are notified and approved. Many 'vertical' mergers do not come under the purview of their competition law. Although horizontal mergers are generally more likely to restrict competition than vertical mergers, the absence of provisions to deal with all of them could be an omission.

Let us imagine the following situation: a supplier 'x' of a primary commodity is a monopolist and the downstream market is an oligopoly of 'a', 'b', 'c', 'd' and 'e' with roughly equal market shares. If 'b'

115 Annexure 3: Table 3c gives an overview of the provisions dealing with M&As in the 7-Up countries.

116 CA 2003, Section 6 (2). Section 5 (a) of the CA 2003 states that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises if (i) the parties to the acquisition jointly have - either in India, the assets of the value of more than Rs.1000crores (US$208mn) or turnover more than Rs.3000crores (US$625mn) or - in India or outside India, in aggregate, the assets of the value of more than US$500mn or turnover more than US$1500mn; (ii) or the group to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly - have or would jointly have either in India, the assets of the value of more than Rs.4000crores (US$833mn) or turnover more than Rs.12000crores (US$2500mn) or - in India or outside India, in aggregate, the assets of the value of more than US$2bn or turnover more than US$6bn.

117 *Intermediate mergers* are those where the combined annual turnover or assets in the Republic of South Africa of the acquiring firm and the target firm are equal to or greater than RN 50 million and where the assets or turnover of the target firm are greater than RN 5 million. *Large mergers* are those where these figures are RN 3.5 billion and RN 100 million respectively. See CUTS, 2002, Competition Policy & Law in South Africa- A Key Component in New Economic Governance, section 4.4.

118 For further details on how merger cases are handled in SA, please see supra *page 52*

takes over or merges with 'x' this would not come under the purview of the competition laws. The takeover could nevertheless have serious anti-competitive implications. It is not certain how the authorities in these countries would or could deal with such a situation.[119]

In 1993 Sri Lanka's FTCA was amended to provide for the mandatory notification of all mergers and acquisitions, however the FTCA only recognises these transactions as 'merger situations' when the result is either the substantial strengthening of an already existing dominant position or the acquisition of a new dominant position.[120] This provision could therefore function as a threshold. This could be a tool to restrict the Fair Trading Commission's workload. At the same time, it could also make pre-notification an empty bucket, since companies could simply argue that their merger does not result in a situation that would come under the purview of the competition law. Currently, all M&As are notified regardless of whether they result in the acquisition or strengthening of dominance. The new law however does not include any provisions for merger notification.

The MRTPO of Pakistan prohibits all mergers and acquisitions where the effect of such a transaction will or is likely to have adverse effects on competition or is likely to create monopoly power. Merger control is therefore an important tool in the prevention of unreasonable monopoly power.[121] The only problem with the enforcement is that mergers are in the first instance approved by a civil court under the Company law, and only then can the MCA examine the competition aspects of the merger. This is a little frustrating as it tantamounts to try and unscramble the omlette after it has been cooked. In most other cases, the company law provisions are invoked after the competition dimension is satisfied.

Assessment

The process of assessing a proposed M&A can be a difficult and time-consuming effort. Merger control could therefore substantially contribute to the competition authorities' workload. At the same time they also have important implications for the agencies' learning process.

The main concern for all competition agencies in evaluating a merger is to make sure that it does not substantially lessen competition in any relevant market. It is therefore necessary to determine the relevant market. Certain mergers can affect competition in several relevant markets. In general the competition authorities apply the same kind of tests as they do for establishing dominance. Merger control is done to ensure that the efficiency gains of a proposed merger outweigh the negative impacts on competition, before they actually take place. Merger control is therefore *ex ante* regulation of competition.

The other important issue that needs some discussion in the developing country context relates to the 'quasi-structural' focus of competition law and policy in assessing mergers and acquisitions. Such a focus gets reflected in thresholds defined for screening combinations. Does such a focus make sense in an era of globalisation, especially in situations where domestic market size is small? While Pakistan is the only country where restrictions remain on the size of the company (similar restrictions existed in India also but were abolished in the 1991 amendment)[122], most competition authorities use market share as the most important variable to analyse M&As. In South Africa, the Hirschman-Herfindahl index[123] is used to assess if a merger will have anti-competitive effects.

119 The ZCC indicates that it will deal with such mergers if it is shown that they are intended to restrict competition or distort competition, for instance, if they are employed to foreclose distribution channels to competitors. These will then be dealt with under the RTP provisions of the law. This, however, may not be the best solution since such action can only be taken *ex post* and the divestiture of a merger is a complicated process. Also see Zambia Competition Commission, *Competition Rules in Zambia*, ZCC mimeograph, Lusaka (undated), pages 4 and 5.

120 FTCA, Section 9A. Also see CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 4.1.4.

121 MRTPO, Section 5 (b).

122 The Indian Competition Act, 2003 has imposed a financial threshold for screening of pre-notification of M&As that would imply that most combinations involving large firms are captured by the criteria. But pre-notification is not mandatory. The argument is that 'abuse of dominance' provision will take care of any anti-competitive practices.

123 See note 19.

In most of the 7-Up countries the levels of market concentration were very high in many industries when the competition law was introduced. In Pakistan, for example, a few families controlled a significant chunk of industrial assets and the average four-firm concentration ratio was found to be around 70 per cent for 82 industry groups. The situation was similar in India and South Africa where large conglomerates with interlocking ownership structures, cross-holdings etc. made the distribution of industrial assets very unequal. These 'initial conditions' may have tilted the balance in favour of the 'structural' focus.

Overall, the working of the competition authorities in the 7-Up countries is based on the 'structural' understanding of 'competition' efficiency, market power etc; the behavioural aspects though considered are not accorded primacy. With the emerging focus on 'conduct' in most developed countries, the competition authorities in developing countries may also need to change their criteria of assessment or use the gateways more often.[124] However, a movement from 'structure' to 'conduct' in the implementation of competition policy will require a significant increase in the capacity of the competition authority. This, however, is lacking in most developing countries, including the 7-Up countries, and will remain a challenge for developing countries with limited resources.

4.3 Cross-Border Issues

With the progressive opening up of their trade regimes developing countries as well as developed countries are now required to deal more and more with the influence of actions that take place or originate outside their borders. Their ability to deal with these cross-border competition concerns is therefore of vital importance to the level of competition in their domestic markets. As many other government policies (such as trade and investment or disinvestment policies) can influence the level of competition in a market, the competition authorities have to have adequate tools to deal with a wide array of issues.

The most important tool the competition authorities in the project countries have are the competition laws that all seven countries have enacted. Broadly, these laws deal with three main subject areas:

(i) restrictive trade (business) practices;[125]
(ii) abuse of dominance or monopoly power;[126] and
(iii) mergers and acquisitions.[127]

There is no difference whether these acts are international or domestic; as a matter of subject the law covers them. The problem—when it comes to dealing with cross-border issues vis-à-vis domestic competition concerns—lies in the realm of 'jurisdiction'.

4.3.1 Concept of jurisdiction

The whole question of jurisdiction is complex. Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations. It may be achieved by means of legislative action or by executive action or by judicial action. In each case, the recognised authorities of the state as determined by the legal system of that state perform certain functions permitted to them which affect the life around them in various ways.

In most democracies, parliament passes binding statutes, the courts make binding decisions and the administrative machinery of the government has the power and jurisdiction (or legal authority) to enforce the rule of law. These differences, particularly between the capacity to make law (the prescriptive jurisdiction) and the capacity to ensure compliance with such law (the enforcement jurisdiction), are basic to an understanding of the legal competence of a state.[128]

It follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation. International law tries to set down rules dealing with the limits of

124 In Pakistan, for example, an acquisition was evaluated and found to constitute unreasonable monopoly power. But it was allowed because the parties could justify the monopoly on the promise of increased efficiency, transfer of technology and increased exports.

125 Ibid, section 4.2.1.

126 Ibid, section 4.2.2.

127 Ibid, section 4.2.3.

128 Malcolm N. Shaw, *International Law,* fourth edition, Grotius Cambridge University Press 1999, p. 452.

a state's exercise of governmental functions. Although the expanding scope of United Nations' concern has limited the extent of the doctrine of domestic jurisdiction,[129] the concept does retain validity in recognising the basic fact that state sovereignty within its own territorial limits is the undeniable foundation of international law as it has evolved, and of the world political and legal system.[130]

One aspect of the sovereignty exercisable by a state is the 'territorial principle'. That a country should be able to prosecute for offences committed upon its soil is a logical manifestation of a world order of independent states and entirely reasonable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state. Thus, all crimes or offences committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is even so where the offenders are foreign nationals.[131]

Although jurisdiction is primarily territorial it may also be based on other grounds, for example nationality. This is also where the difference between prescriptive jurisdiction and enforcement jurisdiction becomes important, since enforcement is restricted by territorial factors.

For instance, if a man kills somebody in Kenya and then manages to reach Tanzania, the Kenyan courts have jurisdiction to try him, but they cannot enforce it by sending officers to Tanzania to arrest him. They must apply to the Tanzanian authorities for his arrest and extradition to Kenya. At the same time, if the accused is a Ugandan national, then Uganda can also claim jurisdiction on the basis of the nationality principle (Uganda is sovereign over its subjects), but they too would have to seek the co-operation of the Tanzanian authorities.

4.3.2 Extra-territorial jurisdiction

Although there is a general presumption against the extra-territorial application of legislation, a number of states, particularly the United States, seek to apply their laws outside their territory in the context of economic issues. On the basis of the so-called 'effects' doctrine they have assumed jurisdiction even though all the conduct complained of takes place in another state.

Although the 'effects' doctrine could theoretically be applied to all kind of activities, it has been most energetically maintained in the area of antitrust or competition regulation, particularly by the United States. In the famous *Alcoa*-case[132] the US Supreme Court declared that 'any state may impose liabilities, even upon persons not within its allegiance, for the conduct outside its borders that has consequences within its borders which the state reprehends'.[133]

The wide-ranging nature of this concept aroused considerable opposition outside the US, as did American attempts to take evidence abroad under very broad pre-trial discovery provisions in US law.[134] The European Community had taken a strong stance against the US approach.[135]

However, it is generally accepted now that the Community competition law subscribes to an 'effects' doctrine for determining the reach of Articles 81 and 82. Under this 'effects' doctrine, judicial jurisdiction exists to apply Community competition law to restraints or abuses of dominant positions occurring outside the EU, provided that there are effects within the EU between Member States. For example, if an undertaking is registered

129 This is mainly because, for instance, humanitarian concerns are increasingly prevailing over the respect for each nation's right to manage or mismanage its affairs and its subjects. Also see e.g. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963.

130 Malcolm N. Shaw, *International Law*, fourth edition, Grotius Cambridge University Press, page 455.

131 Ibid, page 459.

132 *United States v. Aluminium Co. of America,* 148 F.2nd 416 (1945).

133 Ibid, page 443.

134 See e.g. the statement of the UK Attorney-General that 'the wide investigating procedures under the United States' antitrust legislation against persons outside the United States who are not United States citizens constitute an 'extra-territorial' infringement of the proper jurisdiction and sovereignty of the United Kingdom', *Rio Tinto Zinc v. Westinghouse Electric Corporation* [1978] 2WLR 81; 73 ILR, page 296.

135 This stance has mainly been against extra-territorial extension of other US laws such as the Helms-Burton Act.

or it maintains its centre of operations outside the EU, the Community competition law would apply if its anticompetitive acts had an effect on trade between Member States. This doctrine is somewhat similar to the 'effects test' used in the US to measure the applicability of the Sherman Act.[136]

Countries have a number of (legal) possibilities when dealing with cross-border issues. They can assume jurisdiction based on the 'effects' doctrine or stretch the objective territoriality principle even when this is a controversial issue under international law. Nevertheless, there are a growing number of states that apply these approaches. Although, this is possible when it comes to prescriptive jurisdiction, enforcement jurisdiction remains limited by territorial factors.

The next section will look into how the 7-Up countries deal with prescriptive jurisdiction vis-à-vis cross-border competition issues, while the next chapter will address how the competition authorities in the project countries try to enforce their laws to the same.

4.3.3 7-Up countries' approaches

The South African Competition Act of 1998 has adopted the 'effects' doctrine as it unequivocally states that the Act applies to all economic activity within, *or having effect within*, the Republic of South Africa.[137] Thus, the South African competition authorities and courts would assume jurisdiction in all cases that had affected the South African market, regardless of where the practice had taken place and regardless of where the companies involved were based. Nevertheless, companies have challenged the jurisdiction of the authorities in cases where all companies involved were based outside South Africa and the illicit behaviour had also taken place outside the territory of South Africa.[138]

Although the Zambian Competition and Fair Trading Act does not have such a clear 'effects' statement, Section 7(1) does prohibit any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or any substantial part of it. This statement is territorial in nature as it provides for jurisdiction when competition in Zambia is distorted. The law is silent with regard to whether it matters if all parties involved are based outside Zambia and the practice takes place outside its territory. However, it seems that as long as the objective is to prevent, restrict or distort competition in Zambia, the Zambia Competition Commission would have jurisdiction and the fact that parties are outside Zambia would not be a limiting factor (at least with regard to prescriptive jurisdiction).

Sri Lanka's Fair Trading Commission Act is silent on whether the law has extra-territorial reach, but the wording of the Act's provisions does not prevent the FTC from applying the 'effects' doctrine. The same holds true for the competition laws of Kenya, Pakistan and Tanzania.

On the other hand the Indian Monopolies and Restrictive Trade Practices Act of 1969 does not apply to situations where there is only 'effect' on the Indian market and when both the action is taken and the companies involved are based outside India. In two recent judgements[139] the Supreme Court of India interpreted the MRTPA, that the competition authority (the MRTP Commission) could only exercise jurisdiction over that part of the practice that takes place in India. The new Competition Act, 2002 has however taken care of this lacunae and elaborately defined the effects issue.

4.4 Exemptions

There are several reasons for making exemptions from the purview of the competition law. Such exemptions could be 'practice' specific (i.e. certain types of practices are exempted, because their benefits are generally considered to outweigh their negative impact on competition), 'enterprise'-specific or 'sector'-specific. The reasons for exempting the latter type are manifold.

136 http://www.antitrust.de/kartellrecht.htm

137 No. 89 of 1998: Competition Act, 1998, Government Gazette, volume 400, Cape Town, 30 October 1998, Section 3(I).

138 See infra chapter 4 for the *Soda Ash* case.

139 See CA No.2330/2000, Supreme Court of India.

Table 4: Practice specific exemptions

Country	Practice specific
India	• (CA 2002) Activities exclusively related to export. • (CA 2002 & MRTPA 1969) Practices or agreements arising or in accordance with treaty obligations assumed by the Government of India or to meet the requirements of the defence of India or for the security of the State. • (MRTPA 1969) Practices authorised by: any other enactment in force, or Government of India to ensure the maintenance of essential goods and services.
Kenya	• Trade practices directly and necessarily associated with the exercise of trading privileges conferred on any person by an Act of Parliament or Government Agency in accordance with an Act of Parliament. • Trade practices directly and necessarily associated within the licensing of participants in certain trades and professions by a government agency in accordance with an Act of Parliament.
Pakistan	• Any practice in pursuance of any order from the Central Government or a Provincial Government. • Export cartels.
South Africa	• Any type of practice if it contributes to: (a) maintenance or promotion of exports; (b) promotion of ability of small firms and those owned by historically disadvantaged persons to become competitive; (c) stop decline in industry; (d) economic stability of an industry.[140] • Exercise of IPRs.[141] • Collective bargaining within the meaning of the Constitution and Labour Relations Act, 1995. • Collective agreements as per the Labour Relations Act. • Concerted conduct to achieve non-commercial socio-economic objective.
Sri Lanka	• No specific exemptions in the FTPA.
Tanzania	• Agreements or arrangements between consumers relating to goods or services bought by them for consumption and not for resale.
Zambia	• Employee activities for their own reasonable protection • Arrangements for collective bargaining between employers and employees for the purpose of fixing terms and conditions for employment. • Trade union activities to advance the terms and conditions of their members' employment. • Agreements relating to the use and exercise of IPRs. • Activities expressly approved or required under a treaty to which Zambia is a party. • Activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public. • Such business or activity as the Minister may, by statutory instrument, specify.

4.4.1 Types of exemptions

Practice Specific

The South African law allows firms to apply to the Competition Commission for an exemption of agreements or practice from the application of the provisions relating to restrictive trade practices.[142] In order for it to be granted an exemption the agreement or practice is necessary to attain any of the four 'public interest' goals, including the promotion of exports. Export cartels are also explicitly exempted in the Pakistani MRTPO and the Indian Competition

140 Only on application to and granting from the Competition Commission. See Section 10 of the Competition Act, 1998, No. 89 of 1998.

141 Ibid.

142 CA 1998, Section 10.

Act, 2002.[143] Apart from these four grounds the South African Commission may also exempt agreements relating to Intellectual Property Rights (IPRs).[144] Thus, certain anti-competitive licensing agreements in respect of, for example, pharmaceuticals may also be exempted. The exemption, however, is not automatic and can be revoked.[145]

The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) recognises that certain licensing practices or conditions pertaining to IPRs restrain competition, and that countries can deal with such practices in their legislation.[146]

The South African law recognises this by making the Competition Commission a gatekeeper. The existing Indian law does no such thing, but suitable provisions have been made in the new law to cover IPR abuses. Zambia is another country that specifically exempts arrangements and agreements relating to the exercise of IPRs.

Although none of the other project countries seem to specifically exempt IPRs from their competition laws[147] it is, however, not clear whether IPR laws in these countries contain provisions that give them an overriding power. On the other hand, Zambia's neighbour: Zimbabwe has included IPR issues quite clearly under its competition law.

Many developed country jurisdictions like the US, Japan, EU and Canada have some form of guidelines or regulations regarding the treatment of IPR and/or technology licensing practices under competition legislation. The US agencies regard IP as being essentially comparable to other forms of property and is neither exempted from scrutiny, nor particularly suspect under the anti-trust law.

The EU rules call for a balance between the need for innovation and the maintenance of competition within the common market. Under Article 81 (ex art. 85) of the Treaty of Rome[148] all agreements, decisions or concerted practice between undertakings which may affect trade between the Member States and which have as their object or effect, the prevention, restriction or distortion of competition within the common market are prohibited. However, the EU treaty also provides for the possibility of exemptions from this prohibition. In a case before it, the European Court of Justice has held that the abuse of IPR is covered under the Treaty of Rome.

Enterprise Specific

Both the Kenyan and Indian governments are given wide powers to exempt any enterprise that performs a sovereign duty on behalf of the state.[149] This of course leads to the question: what is a sovereign duty? Pakistan's MRTPO exempts all state enterprises from its application.[150]

The services of professionals such as doctors, engineers and lawyers are currently not exposed to the competition law in Tanzania. These professionals claim that price-fixing in these services is in the interest of consumers. It was widely voiced in the 2nd Tanzanian NRG meeting that these services should be covered under the competition law. *See Table 5.*

Sector Specific Regulation

Despite significant changes in technology, several segments of infrastructure (telecom, power, transport etc) will retain elements of a natural monopoly. As a result some kind of price regulation will remain a necessity. Typically, sector specific regulatory authorities set maximum tariffs and performance standards. In several project countries the competition related activities are overseen by the sector regulator, whereas in others this is done by the competition authority. *See Table 6.*

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143 MRTPO, Section 5 (2)(a).

144 CA 1998, Section 10 (4).

145 Ibid, Section 10 (5).

146 TRIPs, Article 40.

147 Although IPRs are not specifically exempted in Kenya, Section 5 of the RTPMPC Act provides a blanket exemption to all trade practices conferred by an Act of Parliament. This means that IPRs were effectively exempted even before the new Industrial Property Act, 2001, which is TRIPs compliant.

148 As amended and consolidated by the Treaty of Amsterdam.

149 See RTPMPC Act, Section 5 and CB 2001, Clause 52 respectively.

150 MRTPO, Section 25.

Table 5: Enterprise specific exemptions

Country	**Enterprise specific**
India (MRTPA, 1969 & CA 2002)	• Any class of enterprises if such exemption is necessary in the interest of security of the state or public interest. • Enterprises performing sovereign functions on behalf of the Central Government or State Government.
Kenya	• Trade practices directly and necessarily associated with the exercise of trading privileges conferred on any person by an Act of Parliament or Government Agency in accordance with Act of Parliament. • Trade practices directly and necessarily associated within the licensing of participants in certain trades and professions by a government agency in accordance with Act of Parliament.
Pakistan	• Any undertaking owned by the Central Government or the Provincial Government. • Undertakings owned by a body corporate established by the Government by law. • Undertakings whose Chief Executive is appointed by or with approval of the Central Government or Provincial Government. • Trade Unions and their members for actions necessary to carry out their purposes.
South Africa	• Rules of a professional association such as accountants & auditors, surveyors, attorneys & advocates, medical etc. • Promotion of ability of small firms and those owned by historically disadvantaged persons to become competitive • The abuse of dominance provisions do not apply to firms below a certain threshold[151]
Sri Lanka	• Any enterprise that has entered into an Agreement with the Greater Colombo Economic Commission under Section 17 of the Greater Colombo Economic Commission Law, No. 4 of 1978.
Tanzania	• Professionals such as lawyers etc.
Zambia	• Such business or activity as the Minister may, by statutory instrument, specify.

The division of labour between sector specific regulatory bodies and the competition authorities is often unclear; sectoral regulators are typically assigned tasks (other than price determination) that impinge on competition in the sector. Moreover, sector specific regulatory authorities are not restricted to infrastructure sectors; specialised bodies also often regulate activities not necessarily having natural monopoly elements. This makes the overlap between the functions of sector specific regulators and competition authorities even more complex, and gives rise to potential conflicts. The possible conflicts between the competition authority and sector-specific regulators will be discussed in Chapter 5.

Although very few competition laws specifically exempt sectors from the purview of that law, this does not necessarily mean that sectors such as utilities are not exempted from the law. The specific laws regulating a certain sector could have provisions that supersede the generic competition law. However, it may be possible that RBPs of such sectors would continue to be covered by the competition law, and structural and basic issues could be left to the sector regulators.

4.4.2 Importance of exemptions

The competition laws in the 7-Up countries provide a lot of scope for exempting certain practices, enterprises or sectors from their purview. Even when something is not specifically exempted in the competition law itself, this does not prevent legislators from doing so subsequently in other laws. In the new Indian law, the government has assumed the power to declare exemptions through a notification. Albeit, the notification has to be placed before the parliament within six months of its adoption for approval.

151 Section 6 of the CA 1998 states that the Minister of Trade and Industry in consultation with the Commission must determine that threshold in terms of annual turnover, irrespective of their market share. The market share thresholds for determining dominance are set out in Section 7.

Table 6: Sector specific exemptions

Country	Sector specific
India (CA 2002)	• Any class of enterprises if such exemption is necessary in the interest of security of the state or public interest.
Kenya	• No specific exemption in the competition law.
Pakistan	• No specific exemption in the competition law.
South Africa	• No specific exemption in the competition law.
Sri Lanka	• No specific exemption in the competition law.
Tanzania	• Surface and Marine transport under the SUMATRA Act. • Energy and water utilities under the EWURA Act. • Other regulated sectors. (Decisions of the respective RA are subject to appeal at the Competition Tribunal)
Zambia	• Such business or activity as the Minister may, by statutory instrument, specify.

There is no consensus on the desirability of these exemptions. Some argue that they are unwarranted, since they reduce efficiency and buyer choice. Others argue that these exemptions serve the public interest. In that sense exemptions form part of the expression of the objectives of competition law. Sustaining or improving the international competitiveness of a country's exports is part of the State's objectives of many of the 7-Up countries. Therefore, many countries exempt the export sector from the purview of their domestic competition law. Similarly, 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 person*s*. The Competition Commission may therefore exempt certain practices if they promote the ability of firms owned by historically disadvantaged persons to become competitive.

As competition policy and law are part of a country's overall public policy, and thus a tool for serving the public interest, it is clear that a competition law should not be too rigid. Competition policy does not exist in a vacuum. A competition law must thus be able to aptly deal with (and support) a country's varying public needs. This holds especially true for developing countries.

Unfortunately it is difficult to ascertain the public interest and the possibilities of government failure are numerous. As is the case with having too many objectives[152], having too many possibilities for exemptions would create multiple opportunities for lobbying by different interest groups. This could lead to inconsistent application of competition law and policy and could undermine long-term competitiveness, economic growth and job creation.

4.5 Remedies and Penalties[153]

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. Cease and desist orders, fines, penalties, de-merger, division of entities etc. are the main provisions. The key issues that need to be evaluated in this regard relate to: (a) the level of penalties, fines, etc. and (ii) inclusion of prison sentences for convictions in competition abuses.

The fines are often very low in developing countries. In Kenya the maximum fine is Kenyan Shillings 100,000 (approximately US$ 1300). In Tanzania it is Tanzanian Shillings 3,000,000 (approximately US$ 3750). Such fines will not impress big enterprises (abuse of dominance, cartels) in a manner that will deter them from anti-competitive practices.

152 Supra section 3.2.2

153 Annexure 3: Table 4c provides an overview of the various remedies in the project countries

The approach of the South African and new Indian legislation seems to be better in this respect, since they relate the maximum fine to the size of the enterprise involved. In these countries the authorities can impose a fine not exceeding ten percent of annual turnover.

In the case of South Africa this is limited to annual turnover in the Republic of South Africa or derived from exports from the Republic.[154] The new Indian law does not seem to have such limitations.[155]

Another interesting characteristic is the fact that while South Africa and India (possible high fines) do not have criminal liability to tackle competition offences,[156] Kenya and Tanzania (low fines) provide for imprisonment for up to three and two years respectively.[157] It seems that the link between fines and prison sentences is somewhat disproportionate. However, the new Indian law like the old one does prescribe for prison sentencing if the order of the Commission is violated and not implemented by the parties.

The UK Competition Act of 1998 provides for criminal penalties under sections 42 to 44, whereas, the competition legislation of the European Community and its member States provides, in most cases, for administrative sanctions only.

In the US, the Sherman Act of 1890, which prohibits contracts, combinations and conspiracies in restraint of trade & monopolisation, includes criminal penalties when enforced by government. Violations can result in substantial fines and, for individual transgressors, prison terms.

Broadly, the 7-Up project nations will have to assess if the sanctions are significant enough to deter anti-competitive practices, as litigation is a very expensive and time-consuming process. An interesting fact that was highlighted during a review meeting of the 7-Up project in Goa in September 2001 is that adverse publicity for well-known firms in the media can also deter anti-competitive practices.

4.6 Consumer Protection

In Tanzania and Zambia the competition law also covers unfair trade (business) practices, which are different from restrictive trade practices in the sense that they are to the direct detriment of consumers. In India, the old MRTPA covered such practices, but the new law has dropped them on the grounds that they should be dealt with under the Consumer Protection Act, 1986 which already covers them. As a result all existing cases except those relating to false or misleading facts disparaging the goods, services or trades of another person, will be transferred to forums under the consumer protection law. It maybe noted that many countries such as Australia, Bulgaria, Canada, Colombia, Peru, Poland, Russia, Tanzania, UK, US and Zambia cover both competition and consumer protection areas.

Whereas RTPs indirectly affect consumer welfare by restricting competition at the expense of other businesses, UTPs are mainly misleading practices which affect consumers directly. Typically, when the competition laws do not cover these practices, the consumer protection laws cover them. However, Kenya and South Africa do not have exclusive consumer protection laws, nor are unfair trade practices covered in their respective competition laws.

The various dimensions on the relationship between consumer protection and competition laws arising from the country reports reflects a varying treatment on the issue. The UNCTAD Model Law provides space for consumer protection provisions, but this is done in a tentative way. There is certainly a link between the two, but in general, a competition law seeks to protect consumers indirectly (and perhaps invisibly) through fostering competitive markets, rather than through the more direct and specific remedies often provided in consumer protection law. However, some of the provisions of the competition law can be read as providing remedy for consumer abuses directly, such as tied-sales, resale price maintenance, excessive pricing.

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154 CA 1998, Section 61 (2).

155 CB 2001, Clause 27 (b).

156 This is the case for competition offences. Offences such as obstructing an investigation or proceedings or contempt issues can lead to imprisonment.

157 RTPMPC Act, Section 12 (2) and FTPA, Section 29 (2) respectively.

Chapter-5

The Competition Authorities: Powers and Capabilities

Having a competition policy and law is one thing, its proper implementation and enforcement is quite another. Implementation and enforcement of competition law are pivotal to the success of a competitive market environment. Most 7-Up countries have very limited experience in competition regulation. The project countries have all set up institutional frameworks in some form or other to implement and enforce the competition law. The extent to which these competition authorities can successfully discharge their enforcement duties depends on a number of factors.

There are legal factors, such as whether the authority is entrusted with enough powers to do its job or if it is sufficiently autonomous from or prone to government intervention. Other factors include its financial and human resources, but also more basic requirements like office and library space, the number of computers and internet access. In dealing with cross border issues, cooperation (or otherwise) with foreign competition authorities can be of importance as is the cooperation or possible conflict with sectoral regulators. Since most of the 7-Up countries do not have a 'competition culture' yet, the competition authorities have an important role to play in competition 'advocacy', with the government, sectoral regulators, consumers and producers.

5.1 Powers and Institutional Framework[158]

For the competition authorities to function properly it is important that they are allocated the necessary and right powers (i.e. not just any broad power but those tailored to deal with competition) to enforce the competition law. Broadly these powers can be separated into 'investigative' and 'adjudicative' powers. Whether these powers are completely separated between various institutions or not varies from country to country.

In South Africa, for example, the investigative powers are reserved for the Commission, whereas the adjudicative powers are generally reserved[159] for the Tribunal and the Competition Appeal Court. Appeals against decisions of the Competition Tribunal can only be taken up before the Competition Appeal Court, which is a specialised division of the High Court of South Africa.[160]

The new Competition Act, 2002 of India proposes to establish a Competition Commission that will have both investigative and adjudicative powers, although appeals can be lodged at the Supreme Court.[161] The same structure also exists under the MRTP Act, 1969. The other project countries seem to have some sort of mix of these arrangements.

In Tanzania there are two institutional levels of implementation: the Fair Trade Practices Commissioner and the Fair Trade Practices Tribunal. The Commissioner is supported by a deputy and two directors responsible for research and legal affairs and is generally responsible for monitoring, investigating, evaluating, prosecuting, issuing orders, imposing penalties or otherwise resolving alleged contraventions.[162] The Fair Trade Practices Tribunal is established as the appellate body and has the jurisdiction to hear and determine any complaint, to inquire into any matter referred to it and to issue orders. Decisions of the Tribunal can be appealed in the 'ordinary' judicial system, but such appeals are limited to 'judicial review'.[163]

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158 In India and Pakistan there are several High Courts and the Supreme Court is the highest court of the land. In other countries there is only one High Court and it is the highest court of the land.

159 The Competition Commission can nevertheless rule independently on 'intermediate' mergers, and these rulings can be appealed at the Tribunal at all times. See supra section 4.2.3.

160 CA 1998, Section 65 (4).

161 *CA 2003, Clause 40.*

162 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, chapter six, chapeau.

163 Ibid, sections 6.2 and 6.3. The limitation to 'judicial review' means that the 'ordinary' judicial system cannot review the 'facts' and 'merits' of a case, but can only review the Tribunal's interpretation of the law and whether it has upheld the proper procedures.

The Zambia Competition Commission consists of a Board of Commissioners, whose function is to monitor, control and prohibit acts that are likely to adversely affect competition within Zambia.[164] This Board is a representative body and has the advantage that it provides key linkages with government, industry and civil society.[165] An Executive Director is appointed to carry out the day-to-day functions of the Commission. The ZCC has no power to issue legally binding final orders to parties prohibiting conduct found to have violated the law. They are therefore required to take all cases to a court of law for adjudication. There is, therefore, a clear separation of powers. The ZCC does have the power to take interim measures ordering the discontinuation of illegal conduct if prompt action is required. The ZCC has yet to exercise the full range of powers available to it.[166] However, the ZCC can persuade offending parties by negotiating agreements leading to the discontinuation of the violating conduct.

This is somewhat similar to the Australian arrangements, where the Australian Competition & Consumer Commission has to prosecute matters before civil courts, though in cases it does have persuasive powers to stop some anti-competitive practices including mergers. If the offending party does not agree, then the ACCC takes the matter to the court.

Pakistan's Monopoly Control Authority has recommendatory, investigative and adjudicative powers. No other body is entrusted with the enforcement of the MRTPO but its decisions can be appealed before both the High Courts and the Supreme Court.[167]

In Kenya the Monopolies and Prices Commission works under the general guidance of the Minister for Finance and Planning. The Commission makes recommendations, after its investigation, to the Minister who has the power to make orders in all aspects of the law. The Restrictive Trade Practices Tribunal operates independently as the court of first appeal, although administratively it falls under the Ministry of Finance and Planning. Decisions of the Tribunal can be appealed against by both the Minister and the concerned party at the High Court of Kenya.[168]

The Fair Trading Commission (FTC) of Sri Lanka has broad powers aimed at promoting competition and consumer protection. These powers are both investigative and adjudicative. The FTC can order the divestiture of a business as well as the termination of any anti-competitive practice. An aggrieved party can appeal against any order to the Court of Appeal within 30 days of such order.[169]

The practice of whether or not to separate the investigative and adjudicative powers varies across the project countries. These arrangements may depend on the specific judicial framework of each of the countries. A 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law.[170] However, such a set up might not be constitutional in some countries, which provide for final jurisdiction of the apex court in all cases, as is the case in India and South Africa. This has been taken care of by South Africa by creating a permanent bench of their apex court as the Competition Appeals Court. Practices with respect to separation of powers vary all over the world. In the United States the Federal Trade Commission has both investigative and adjudicative functions with rights of appeal to the courts. The Antitrust Division of the Department of Justice only has investigative and prosecutorial powers and has to go to court for the adjudication of its cases. On the other hand, the European Union's Directorate General for Competition (DG-COMP) performs both investigative and adjudicative functions and these functions are only separated at the appellate level (Court of First Instance or European Court of Justice).

164 CFTA, section 6 (1).

165 The Board has two people representing consumer interests and representatives from the Law Association of Zambia; the Zambia Federation of Employers; the Economics Association; the Zambia Congress of Trade Unions; the Institute of Certified Accountants; the Engineering Association of Zambia; the Zambia Bureau of Standards; the Zambia Association of Commerce and Industry; the Zambia Association of Manufacturers; the Ministry of Commerce, Trade and Industry; the Ministry of Finance and Economic Development. See Schedule 1 accompanying Section 4 of the CFTA.

166 CUTS, 2002, Enforcing Competition in Zambia, section 4.11.

167 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 5.2.

168 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, sections 6.1 and 6.2.

169 CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 5.5.

170 See Annexure 3: Table 4a.

This bundling of powers is increasingly being criticised by both competition lawyers and businesses, especially with respect to merger control.[171] The main critique is that there are not enough checks and balances in the system. When writing this report, the EC has launched an exercise to see how the system can be improved by requesting the European Court of First Instance to establish a fast-track court to decide competition cases.

On the other hand, having to go to court in every case might diminish the competition authority's effectiveness since litigation is usually a long and arduous process. This is especially so in developing countries where there is little awareness of competition issues within the existing judicial structures. Further, in developing countries the judicial systems are often overloaded and undermanned. Such litigation might also stretch the authorities' resources too much. It is, therefore, necessary that a balance be found between the flexibility needed to properly enforce the competition law on the one hand, and the obligation to prevent prejudice and arbitrariness in the outcome on the other.

5.2 Independence

The World Bank-OECD model law suggests that the enforcement agency should be independent from any government department and should receive its budget directly from (and report to) the legislature. Only the Kenyan and Tanzanian competition authorities is still part of a government department. All the other competition authorities are not administratively part of any government department. This does not, however, mean that they are independent from such a department of the government or their influence.

Arguably the possibilities of such intervention increase if the competition authority is under a Government Ministry. The *Kibo Breweries v. Tanzania Breweries Limited* case proves that government interference can diminish the effectiveness of the competition authority. The Competition Commissioner found Tanzania Breweries to be abusing its monopolistic position and was directed to desist from undertaking these anti-competitive practices. The company accepted its act to be illegal but justified its actions on the ground that the regulations to carry out the Competition Act were not in place and therefore, the Commission had no mandate. The Permanent Secretary of the Ministry of Industry and Trade who was a member of the Company's board supported the company's stand.[172] The competition authority, being under the Ministry of Industry and Trade, could not do much.

In Pakistan, even though the Monopoly Control Authority is *de jure* independent, it is *de facto* prone to government interference. For example, once the competition authority tried to curb cartelisation and collusive pricing by *cement* and *vanaspati ghee*[173] manufacturers but the government intervened to fix prices at a 'mutually acceptable' level.[174]

In South Africa and Zambia funds are allocated to the competition authorities by the legislature and apart from these grants they can receive income from filing fees. These authorities are thus less dependent on the government. However, the fact that they are not dependent on a government department for its finances does not necessarily mean that they are free from government influence. In Sri Lanka the Fair Trading Commission's main source of income are the funds allocated by parliament, yet the selection process of the commissioners and the structure of the system leave room for external influences. The Minister of Internal and International Trade and Food can remove any member of the Commission by simple order, without having to provide any reason thereof.[175]

It is clear that a competition authority's independence depends on a combination of factors and that each of these factors individually do not guarantee independence. First of all it is important that an authority is *de jure* independent. This means it is a legally independent body and not part of any government department. It also means that members

171 The critique is, *inter alia*, that it is difficult to dislodge a view once it is entrenched in the European Commission's thinking: "I have made up my mind. Do not try to confuse me with the facts." A separation of the adjudicative powers from the investigative would at least solve the effects of this problem. See *A Fairer Deal for Europe* by Alec Burnside (partner at Linklaters & Alliance Brussels) in the Financial Times, January 12th 2002.

172 See CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, table 6.

173 Vanaspati ghee is a hydrogenated vegetable oil used for cooking.

174 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 4.2.6.

175 CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 5.2.

cannot simply be removed by the government without proper justification. Secondly, the authority should also be financially independent. A combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is of course that there could be a deadlock, making the budget subject to political gerrymandering. Finally, the authority's independence and credibility also depend on the automatic cooperation of government agencies in enforcing its decisions, thus making it *de facto* independent.

5.3 Resource Availability

The manner in which funds are allocated is important, but the size of the funds is also important for the effectiveness of the competition authorities. It is also important how these funds are spent. The size of funding varies considerably within the 7-Up group, not only in absolute terms, but also in relative terms. There is no study to establish the right benchmark for what should be the expenditure of enforcing a competition regime, but it would depend upon the following factors:

- Capacity of the government budget
- Priority of the country
- Caseload, both existing and potential

5.3.1 Infrastructure and financial resources

Most 7-Up countries have little experience or jurisprudence in the regulation and arbitration of competition matters. These countries will have to acquire capabilities in this area. Even countries like India and Pakistan, which have had a competition law for several years, do not have requisite capabilities as the basis of regulating competition has changed; the world is moving towards assessing anti-competitive 'conduct' rather than focusing on potential anti-competitive 'structure'.

Table 7: Budget and Pattern of Expenditure

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Annual budget of CA US$ (2000)	723,632	235,892	325,919	7,742,678	97,870	162,056	193,005
Annual Govt Budget Millions US$ (2000)	81,307	3,230	13,560	23,270	3,395	1,010	340
% Government Budget	0.00089	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
Pattern of expenditure - % share (2000)							
Salaries & honoraria	66	54	33[176]	41	43	18	81
Establishment cost	31	36	16	21	53	NA	0
Books, periodical etc	2.21	NA	0.49	NA	0.80	NA	0
Research & investigation	NA	NA	NA	7.1	0.39	NA	11
Printing/publications	NA	NA	NA	NA	2.33	NA	1.98
Meetings/conferences	0.66	0.33	NA	3.6	0.18	NA	5.87
Other	NA	0.27	NA	NA	NA	NA	NA
Staff (2000/2001)							
Full time members	4	1	3	1	1	1	-
Part time members	0	0	-	8	5	0	12
Professionl	23	24	5	37	7	2	5
Support Staff	125	6	25	32	7	2	6
Total	**152**	**31**	**33**	**78**	**20**	**5**	**23**

176 Expenditure data of expenditure for Pakistan is for 1999.

The methods of analysing the static and dynamic consequences of a given structure or conduct have become more and more sophisticated and few developing countries have the capabilities to effectively apply these methods. Moreover, the kind of databases and information that is available with the competition authorities is simply inadequate to undertake proper analysis of M&As and other types of firm behaviour. Many 7-Up countries have upgraded the facilities available to the competition authorities with some investments in IT, infrastructure, library etc. But in the absence of good databases and capabilities to analyse markets, the possibilities of regulatory capture are very high. Research staff positions in many countries are not filled and training is rarely undertaken.

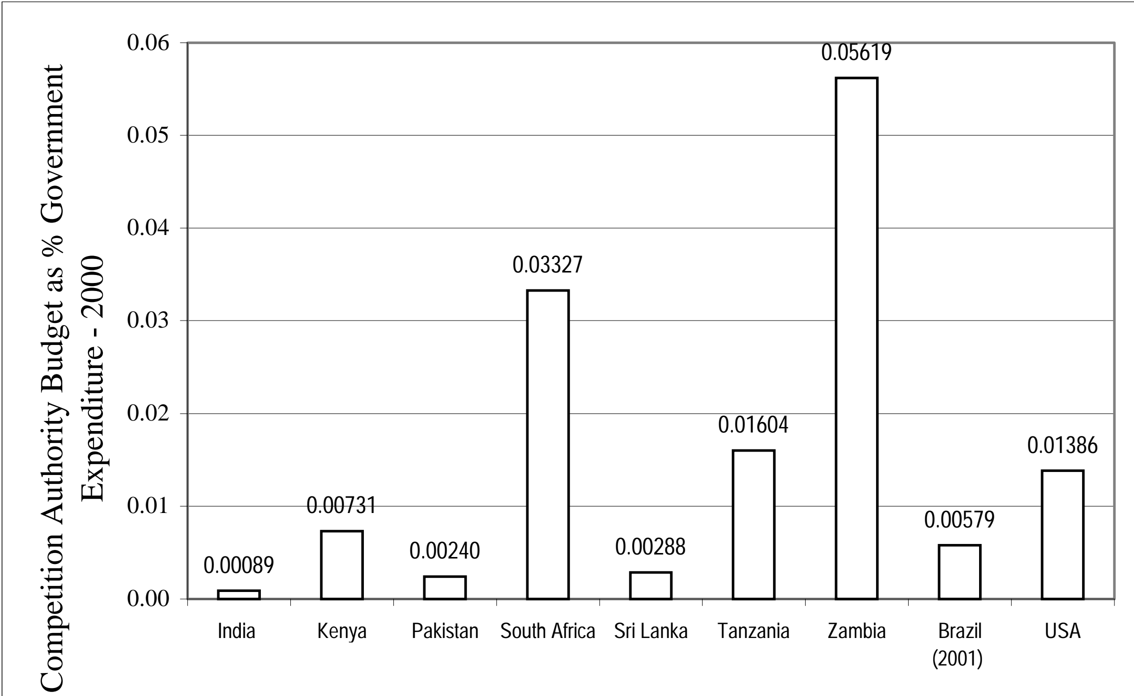
In general, the budgets of the competition authorities are low in absolute terms. The only exception is South Africa which seems to be well funded. It is noteworthy that out of the 1999/2000 budget for the South African Competition Commission 49 percent was derived from filing fees paid by parties.

The percentage of funding that is spent on salaries is generally high. In Zambia it is as high as 81 percent of the total budget. These high amounts indicate that very little money is left for research activities and outreach programmes.

As a percentage of the government's total expenditure the three South Asian countries are spending much less than the African project countries, with India's MRTP Commission having the smallest budget in relative terms. The Zambian and South African competition authorities are leading in this respect. Apart from Kenya, all the African competition authority budgets exceed that of the United States as a percentage of the government's expenditure. In absolute terms the Federal Trade Commission's and the Department of Justice's Antitrust Division's combined budget of US$ 236 million remains, quite logically, a far-off target for all 7-Up countries.[177] All African project countries spent relatively more than Brazil[178] , whereas the Asian countries trail far behind.

There has, however been some shift in the authorities' budgets in several 7-Up countries in recent years. This also reflects the fact that in South Africa, Tanzania and Zambia the competition authority has only been operational for two to three years.

Figure 3: CA's Budgets as % of Government Expenditure



177 Budget for the FTC and the DoJ-AD comes from their respective websites. Expenditure of the US Federal Government (2000) comes out of the Federal Budget 2003, Executive Office of the President of the United States.

178 CADE's budget comes from its Relatorio Annual 2001, The Brazilian Federal Government's expenditure from the CIA-World Fact Book.

Ever since it became operational in 1997, the ZCC's budget has increased as a percentage of the Zambian government's expenditure. The percentage of the Tanzanian authority's budget has also more than doubled in relative terms. The South African authority's budget has decreased as a percentage of the government's budget. This, however, is due to an increase in the government's expenditure, since the Competition Commission's budget stayed the same in absolute terms. In fact, government expenditure rose in all project countries in the period between 1996 and 2000. In relative terms the budgets of the South Asian competition authorities have remained at the same low level.

The facilities of the competition authority also vary considerably among the project countries. Table 8 provides an overview of the different facilities in each of the 7-Up countries.

In terms of computers, telephone and fax lines, etc., the South African Office is very well equipped. The computer system in the office includes electronic faxing service, e-mail, internet and intranet facilities. In addition there is a fully computerised switchboard (PABX), telephone management and voice-mail system. There is a fully electronic information resource centre, and all reference material is available online. There is also a web-based library index system. The Commission uses a case management and tracking system, which allows users to keep track of the progress of cases. An interface with the document management system means that case-related documents can be accessed online. The Commission keeps track of the information systems of other countries as a benchmark against which to monitor its own development.

In 2001 the South African Commission spent over US$100,000 on computer equipment, over US$300,000 on furniture and fittings and other office equipment, and US$8,250 on vehicles.

Apart from South Africa, the ZCC and the MCA are the only authorities that have a comprehensive industry database. The MCA's database has not been updated, however the Sri Lankan database only involves a small part of the pharmaceutical sector and can hardly be called comprehensive.

Given its staff-size the ZCC's facilities seem to be well tailored, whereas the Indian authority does not even have internet access! This is all the more surprising because now most government offices and courts in India have started computerisation with internet access under a centrally sponsored scheme.

5.3.2 Human resources

The staff size of the competition agencies ranges from 5 (Tanzania) to 152 (India). Apart from differences in the size of staff there are also differences in the composition of the staff. In India the support staff dominate the composition of the authority, with few professionals and members. A similar picture exists in Pakistan, where out of a total staff of 33, the support staff accounts for 25 positions.

Figure 4: Growth of Budget as % of Government Expenditure

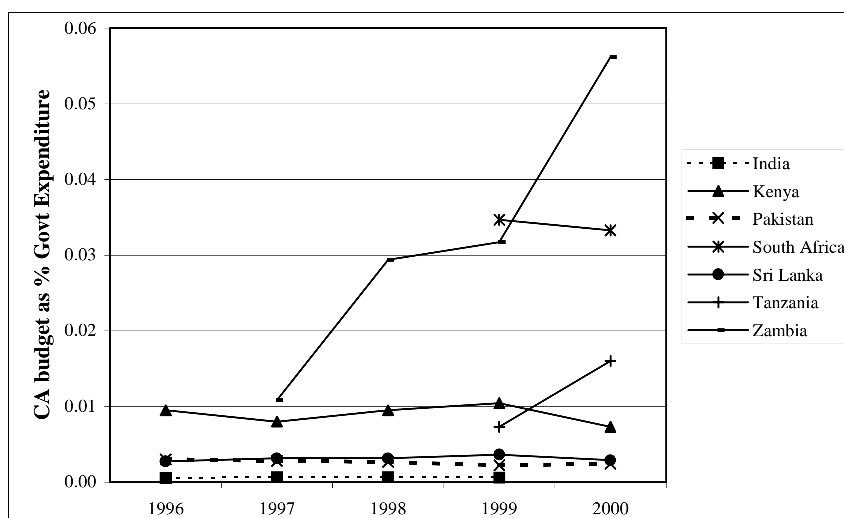


Table 8: Facilities

Country	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Total office space (sq metre)	1900	1200	2200	3900	530	-	652
No. of Phone lines	17	1	19	14	15	-	3
No. of fax lines	1	1	1	11	1	-	1
No. of internet connections	0	1	4	13	1	-	1
No. of computers	10	12	14	104	9	1	7
No. of printers	10	-	11	15	9	1	-
No. of photocopiers	3	1	1	7	1	-	1
Library space (sq m)	40	150	95	61.5	0	-	20
Library staff	3	2	3	1.5	0	-	1
No. of volumes	NA	250	3,500	947	NA	NA	NA
No. of periodicals subscribed	21	None	5	77	5	-	16
No. of newspapers	17	1	5	43	10	-	4
Domestic				41	10	-	4
Foreign				2		-	
Arrangements for news scanning/clipping	No	No	Yes[179]	Yes	No	No	Yes
Maintenance of industry database							
Domestic	No	No[180]	Yes[181]	Yes[182]	Yes[183]	No	Yes
Foreign/Global	No	No	No	No	No	No	Yes
Access to data bases of other competition agencies	No	No	No	Yes	No	No	Yes

In both Kenya and South Africa, the majority of positions at the competition authority are taken up by professionals. In Zambia and Sri Lanka the division between professionals and support staff is about equal. The fact that there are more Members in the Zambian competition authority, it reflects the broad representative set up of the ZCC. The members are not staff members of the ZCC as they are representing the different stakeholders in the Zambian economy.

In general, the competition authorities' professional staff is dominated by economists and there is a general shortage of lawyers. For instance, in Zambia the ZCC is structurally divided into 4 directorates (economics, consumer affairs, finance and administration, and legal affairs), but all the positions in the legal directorate are currently vacant.[184] In Sri Lanka, the post of legal officer was vacant until 2000, while the post of senior economist was vacant until 1999.[185]

In South Africa, the situation is different in the sense that there is a general shortage of economists and there are more lawyers than economists among the professionals. The South African Competition

179 One scanner.

180 Some information in files on domestic firms.

181 Database of 446 firms.

182 Industry database is maintained by Competition Commission and not Tribunal

183 Market Share database on Pharmaceuticals.

184 See CUTS, 2002, Enforcing Competition in Zambia, chart 2 in section 7.2.

185 CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 6.1.

Commission has continuous training and development programmes (six days per person per year). Financial support is also provided for staff to pursue higher studies.

Even when the professionals have an economic or legal background, that does not necessarily ensure good quality. This is largely due to the lack of funds necessary to attract top quality economists and lawyers in most countries. The Kenyan Competition Commissioner stated in 1999 that only by substantially increasing the Commission's budgetary allocations will it be possible to have the Commission "… manned by high calibre and independent competition economists and lawyers so as to safeguard the quality of investigations, enforcement and compliance standards… (and) to attract and retain 'top notch' professionals in these two fields".[186]

Except in South Africa and Zambia the salaries paid to employees of the competition agencies are perhaps lower than those prevalent in the private sector, but even those agencies have difficulties in attracting and retaining competent staff. In Sri Lanka, the professional staff-members are paid salaries that are even lower than the government sector.[187] Obviously, in all these countries, it is difficult to attract good professionals to the competition agencies.

There is a general need to build up the capabilities of the competition authorities and while such capabilities are built up, the competition authorities may need to take help of outside agencies to evaluate competition cases. Pakistan seems to have tried it out in a few cases. The South African Competition Commission has had the assistance of at least six consultants from the US Department of Justice and the Federal Trade

Table 9: Human Resources

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Staff (2000/2001)							
Full time members	4	1	3	1	1	1	0
Part time members	0	0	0	8	5	0	12
Professional	23	24	5	37	7	2	5
Support staff	125	6	25	32	7	3	6
Total	152	31	33	78	20	5	23
Professional Background							
Members							
Economics/ Commerce/Finance	1				2	1	6
Law	2				3		2
General							
Administration	3	1					2
MIS/Systems							1
Others			3				2
Professionals							
Economics/ Commerce/Finance	3	22	1	16	5	2	4
Law	2	1		22	1		1
General Admin.	2				1		
MIS/Systems		1	1				1
Others					2		2

186 Republic of Kenya/Monopolies and Prices Commission, *Annual Report 1998*, Government Printers, Nairobi (1999), page 17

187 The Sri Lanka NRG meeting held on November 2, 2001 also raised the issue of very low salaries.

Commission in handling cases. It also has a co-operation agreement with the Norwegian competition authority.[188] Some flexibility to use outside experts will be very useful. Cooperation with competition authorities for training and capacity building purposes is another option. International funding agencies often support such endeavours, as was done in Tanzania.[189]

5.4 Disposal of Cases: Capabilities and Efficiency

There are considerable differences in the number of complaints that the competition authorities deal with as well as to the composition of these complaints. Another issue is the efficiency of the competition authorities in dealing with these cases.

Since some countries' competition authorities do not maintain records of all the cases they investigate, it is difficult to get a clear and comparable picture of their efficiency.[190]

In Sri Lanka, for instance, the time taken for the investigation and adjudication of a case is also normally not recorded. There are cases that are concluded within one year, while others take as long as five years. The Fair Trading Commission explains the delay as being purely administrative. The problem is not so much the investigation by the FTC's officers looking into the legal and economic aspects of a case, but the lack of interest on the part of the Commissioners. The officers generally do not take more than two to three months, but there have been problems just convening a meeting of the Board of Commissioners.[191] It would seem therefore that the FTC's efficiency could easily be enhanced, if the Commissioners would simply take more interest. In the period between 1996 and 2000, the FTC investigated two mergers and 23 RTPs.

India's MRTP Commission has an enormous backlog in dealing with cases. In 1999, 1410 cases dealing with RTPs were brought forward. During the year they disposed off 206 cases. However, they also received 218 new cases, so by the end of the year the number of pending cases had increased to 1422.[192] In fact, they only disposed of 13 percent of the total number of cases in 1999. The MRTP Commission also has to deal with an enormous number of Unfair Trade Practices, even though India has a separate and comprehensive Consumer Protection Act (COPRA) which also covers UTPs.[193] The number of UTPs pending at the end of 1999 was 1273.[194] With only seven professionals the MRTP Commission seems ill equipped to handle such an enormous case-load. The new Competition Act, 2002, takes out UTPs from the purview of competition law and transfers the existing and potential cases to COPRA. This will undoubtedly lessen the workload of the (proposed) Competition Commission of India as compared to that of the MRTP Commission.[195]

The Pakistan Monopoly Control Authority accepted 65 references relating to mergers and acquisitions in the period between 1996 and 2000. It rejected 49 after investigation and took up 16 for adjudication. In the same period it entertained 597 cases of anti-competitive behaviour, rejecting 568 and taking 29 for adjudication. The authority therefore seems to reject the majority of complaints after preliminary investigation. No records are being kept on how long it takes to investigate a complaint, nor of the status of cases that are pending with the Authority.[196]

Both the Kenyan and South African authorities handle more M&A cases than cases relating to anti-competitive practices. Between 1996 and 2000 the Kenyan MPC handled 150 complaints. Thirty of these

188 Competition Commission of South Africa, *Annual Report 2001*, Johannesburg (2001), page 6.

189 CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, section 8.2.

190 The Tanzanian Commission indicated that since they are not yet fully operational, no cases were disposed of so far. The Country report, however, identifies that seven cases have been adjudicated.

191 CUTS, 2002, Towards a New Competition Law in Sri Lanka, section 6.2

192 Ministry of Law, Justice & Company Affairs, 29th Annual Report (1999) pertaining to the execution of the MRTP Act, 1969, Government of India Press (2000), page 13.

193 COPRA also covers some RTPs such as price-fixing and tied sales.

194 Ibid.

195 The MRTP Commission has not dealt with mergers and acquisitions over the past few years. One of the reasons is that the pre-notification requirements and merger provisions were scrapped from the Act in 1991.

196 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, chapter six.

complaints were rejected before investigation and of the remaining 120 complaints, 87 related to M&A activity. The average time taken to complete an M&A investigation was seven months, whereas the MPC took 3.5 months on an average to complete an investigation into anti-competitive practices. The Kenyan authority seems to be relatively efficient, even though more capacity building is needed to maintain continuity, consistency and predictability in outcomes.[198]

The South African Competition Commission received 331 merger notifications in 1999 and finalised 236 of these cases in an average period of two months per case. Their efficiency in handling M&As is higher than in dealing with anti-competitive practices. They received 122 complaints and finalised only 37 of these. The average time taken in each case was 3.5 months. This reflects the emphasis that has been placed on dealing with M&As by the Commission and the large M&A activity that has taken place in South Africa.

Despite its low staff levels, the Zambian competition authority has also been quite efficient in handling cases. Between 1998 and 2000, they handled 65 merger cases and 84 cases relating to anti-competitive practices. On average, an M&A investigation took 4.5 months and an ACP investigation two months.

5.5 Cooperation with Other Competition Authorities

Cooperation with other competition agencies can be useful, not only for training and capacity building purposes, but also in dealing with cross-border issues. A number of project countries are a member in some form of regional organisation. Some of these regional arrangements foresee the establishment of a Free Trade Area.

Although India, Pakistan and Sri Lanka are all parties to the South Asian Association for Regional Cooperation (SAARC), which envisages the establishment of the South Asian Free Trade Area (SAFTA), there is no cooperation between their respective competition authorities. In fact these authorities are not involved in any sort of cooperation with other competition authorities. The overall political standoff between India and Pakistan on many issues is one of the reasons that progress on regional cooperation is not forthcoming. Surprisingly the two countries collaborate very well at the WTO.

All the four African project countries are not part of the same regional arrangement as the South Asian countries, yet they are interlinked. South Africa is a member of the South African Development Community (SADC) as is Zambia and Tanzania. Zambia is also a member of COMESA to which Kenya is a party. Tanzania was a member of COMESA, but withdrew. Finally, both Kenya and Tanzania are parties to the East African Community, which is also moving ahead on closer coordination on a variety of issues. There is cooperation between the competition authorities of both the SADC and COMESA countries. As COMESA pursues further economic integration, harmonisation of regional competition regimes will become more important. COMESA is in the process of establishing a competition regime at the regional level, to begin with only in the ten (out of twenty) countries that have formed a free trade area.

Table 10: Average Number of Cases Disposed off Annually between 1996-2000[197]

	India	Kenya	Pakistan	South Africa	Sri Lanka	Zambia
	1999	1996-2000	1996-2000	1999	1996-2000	1998-2000
Mergers & Acquisitions	0	22	16	236	1	22
Anti-competitive Practices	206	8	149	37	6	28
Total Cases	206	30	166	273	6	50
Professionals	23	24	5	37	7	2
Cases per professional	8.96	1.25	33.10	7.38	0.89	24.83

197 The Tanzanian Competition Commission has not been fully operational yet and is therefore not included in this table.

198 CUTS, 2002, Promoting Competitiveness & Efficiency in Kenya - The Role of Competition Policy & Law, section 7.5.

Further, the competition authorities in Eastern and Southern Africa have set up a network of competition authorities in the region to deepen cooperation: Southern and Eastern Africa Competition Forum (SEACF). It covers Kenya, Malawi, Mauritius, Mozambique, Seychelles, Swaziland, South Africa, Tanzania, Zambia, Zimbabwe and the secretariats of SADC and COMESA.

The takeover of Pan African Cement (PAC) by Lafarge S.A. of France highlighted the need for regional cooperation and establishing a regional competition regime. PAC owned (through its subsidiaries) cement plants in Zambia, Malawi and Tanzania. Lafarge had no presence in these three countries, but did have cement plants in South Africa, Zimbabwe, Uganda and Kenya. Although the takeover did not directly change the level of market concentration in either of these countries individually, the takeover clearly consolidated Lafarge's regional position. Zambia, Malawi, Zimbabwe and Kenya are members of COMESA, but Tanzania and South Africa are not. It therefore became difficult to effectively regulate the behaviour of Lafarge and PAC in the absence of a regional competition authority.[199]

In dealing with international cartels or other trans-border issues, cooperation outside the region might also be necessary. Currently, a Working Group on the Interaction between Trade and Competition Policy is discussing these issues within the framework of the World Trade Organisation. This might ultimately lead to a multilateral agreement on competition. Within the WTO Working Group the view was clearly expressed that arrangements at the regional and multilateral level are not mutually exclusive, but could indeed be complementary in nature.[200]

5.6 Sectoral Regulators: Cooperation or Obstruction

In recent years, all project countries have complemented the trend of economic deregulation by sector specific measures designed to eliminate public monopolies or to open up strategic sectors such as telecommunications, electricity distribution etc. for competition. This has been done in view of the considerable importance of many of these sectors for technological and economic development. There is some cross-country empirical evidence to suggest that in many sectors the introduction of competition has led to significant decreases in costs and prices; an increase in the diversity of services offered to consumers; and higher economic growth. All 7-Up countries have created sector specific authorities in many areas.

The Bank of Zambia has statutory powers to ensure that competition in the provision of financial services should not be restricted. In fact, it has powers to prosecute a financial institution that contravenes this provision. Similarly, the Energy Regulation Board (ERB) recently stopped a fuel price hike by the dealers on the ground that the hike was a result of collusive activities. Interestingly, Zambia Competition Commission (ZCC) has also threatened to prosecute the fuel dealers for collusive activities.

The other clear overlap in Zambia exists between the tasks of the ZCC and the Securities Exchange Commission (SEC). According to Zambian regulations when a company wants to sell/transfer its stocks in another company or partially owned subsidiary it must make a mandatory offer to the minority shareholders to enable them to acquire these shares. The SEC has often exempted companies from this requirement, even when the ZCC opposed this.[201] This effectively undermines the power of the ZCC. The fact that the Executive Director of the ZCC is an *ex officio* member of the other regulatory boards does not seem to prevent this.

It is unclear whether similar conflicts between securities regulators and competition authorities can arise in other countries. In principle, a bid may be in compliance with a country's takeover code but may not pass when tested under the merger control regulations. Conceptually, the competition authority need not be concerned about the distribution of control in a firm. But it is desirable that merger control regulations and the takeover code are consistent with each other.

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199 The takeover of PAC by Lafarge S.A. is one of the case studies that was conducted as part of Phase II of the 7-Up project by the Zambian project partners, and a more comprehensive analysis is placed at page 55. Also see CUTS, 2002, Enforcing Competition in Zambia, section 5.3.

200 WT/WGTCP/5 Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council (2001), paragraph 53.

201 Such was the case when the Commonwealth Development Corporation (CDC) transferred its 51 percent stake in Chilanga Cement Plc. to its wholly owned subsidiary PAC. CDC subsequently sold PAC to Lafarge S.A.

The conflicts between sector specific regulators and competition authorities are more common. In Pakistan, for example, regulatory authorities for several utilities (telecom, natural gas, power etc.) have been set up. These authorities work independently. They may seek advice from the competition authority but are not legally bound to do so. The situation appears to be similar in Kenya and Sri Lanka.

The case of Tanzania is interesting as the sector specific regulation was initially under the purview of the competition authority. Subsequently, some sector specific regulatory authorities were created. The conflicts between competition authority and Tanzania Communication Commission (TCC) became obvious when the former filed a complaint against the latter for permitting dominance of two cell phone companies (Mobile and Tritel) in the country. The TCC subsequently permitted other cell phone providers e.g. Vodafone to provide service in the country.

The government is now creating two multi-sector regulatory agencies: one to regulate utilities (electricity, telecom, electronic broadcasting, natural gas and postal services) and the other to regulate the transport sector. The new legislation is expected to provide clear guidelines regarding the division of responsibilities between the competition authority and the sector specific regulators. Apparently, the Competition Tribunal will also act as the final appellate body for the multi-sector regulatory agencies. Thus, Tanzania seems to have recognised the potential overlaps between sector specific regulation and competition law. However, it is not entirely clear how the harmonisation of competition policy within the East African Community will affect the division of labour envisaged by them.[202]

The situation in South Africa is somewhat different, as they have 'privatised' utilities and infrastructure services through 'strategic equity partners' who bring in technical and management expertise along with capital. In some cases, limited time monopoly (telecom, fixed line) has been provided. The fixed line operator can also provide value-added services and compete with private operators. Since the fixed line operator owns the network, private operators providing value added services have often complained about access to the network. Along with these privatisation efforts, sector specific regulatory authorities have also been set up in South Africa. For example, matters relating to telecom are now covered by the Independent Communications Authority of South Africa (ICASA).

The problems faced in Tanzania and South Africa can arise in other countries as well. Since the sector specific regulatory bodies are often responsible for defining 'entry conditions', their actions directly affect the nature of competition after entry has taken place. Consequently, the conflicts between sector specific regulators and competition authorities are expected to arise.

There are no clear solutions to this problem but an explicit recognition of the issue is a good starting point. One can then work towards a remedy. The South African example is very instructive in this regard. The South African government recognises the fact that the overlapping jurisdictions between competition authorities and regulatory bodies will create problems, as firms will take their cases to the forum they believe to be most favourable. Therefore, it is stipulated that the Competition Act will not apply to 'acts subject to or authorized by public regulation'. But firms used this provision to argue in the High Court that the Competition Act did not apply to the agricultural and banking sectors, as there are a series of other acts regulating the practices of these sectors.[203] As a result, the stipulation was removed from the Act.

The South African Competition Act provides for consultations to avoid situations of conflict between competition authority and regulatory agencies. A Regulator's Forum is being established to implement this provision. Under this provision, the Commission is responsible to 'negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector'. It seems that

202 The Tanzania paper also gives the impression that the East African Community may also harmonise sector specific regulation.

203 Interestingly, in the case of a proposed merger between two of the four national retail banks, the courts ruled that jurisdiction lay with the Minister of Finance. The Competition Tribunal, therefore, could not decide on the merger. The Competition Commission prepared a report for the Minister of Finance opposing the merger on grounds of likely reduction in competition. The Minister followed the Commission's advice and disallowed the merger.

all 7-Up countries can learn from this experience. In addition, the Tanzanian experience should also be looked at more closely.[204]

In India, as far as the relationship between the CA and other statutory authorities is concerned, in general, and utility regulators, there is no clarity. But the regulatory laws do not have provisions to deal with anti-competitive practices and hence competition issues maybe kept outside the purview of the regulators. So far there has been no conflict between the CA and the regulators, probably because the CA has not been very proactive or it did not have adequate legal power.

For example, recently there was a big merger in the telecom sector which has raised competition concerns. The sectoral regulators did not look at the issue from competition angle. But the CA also did not intervene as it did not have the legal mandate and there was no question of conflict. However, in future, the CA is likely to have the mandate to review mergers and hence, chances of conflict with the regulators cannot be ruled out unless the relationship is clearly established.

In the United Kingdom there are five sectoral regulators (at the moment three have merged because of convergence) and each can enforce the UK Competition Act, 1998, in the sector under its purview concurrent with the Office of Fair Trade (OFT). To ensure consistency between the OFT and the sectoral regulators a 'concurrency working party' has been set up. The arrangement aims to prevent both forum shopping as well as 'double jeopardy'. At the same time, the staff of all authorities have a common training programme.

204 The Chief Executive of the Competition Agency in Zambia sits on the Boards of sector specific regulatory authorities. This representative is expected to address competition related issues as and when they arise. We do not have enough information to analyse if this process works well and minimises the overlaps between the two authorities. More details will be useful for all the 7-Up countries. The report of the Zambia NRG meeting held on November 22, 2001 indicates that cooperation between sectoral authorities and the competition agency is mandatory in the country. No details of this co-operation are readily available.

Chapter-6

Competition Authorities: Dealing With Cases[205]

In the previous chapter we had a look at the capabilities of the competition authorities in the 7-Up countries where the relevant issues were examined from a macro angle. For example infrastructural facilities, number of staff, budget of the authorities, number of cases handled. But these are some quantitative indicators and do not give a clear picture of the functioning of the authorities as such. For example, presence of a large number of staff or handling of a large number of cases by the authority does not necessarily mean that it is doing its job in the right manner.

To get a closer look at the functioning of the competition regimes, case studies were conducted which analysed the dealing of a particular case by the authority or did a competition audit of a particular sector. Three case studies were done in each of the project countries. While selecting the cases or the sector, care was taken to adopt a general approach and take similar cases and sectors in all the seven countries so that a comparative analysis could be made to see how similar cases were dealt with by different competition authorities. Care was also taken to select cases in such a way that a fair understanding could be derived on the countries' approach to cross-border competition issues.

Some broad guidelines were agreed in relation to the selection of the case studies. The first case study related to an international merger, preferably, that of Coca Cola and Cadbury Schweppes or between Glaxo Wellcome and SmithKline Beecham. The second case study involved a competition audit of the cement industry. The third case study was kept more open but preferably in the services sector, which could be the study of a particular case or a sector. However country researchers were allowed to deviate from these guidelines depending on the local situations perceived by them or on the recommendations of the national reference group in the country.

Based on the analysis of the case studies, an attempt was made to tentatively assess the effectiveness of the competition regimes in the project countries. In the following paragraphs we will look into some aspects like:

- adequacy of legal provisions;
- investigative/technical capacity of the authorities;
- attitude of the staff members;
- importance of external influence and public opinion; and
- coordination between the competition authority and other regulators.

6.1 Adequacy of Legal Provisions

This is probably the most important aspect of a competition regime that has a bearing on its effectiveness. It maybe said that adequacy of legal provisions is a necessary but not a sufficient condition for a well-functioning competition regime.

While analysing this aspect, the inadequacy of legal provisions or lack of legal clarity came most prominently in case of India. As in many other jurisdictions, the cement sector in India is believed to be afflicted by cartelisation. Complaints to this effect were lodged. But nothing came out and the case remains unresolved due to the difficulty of collecting sufficient evidence. This is partly due to the poor investigative capacity of the MRTPC or the Director General (Investigation & Registration), but inadequate provisions are also responsible. Twice earlier, the MRTPC had tried to prosecute the cement cartel, but the strict evidence requirements let them go scot free.

Moreover, even before the current case could be settled, the Builders' Association of India made an appeal to the MRTPC against cement players involved in the collusive price rigging of cement. But again the MRTPC could not do anything and the case is still pending. The existence of a cartel is typically difficult to prove even in a developed country with a

205 This chapter of the report is primarily based on the case studies prepared under the 7-Up project during the Phase-II of its implementation.

highly competent competition authority. But provision of leniency programme in the competition law has played an important role in busting many cartels. The existant Indian law does not have any such provision, though the new Competition Act, 2003 has provided for 'lesser penalty' for collaborating firms, which will cooperate in the investigations.

Moreover, in its recent judgment in the ANSAC case, the Supreme Court of India has observed that cartels per se are not prohibited and action can be taken only if a cartel is injurious to the public interest. But, there is no criteria to judge public interest, which is quite flexible and subject to different interpretations as lobbied by interest groups.

The ANSAC judgment has also brought to end the debate on extra-territorial applicability of the Indian competition law. The law does not have any explicit provision in this regard. However, the competition authority had taken action on cross-border cases by applying the 'effects' doctrine. The case relates to a complaint lodged by the Alkali Manufacturers' Association of India (AMAI) to the MRTPC alleging that ANSAC was acting as a cartel and that it was charging lower prices to eliminate Indian competitors as it has done so in a few other countries in the past. The MRTPC granted an injunction on imports from ANSAC as a cartel. ANSAC challenged the MRTPC decision in the Supreme Court.

The Supreme Court, in its interim order, upheld the MRTPC decision. However, in its final verdict in the case, the Supreme Court impugned the order and held that the Commission could not deal with the case as it was beyond its jurisdiction. But one may wonder, in an age when cross-border anti-competitive practices are rampant, and most important countries have extra-territorial jurisdiction, and there is no multilateral framework to deal with such cases, if doing away with 'effects' doctrine or extra-territorial jurisdiction could be the right move in India. Here the Supreme Court failed in addressing the issue on the basis of existing jurisprudence, which is quite substantial. Or perhaps the ANSAC lawyers were smarter than those engaged by the AMAI. However the new law has inter alia clearly defined cartels and included provisions for extra territorial jurisdiction.

The existant Indian competition law does not have any merger review provision. The merger of Coca Cola and Cadbury Schweppes did not raise any competition concern in India. However, many other mergers *prima facie* indicate substantial lessening of competition in the market. An unpublished study by an M. Phil student, who has built up a data base of all mergers after the 1991 amendment, found that the merged firms were behaving in an anticompetitive manner[206] . The new competition law has, however, taken care of these problems.

It is not very clear in most jurisdictions whether they have extra-territorial jurisdiction or if they can apply the 'effects' doctrine. Another confusion is whether to apply *per se* rule or rule of the reason in case of extra-territorial application of the law. This issue came to the fore also with the ANSAC case that South African Competition Commission was handling. The South African authority preferred to use the *per se* rule as it was an export cartel and cartels should be prohibited *per se*. However, the argument put forward by the ANSAC in this regard also needs serious consideration.

ANSAC argued that due to long distance it would not be possible for the individual companies that form the ANSAC to export to the South African market. They can export only if they are allowed to operate together so that some costs are shared. Thus banning the ANSAC in the South African market would essentially mean that it would be left with a monopoly, Botash. Hence, the ANSAC argued, it is in the interest of promoting and maintaining competition in the South African market that ANSAC should be allowed to operate as a cartel. It is not clear whether the argument was really valid in this particular case, but such a situation as described by the argument may indeed arise.

Whether a foreign company can lodge a complaint with the authority is yet another issue in the ANSAC-Botash case in SA. No jurisdiction has explicit provision in this regard. However, traditionally they are allowed to lodge a complaint only when they have a local office. In the case of Botash, it was argued by the complainant that as Botswana (Botash's home base) is a member of the Southern African Customs Union and Southern African Development Community, it has a right. That was accepted by the South African competition authority.

206 Agarwal, Manish "Analyses of Mergers in India", unpublished thesis submitted to the University of Delhi, New Delhi, November 2002. (In a personal communication to CUTS).

In a globalising world it may be a good idea to allow foreign companies with a clear locus standii to lodge a complaint. Moreover, in some situations especially in small economies there may be no domestic players and only foreign suppliers. For example most of the goods supplied in Nepal and Bhutan are from India. Thus, it would be logical to allow Nepalese and Bhutanese companies and/or consumers to bring forward complaints before the Indian competition authority to maintain competition in their markets. Currently both Nepal and Bhutan do not have a competiton regime.

Another important aspect of legal provisions that was highlighted is the issue of sanctions or remedies suggested in the law. In some countries the levels of penalty are so low that they cannot act as a deterrent. For example, in India the competition authority has power to issue 'cease and desist' order only. There is no risk at all and one can continue rent-seeking behaviour through anti-competitive practices till the time it is caught and the CA asks the offending firm to stop. Similar problems exist in other countries like Pakistan, Sri Lanka and Kenya where the levels of fine were fixed long time ago and have not been revised to take care of inflation, or catch up with the trends in other countries.

Under the EU and US laws, firms can be fined upto 10% of their annual turnover, when prosecuted for cartelising. A similar provision has been made in the new Competition Act, 2002 of India.

6.2 Research & Investigation Capacity

Investigative capacity of the competition authority is one of the important aspects of competition law enforcement in a country. However, it seems to be quite inadequate in most of these countries. It has both quantitative and qualitative dimensions. The quantitative inadequacy is quite apparent in most of these countries. Pakistan has only five professional staff and India has only 23. While Tanzania has only one professional staff member, Zambia's strength of five maybe quite comfortable considering the small size of the economy. South Africa and Kenya have relatively better-sized professional staff. However, the existence of good strength in professional staff does not guarantee that the authority has good investigative capacity.

The professionals in most competition authorities are not trained well. It is difficult to recruit well-trained people in these countries and hence the need for training can hardly be over emphasised. However, it is sad to note that even the business of recruitment in the CAs is not taken seriously. The case of a high ranking investigating officer in the Indian CA is possibly most illustrative in this regard. The officer concerned, while talking to one of the researchers of the 7-Up project, observed, "I was with the Department of Company Affairs, performing purely administrative duties, but suddenly I was transferred here. Neither I had any knowledge of competition law and experience in investigation, nor I intend to learn all these."

It is quite obvious that the issue of building investigating capability has never been taken seriously in India. This has led to a situation where the infamous cement cartel could not be busted despite repeated complaints and enough prima facie evidence. The lack of research and investigation capability became evident also in the ANSAC case. The case was handled without adequate investigation and proper argumentation and interpretation of the legal provisions in the country. The decision of the MRTPC was mainly based on the decision of the EU in a similar case involving ANSAC.

The question of extra-territorial jurisdiction that became important in the case was not given due consideration by the MRTPC. The Indian law is not very clear on the issue and hence open to interpretation. The argument that similar actions are being taken in other jurisdictions cannot hold much water. The MRTPC did not do enough homework and it could not be proved whether the activities that ANSAC indulged into India, amounted to a restrictive trade practice (predatory pricing). As a result the Supreme Court finally went against the order of the MRTPC in the case causing embarrassment to it.

In Pakistan the Monopoly Control Authority took initiative to investigate the merger of Glaxo Laboratories Pakistan Limited and Wellcome Pakistan Limited. But MCA failed to take any action and the case was abandoned halfway. The reason provided by the MCA for this abandonment is that calculating market shares of individual products with the identification of their substitutes as required in the case was a complicated case and the MCA did not have qualified and trained staff for this exercise.

Similarly, the Kenyan CA found it difficult to identify the relevant market and dithered into sub-optimal decisions. For example, SmithKline Beecham Limited notified the CA about its plan to acquire Sterling

Health Limited. The acquisition was allowed by the CA, as their combined share in the pharmaceutical market was 12 percent. However, the CA failed to recognise that the acquisition could raise competition concerns in some product categories. In fact, prima facie, there was enough evidence to think so.

On the other hand the same authority decided to block the acquisition by Coca Cola Holdings Limited of its acquisition of East Kenya Bottlers Co. Ltd., which was its own franchisee bottling plant. It was to be blocked on the ground that it had already crossed the 33.3 percent (threshold) control of production in the soft drink market even though the supplier was not competing in the market and there was no impact on competition in the market. More critically, Coca Cola had given a prior undertaking not to take over more bottling plants, and the Commission saw the new application as a violation. The decision of the CA was overruled by the Minister.

There is not much to comment on the Tanzanian authority in this regard as it is yet to take off. The Zambian authority is relatively placed better in this regard. However, the reason behind the decision of the authority to allow the merger of Coca Cola and Cadbury Schweppes was not very clear. There are indications that the merger could raise competition concerns in some of the product categories.

Amidst this relatively discouraging scenario, the record of the South African authority seems to be quite encouraging. Despite being quite new it has already developed substantial capability. The fact that the CA could make a breakthrough even in the complicated ANSAC case speaks for its capability. According to Menzi Simelane, Commissioner, South Africa Competition Commission, the termination of ANSAC's cartel activities in the soda ash market has been agreed upon in principle.[207] However, ANSAC has not lived up to its promise.

The handling of the merger of Glaxo Wellcome and SmithKline Beecham case is also quite remarkable. Upon investigation and evaluation of the merger the Commission reached the conclusion that the transaction should be prohibited on competition and public interest grounds. In particular the Commission was concerned that the merger would result in the merging parties having high market shares in two therapeutic categories. The Commission stipulated that there would be unacceptable level of concentration in respect of Bactroban, Zelitrex and Famir and there was no appropriate substitutes to counter any price gouging, or ease of entry to offset the concern.

Upon prohibition of the merger by the Commission, the merging parties volunteered to out license some of their products identified by the Commission to be the cause of the competition concerns. The merging parties and the Commission reached an agreement and the merger was allowed conditionally. Interestingly the conclusion of the Commission in making its recommendations to the Tribunal was substantially the same as the conclusions of the EC in so far as the overlap of products was concerned. This may partly be due to the fact that the Commission sought and received extensive cooperation from both the US and EC. However, it may be noted that the Commission completed its investigation much before the case was decided by the EC.

The same approach has been taken by the South African competition authorities in similar cases, for example in agro-chemicals, and other pharmaceuticals and succeeded. In many cases, the merged companies' aggregate market share will have been much below the threshold, therefore not causing any competition problems. But it went deep inside to see the effect on a disaggregated product range and examined their market share closely to see if there would be dominance in that particular product(s). Then allowing the merger with the condition that they would out licence the products which would be dominant. A brilliant example of on-the-job capacity building, which can be shared by them with other competition authorities in developing countries.

6.3 Autonomy, External Influence and Lobbying

It is well recognised that the autonomy of the CA is an important determinant of its efficiency and effectiveness. In the 7-Up countries CAs are *de jure* autonomous except in Kenya and Tanzania. In Kenya the CA is housed in the Ministry of Finance and Planning and the CA recommends its decisions to the Minister who issues the order. In Tanzania, the CA is placed under the Ministry of Trade and Industry, but it can issue orders in cases other than M&A, which needs to be referred to the Minister for his approval.

207 *Business Day*, Friday April 26th 2002, *Competition Body Strikes Three Deals.*

It can well be expected that when the CA is not even legally autonomous, there will be interference from the Government, which has been proved both in Kenya and Tanzania. In Kenya of course the Minister was right in overruling CA's decision in the Coca Cola case. However, this cannot be generalised as it is not known if the Minister took the right and impartial decision in all the cases that have been overruled. It may, however, be noted that in Kenya the Minister is well within his lawful right to overrule any decision of the CA.

In Tanzania, the arrangement is quite different. Here even though the CA functions under the Ministry, its decisions are binding except in M&A cases. In the *Kibo Breweries v. Tanzania Breweries Limited* case, the CA's decision was binding and neither the Minister nor any other senior officer in the Ministry was required to play any role. However, the Permanent Secretary of the Ministry of Industry and Trade who was a member of the TBL's board supported the company in contravening the order of the CA.[208] This is a blatant violation of the law of the land.

The CA being *de jure* autonomous of course does not necessarily mean that it will enjoy *de facto* autonomy. This was evident in Pakistan where the Government interfered in a number of cases, the cement cartel case being the most notable one. The competition authority tried to curb cartelisation and collusive pricing by the manufacturers but the government intervened to fix prices at a 'mutually acceptable' level.[209]

No such undue intervention by the Government was reported in other 7-Up countries. In Sri Lanka, it is believed that government interference is there, but it was not apparent in so far as handling of the cases are concerned. In case of India and Sri Lanka it may be quite possible that by remaining relatively inactive, especially in controversial and difficult cases, the CAs ensured that the vested interests did not feel any need to interfere in their affairs.

There might be other kinds of external influence on the CAs as well. Public opinion is one such factor. Sometimes competition authorities get swayed by public opinion/emotions or national sentiments and take decisions, which may not be the best or required to promote competition. The takeover of East Kenya Bottlers Co. Ltd by Coca Cola in Kenya became a national issue there. Even though it did not raise any major competition issue as such the CA decided to block it, partly because it was highly influenced by the public opinion. Secondly, because it violated an undertaking by Coca Cola to not to take over any further bottling plants in the country.

Similarly in Zambia, the Chilanga Cement case became a national issue and ZCC, even though was initially swayed by the public mood, finally allowed the takeover with some conditions, which was probably the best option before it. However, still many people in Zambia feel that ZCC should not have allowed the takeover.

Public perception on competition may not be necessarily correct. CAs need to take decisions based on merits (of promoting and maintaining competition) and not popular perceptions. Sometimes CAs devote much of regulatory resource in a case that may not be important from competition viewpoint but on public mood, which may have been whipped up by the media, which in turn could have been orchestrated by some interested party. But conserving regulatory resource, which is scarce is very important. Prioritising the cases on merits may help in this regard.

Lobbying by different interest groups can also make a difference in many jurisdictions. In India, for example, the MRTPC was found to be quite active in one case but exhibiting complete silence in the other case. This may raise doubts if the MRTPC indeed acts on its own. In the soda ash case, the domestic soda ash lobby: AMAI lobbied for the case, which was backed by few big industrial houses of the country. In the cement cases the sufferers are ordinary consumers. Even the appellant, the Builders Association of India is an association of small builders who do not wield much power.

It was also generally observed that businesses are more active in lobbying and consumer movement is weak in most countries. It is quite possible that the competition authorities might find it difficult to maintain a balance between business and consumer interests in a situation where there is lot of business lobbying but no countervailing influence. India is an

208 See CUTS, 2002, Competition Law & Policy - A Tool for Development in Tanzania, table 6.
209 CUTS, 2002, Competition Regime in Pakistan - Waiting for a Shake-Up, section 4.2.6.

exception where consumer groups are quite active, but when it comes to filing cases, they have often been frustrated by court craft indulged in by the opposite parties' well-paid lawyers.

6.4 Attitude of the Authorities

The lackadaisical attitude of the people in the CA was quite apparent in some of the project countries, especially in the South Asian ones. This partly explains that the cases take unusually long time to be disposed off. This may be because the competition authorities in some countries are not manned by right kind of people. In India for example it has become the resting ground for retired bureaucrats and judges, who have little understanding of competition law and policy issues.

Very often officials from other government departments are transferred against their own will, or even appointments made on pure political grounds, thus breeding corruption. Moreover, they have no intention to learn. Since these countries have inadequate experience in competition law enforcement, they need to get onto a rapid learning curve. For example they can look at how similar cases are being handled in other jurisdictions. But except in South Africa and Zambia such efforts could not be seen to any significant extent.

More importantly, it is necessary to ensure that the CAs are manned by well-informed and dynamic people. This can be seen in South Africa and Zambia where personality played an important role in raising the profile of the CA within a very short time. This kind of dynamic leadership can bring dynamism in the CA as a whole and can instil positive attitude in the people.

Lack of information can hamper the functioning of the CAs. But in the age of information revolution this should not be a problem if people have the right attitude. Of course it has to be accompanied by availability of optimum resources. But that cannot be an excuse. For example, the Indian CA does not have access to Internet. Is it because of lack of financial resources? Of course not! It does not require huge financial resources but some initiative. This just shows the lack of right attitude. After all most government offices in Delhi and other states, now have internet access and also their own websites.

6.5 Coordination with Other Regulators

One important requirement for maintaining competition in the economy vis a vis the services sector is to ensure that there is good amount of coordination between the CA and other sectoral regulators. A failure to achieve that leads to sub-optimal regulatory outcomes. Some evidence of such outcomes could be found in the case studies.

In Kenya, for example, the case of acquisition of ABN AMRO Bank by Citibank was handled entirely by the Central Bank of Kenya (CBK). But competition concerns were not a factor in evaluating the case by the CBK. Neither was the CA consulted. Post-merger; the combined entity became the fourth largest bank in the country with a market share of eight percent. However, market for financial services being segmented, product wise, customer category wise and geographically, it is quite possible that the transaction might have raised competition concerns in the relevant market.

Similarly, in Pakistan, under the Banking Companies Ordinance 1962, the State Bank of Pakistan is fully authorised to regulate and supervise banks and financial institutions (SBP). However, the SBP's supervisory policy does not take cognisance of restricting competition in the sector. Thus the acquisition of ANZ Grindlays by Standard Chartered Bank in Pakistan was evaluated only by the SBP and the CA was not at all involved. As a result the deal had a smooth sailing even though it has significantly lessened competition in the corporate banking segment in the market. Even in the Glaxo-Wellcome merger case in Pakistan, one of the reasons for the CA abandoning the case halfway was that the Ministry of Health looks after the issues relating to drug policy formulation and the CA thought it may not be appropriate for it to interfere in a Government regulated industry.

6.6 Dealing with Cross-border Cases

All the problems encountered by the CAs in handling of domestic competition cases are also applicable in their handling of cross-border competition cases. But they encounter some additional problems while dealing with cross-border cases. Some of them have been mentioned here, while details of such issues, have been covered in the next chapter.

CAs are not aware of many of the international cartels that have been penalised in developed countries. A lot of information on many of the cross-border cases (especially the international cartels) handled by the developed countries is in public domain, which these CAs can make use of but do not make any attempt. Even if they are aware, they are not sure whether they can take similar actions. Moreover they do not make any effort to get cooperation from the developed countries. This was done by Brazil in the vitamins cartel case by seeking information from the US authorities, who complied under a cooperation agreement.

Any case involving a foreign company has a tendency to draw greater public attention and the public opinion in such cases go against the foreign company irrespective of the facts on ground. The Chilanga Cement case in Zambia and the takeover of East Kenya Bottlers Co. Ltd by Coca Cola in Kenya are testimony to such situations. The CAs have to be very careful in dealing with cross-border cases involving foreign companies. If they get swayed by public mood or nationalistic rhetoric then it is competition and FDI inflows that may suffer.

Another problem in dealing with cross-border cases as was found in some of these countries is the defeatist attitude of the CAs. Many CAs feel that they are unable to enforce their decisions in cross-border competition cases even if they take them up. Pakistan abandoned the case of merger of Glaxo and Wellcome and Sri Lanka did not even take up the merger of Glaxo Wellcome and SmithKline Beecham partly because of such an attitude.

In contrast South Africa allowed the merger of Glaxo Wellcome and SmithKline Beecham on the condition that they licence out the products in which there could be heavy dominance in the post merger scenario. Even in a least developed country like Zambia, without much of economic might the CA has shown much courage to allow merger of TNC subsidiaries only after they undertook to abide by some conditions stipulated by the CA. Other countries probably could not even think of such options.

Chapter-7

Competition Issues with International Dimensions

Over the past decade all 7-Up countries have extensively liberalised their trade regimes and have opened up their markets for foreign trade. With this opening up the countries have become increasingly sensitive to anti-competitive practices that originate outside their own territory. Trans-national corporations (TNCs) have entered developing country markets or increased their activity within those same markets. The entering of TNCs can have many positive effects for developing economies. It can bring in much needed investments and help economic development of country, as well as increase the number of players in a market, thus having a positive effect on competition.

At the same time there is a serious risk that competition suffers because of this. When TNCs enter a particular market by taking over a potential competitor in a developing country rather than trying to compete with that same company, competition does not increase but suffers potentially. Similarly the international merger trend leading to the consolidation of businesses worldwide can have serious implications for a developing country's economy. As enterprises hold different market shares in different countries, the implications of a merger between two TNCs might also vary.

The process of liberalisation also includes the privatisation of public monopolies in the utilities sector such as telecommunications, energy and public transport. Although, this can possibly lead to an increase in competition as well as improved performance, often it has meant that public monopolies have been transferred to the private sector. In many cases this monopoly is now in the hands of a foreign-based TNC. This in itself is not more detrimental to competition in a particular market than if the monopoly were held by a domestic private enterprise. But, this could cause further complications in enforcing competition policy and law vis-à-vis that particular sector/enterprise.

The question is how do the competition authorities in the 7-Up countries deal with these cross-border (international) challenges to the level of competition within their respective markets. This is clearly a difficult task. As Karel van Miert, former EU Competition Commissioner, observed: "National or even regional authorities are ill-equipped to grapple with the problems posed by commercial behaviour occurring beyond their borders.[210] When competition authorities from highly developed countries/ organisations like the European Union face difficulties in handling cases with a cross-border dimension, it is clear that the authorities in developing countries such as the 7-Up group find the task much more difficult.

Clearly, the competition authorities in the 7-Up countries face many challenges in dealing with competition issues with international dimensions. These challenges have both cross-border as well as domestic dimensions. As many other government policies (such as trade and investment policies) can influence the level of competition in a market, the competition authorities have to have adequate tools to deal with a wide array of issues.

Whether or not a country has the legal provisions to deal with competition issues with international dimensions in all its varieties or not, the implementation of decisions and jurisdiction is quite another matter. While the competition authorities in the 7-Up countries already face formidable constraints in implementing and enforcing the competition laws of their countries, when dealing with cross-border cases they have to deal with the additional problem that implementation and enforcement of law are limited by territorial aspects.

This section will look into the problems that arose when dealing in the cases that were researched as part of the 7-Up project. There are large differences among the 7-Up countries on how (or whether) the cases were handled by the competition authorities.

210 Jones and Sufrin, *EC Competition Law*, Oxford (2001), page 1040.

Whereas some authorities handled some of the cases very seriously (regardless of whether they were successful at the end), others have not acted at all or only with limited interest or in just few of the cases. Although several problems are caused by the special nature of such cases, sometimes the authorities' own lack of action or interest is also an important factor to take into account. This is of course due to a variety of circumstances, but nevertheless gives some valuable insight. We will also discuss some issues that have not been dealt with by the competition authorities but have an important bearing on developing countries.

7.1 Sources and Types of Cases

The types of anti-competitive practices with international dimensions are similar as they are for purely domestic cases. The difference only lies in the cross-border (international) dimension of the anti-competitive behaviour. A number of areas where enterprise behaviour is perceived to give rise to competition concerns with international dimensions are discussed here. These issues can broadly be classified into four groups:

- ***Exercising market power in global or export markets.***

  The anti-competitive practices that fall under this category are international cartels, export cartels and related arrangements, international merger or merger with international spill-over, abuses of dominance in overseas markets, cross-border predatory pricing and price discrimination.
- ***Barriers to import competition.***
  Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopsonistic dominance etc. may fall under this category.
- ***Foreign direct investment.***
- ***Intellectual property rights.***

7.2 Exercising Market Power in Global or Export Markets

7.2.1 International cartels

There is a long history of price fixing cartels in which multinational companies carve up the world into areas of control. Recently there has been a sharp increase in global cartel activity. Simultaneously, enforcement agencies have slapped multi-million dollar fines against vitamin companies, food additive makers, steel manufacturers etc. To date only a handful of countries have taken action to penalise transgressing companies or to recover compensation. No developing country, except Brazil, has taken any action on these cartels.

A World Bank study has shown that in 1997, developing countries imported $81.1bn of goods from industries in which price-fixing conspiracies have been discovered during the 1990s. These imports represented 6.7 percent of imports and 1.2 percent of GDP in developing countries. There might have been several other price-fixing conspiracies, which remained undiscovered. Moreover, all these cartels are made up of producers, who are mostly from industrialised OECD countries.

The vitamins cartel alone has cost the developing countries about $3bn in the 1990s. The additional cost that India had to incur due to this cartel is estimated to be $25mn in 1990s. These are absolute figures. If analysed on a PPP (purchasing power basis) the impact is five times as high for India, or $125mn.

Some other important international cartels that hit the developing countries very hard are those in heavy electrical equipments, steel and aluminium. The first two of them were never prosecuted, but their existence and their agreements were exposed by the US House of Representatives and at the OECD. Neither of the first two operated in the US but the products concerned were very important for developing countries. The aluminium cartel was set up with the active support of the US and the EU governments and it operated worldwide. Steel being one of the basic goods for different industries, most developing countries, without indigenous capacity, had to suffer because of high prices.

Heavy electrical equipment is another item that almost all developing countries require, to install electricity generation plants to meet their growing energy demand. But higher prices of heavy electrical equipments due to cartelisation have significantly raised the cost of installing electricity generating plants and thereby making energy more expensive. Available records suggest that among the 7-Up countries, India, Pakistan, South Africa and Zambia were victims of bid rigging by the heavy electrical equipment cartel members.

The cartel members used their excess profits to engage in predatory pricing against newcomers, particularly from developing countries. For example, predatory pricing drove the independent local manufacturers in Brazil to bankruptcy. However, on

Box 1: International Cartels - The Vitamins Case in India

Although under the project there was no specific case study done into international cartels the so-called 'vitamins cartel' should be mentioned here. The additional cost for developing countries due to this cartel is estimated to be $3bn. Nevertheless, no competition authority from developing countries, except Brazil, have investigated or handled this case. The Indian experience is an example of this.

Several leading and sophisticated drug manufacturers of the world have been involved in a global conspiracy to fix prices of bulk vitamins, sales volume and allocate markets. This international vitamin cartel continued from 1990 to 1999 and was investigated by the authorities in the US, EU, Australia, Canada, Japan, etc. Heavy fines were levied on the companies found to be guilty.

Subsidiaries of most of these companies are present in developing countries also including India. Keeping in view the international character of this cartel it was obvious that it must have had adverse effects in India also. These companies, in all probability, would have been engaged in such practices here also, either through direct sales or by way of exports.

To find out more about this, CUTS decided to start a case. As a first step in this direction, all the relevant information on the cases investigated by several authorities around the world was collected from the internet and documented. This information included details of the company, details of the investigation and the judgement and the balance sheets of some of these companies during the relevant period.

Letters were written to the CEOs of these companies in India asking them to give a written undertaking to the effect that they did not engage in any such anti competitive practice in India. Responses were received from Hoffman La Roche and BASF India Ltd., stating that they have not engaged in such practices but no response came from Rhone Poulenc, which incidentally, was the approver in the US investigation and had escaped punishment.

Being a consumer organisation, CUTS had limited ability and hence it passed on the whole information to the Director General (Investigation & Registration) with a request for further investigation into the matter. The DG passed on the information to the MRTPC and became the 'complainant' and CUTS was given the status of an 'informant'.

On direction of the MRTPC, the DG conducted a preliminary investigation and submitted its report (PIR). On the basis of the PIR, the MRTPC held that no case was made out and CUTS was informed accordingly.

CUTS wanted to get a copy of the PIR in order to see as to what kind of investigation was done but the DG said that it could be obtained only from the MRTPC and the Commission said that only the DG had the authority to issue it. This clearly showed the lack of awareness about the law in the CA. Finally, the case was heard in the court and it was held that the law clearly states that the informant does not have a right to get a copy of the PIR.

To conclude, the way the CAs work is very obvious. The kind of investigation done seems rather weak and no body knows what actually was done. The matter has come to an end as far as MRTPC is concerned but CUTS intends to get to the bottom of the matter, so that in future such type of difficulties do not exist.

an average, the cartels maintained higher prices in developing countries than in the developed countries. The estimated annual overcharges imposed by these three cartels (based on 1995 trade figures) are $44mn for Zimbabwe, $33.5mn in Kenya and $272mn for the countries of Southern African Custom Union. In all these countries, budgets of the competition authorities are substantially lower than the overcharges.

Looking at it differently, in Kenya, where the per capita income is $340, the overcharge amounted to an annual loss of about 100,000 person-years. If 100,000 people lose their jobs due to closure of factories, it would become a national issue but the overcharge over a period of time did not stir people to start marching on the streets.

7.2.2 Export cartels

The limitation of competition laws, as a result of their domestic reach, is evident in the case of export cartels where, absent an effect on the exporting country, its competition authority may have no jurisdiction to challenge such cartels. Developed countries have generally ignored or often even encouraged export cartels whose activities affect other countries. For instance, the US Foreign Trade Antitrust Improvements Act of 1982 provided that foreign firms and consumers cannot invoke US law against US firms for acts that lessen competition only in foreign countries. On the other hand, the Export Trading Company Act of 1982 establishes a procedure for US exporters to obtain a limited immunity from US antitrust laws for export acts and collaborations, as long as they do not distort competition in the US.

Dealing with such practices through application of the 'effects' doctrine is quite prevalent in the developed world, but developing countries have not really developed such options. In India the competition authority tried to deal with such cases through application of the 'effects doctrine', especially in the controversial soda ash case. But enforcing the competition authority's decision in the case was not so easy. The case was made on the basis of an allegation that ANSAC was acting as a cartel and that it was charging lower prices to eliminate Indian competitors as it has done so in a few other countries in the past. The MRTPC granted an injunction on imports from ANSAC as a cartel. In response to ANSAC's appeal challenging the MRTPC's interim order, the Supreme Court upheld the same.

ANSAC however, preferred to lobby with the US government while filing an appeal in the Supreme Court of India. It was quite successful in this and in February 2000 United States Trade Representative (USTR), Charlene Barshefsky, and the US Secretary of Commerce, William M. Daley, sent a joint letter to the Indian Minister of Commerce and Industry, Murasoli Maran. The letter outlined their concerns over Indian practices which were preventing the US soda ash industry from exporting to India. It also reportedly threatened that up to US$1bn of India's duty-free imports of a variety of goods under the Generalised System of Preferences into the US could be jeopardised over the embargo on US soda ash.[211]

The Government of India informed the USTR that India had not imposed any restrictions on imports of US soda ash and that the MRTPC injunction applied only to ANSAC operating as a cartel. Pressure on the Indian government however continued, and ANSAC apparently shifted the focus of its pressure towards the level of the import tariffs on soda ash. It was successful in its attempts to have them reduced. In its 2001-2002 budget, the Government of India reduced the import tariff on soda ash from 35 percent to 20 percent. This was the only chemical on which duty was lowered; all others remained at 35 percent.[212] Domestic producers have argued that this was unfair, given the 25-35 percent tariffs on imports of inputs which raise their own costs.

The reason that soda ash was singled out for this special treatment has commonly been attributed to external pressure from ANSAC and the US Government. The issue of tariff reductions is completely different than that of the import ban on ANSAC. In this case there was a clear link between the case at the MRTPC and the pressure to reduce import tariffs. In its final verdict in the case, the Supreme Court impugned the order and held that Commission could not deal with the case as it was beyond its jurisdiction. It also raised doubt if there was actually a case of predatory pricing. Nevertheless this sufficiently illustrates the influence that powerful foreign companies may exert on the domestic decision-making process and the kind of difficulties developing countries may face in dealing with anti-competitive practices with international dimensions.

A similar case came up before the South African competition authority as well involving the ANSAC. Here also ANSAC argued that the Competition Commission did not have jurisdiction over its activities. After its investigation the Competition Commission found that the ANSAC agreement and/or concerted practices and/or decisions constituted economic activity having *effect* in the Republic of South Africa and thus fell within the scope of the Competition Act, 1998.[213] It also found that the decisions made by ANSAC's board of directors constituted restrictive horizontal practices as prohibited by section 4(1)(b) of the Act and that the determination of prices and trading conditions by the board of directors was in contravention with section 4(1)(b)(i).[214]

On this basis the Commission referred the complaint to the Competition Tribunal and asked that the Tribunal declare the ANSAC agreement as contravening the Competition Act and that the Tribunal should order ANSAC to pay an

211 Business Standard, 29.01.02

212 Alkali Manufacturers Association of India, (2000).

213 Section 3(I) of the Competition Act, 1998, reads that the Act applies to all economic activity within, or having *effect* within, the Republic (of South Africa).

214 Competition Act, 1998, Section (4)(1) An *agreement* between, or concerted *practice* by, *firms*, or a decision by an association of *firms*, is prohibited if - (b) it involves any of the following *restrictive* horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition.

administrative fine not exceeding ten percent of the combined annual turnover for the 1998 and 1999 financial years.

Apart from substantive defences ANSAC raised various points of law including jurisdictional issues relating to the question whether the South African authorities can exercise jurisdiction over what is considered to be a legitimate export association under US law. As the South African competition law is of 1998 vintage, it has little experience in such type of cases, thus the case has protracted over time. There is no jurisprudence to refer to and thus this is a precedent setting case.

However, according to the South African Competition Commissioner Menzi Simelane, the termination of ANSAC's cartel activities in South Africa has been agreed upon in principle.[215] However, ANSAC refused to proceed with the agreement and the case was still pending when writing up this report.

7.2.3 M&As with international spill-over

Large companies merge in the developed world, whereby their subsidiaries and associates in developing countries too end up in a new combination. This can result in unhealthy concentration of the market and create a position of dominance for a firm that offers the potential for abuse. Moreover, developing countries may also be affected by M&A activity that takes place outside their territory without any local presence. Because these companies operate in multiple markets, they can also adversely affect developing country markets.

7-Up countries, to our knowledge have dealt only with the first type of cases, i.e., subsidiaries of TNCs in these countries merged as a result of amalgamation of the parent companies in the home countries. However, even in such cases, the competition authorities have shown lenient attitude towards such mergers. The Zambian competition authority allowed the merger of Coca Cola and Cadbury Schweppes, even after observing that the merger could raise competition concerns in some of the product categories.

In Pakistan the Monopoly Control Authority took the initiative to investigate the merger of Glaxo Laboratories Pakistan Limited and Wellcome Pakistan Limited. But the MCA failed to take any action and the case was abandoned halfway, because the MCA did not have qualified and trained staff for analysing such cases. In Sri Lanka, the competition authority did not even take up the case of merger between Glaxo Wellcome and SmithKline Beecham, saying that that it did not have jurisdiction, even though both the companies had commercial presence in the country!

The two large pharmaceutical giants: Glaxo Wellcome and SmithKline & Beecham merged to become GlaxoSmithKline (or GSK). This merger created a leading global pharmaceutical company with sales of £18.1 billion in the year 2000. Headquartered in the United Kingdom, GSK supplies products to 140 markets in the world including several 7-Up countries. India does not have merger review provision in its competition law, so the merger was not investigated. In South Africa the merger was allowed on the condition that it licensed out few product categories where competition concerns could arise.

It is another matter that the Sri Lankan authority considered even the subsidiaries operating from its own soil to be outside its jurisdiction, but even stopping the subsidiaries from merging would not have served any purpose in Sri Lanka. Because none of them had manufacturing facilities in Sri Lanka and they were operating mostly as repackaging and distribution centre. Blocking of the merger would have meant that they would have remained as separate entities but essentially selling the products coming from the same company. In the absence of any intensive research, it is difficult to say to what extent the merger lessened competition in the country, but the issue could possibly be dealt appropriately only through the application of the 'effects' doctrine and regulating the merger in the home country.

Interestingly, when the 7-Up partner in Sri Lanka approached the FTC for information on the GSK case, the matter was turned around when they were asked to assist them in research.

But the million dollar question is, whether Sri Lanka could enforce any such action on the parent companies in the home country? The question remains valid not only for Sri Lanka but most developing countries, even though similar actions are quite prevalent in the developed world. For example the EU blocked the merger between two US-based

215 *Business Day*, Friday April 26th 2002, *Competition Body Strikes Three Deals.*

Box 2: International Merger Cooperation?*

Merger evaluation, although an integral component of competition law enforcement in most jurisdictions, remains a hotly debated issue. Some even question the very existence of it, especially in developing countries. This is not surprising as merger evaluation involves striking a delicate balance between different interests and concerns. It depends much on economic analysis, and often different economists arrive at different conclusions in the same case. Controversy therefore is inevitable.

In the not so distant past, differing decisions in the GE-Honeywell merger case led to a spat between the US and the EU who otherwise have been in a cooperative mode for quite some time in the area of competition law enforcement. The conflict has now been resolved to a great extent. They have agreed in principle for simultaneous review of mergers, so that the merging companies do not have to face uncertainties in one jurisdiction after getting clearance in another. This was achieved when officials from both sides of the Atlantic met at the sidelines of the first annual conference of the International Competition Network (ICN) held at Naples, Italy on September, 28-29, 2002.

What is missing is that such a cooperative effort would not involve developing and other countries where the merging firms operate. Often parent body mergers lead to an absolute dominance in a developing country, when their subsidiaries merge. Because the market is either small, or in the past only few foreign companies operated.

For example, when Brooke Bond merged with Lipton around the world, it did not create much competition problems in the rich world. However, its impact in countries like India and Pakistan was quite different. In India, Brooke Bond and Lipton were two of the three major packaged tea companies, the other being Tatas. However, there are many smaller packaged tea companies, other than shops which sell loose tea leaves/dust directly to consumers. The merger was not subject to review under the Indian competition law. Because, in 1991 as a part of the reform agenda, the Government of India had diluted the competition law, removing all merger control provisions. In the end, the merger did result in a higher concentration in the market place and prices shot up unreasonably.

In the case of Pakistan, these two companies were the major players. The Pakistan competition authority, having merger review powers, allowed the merger of the Pakistani subsidiaries of Brooke Bond and Lipton, because it could not do anything to prevent the same for obvious reasons. The only condition that they put to the merging companies is that they will invest in growing tea in Pakistan and submit a periodic report to the agency about it. The merged company did not succeed due to severe drought conditions in the area where it planted tea. However, even if they had succeeded by a long shot, whether the quality would have been acceptable is doubtful. Secondly, if tea could have been grown in Pakistan it would have been done during the days of the Raj. But without being pessimistic, let's hope the venture succeeds.

Another interesting manner in which Zimbabwe handled a merger of two companies, did have some good results. When BAT took over Rothmans, they decided to keep only one factory and close down the other. The Zimbabwean competition agency allowed the merger subject to their selling the spare factory to any other entrepreneur who wishes to manufacture cigarettes. A local company did take over, and now offers solid competition to BAT, Zimbabwe.

In some cases in South Africa, when multinational companies in the field of drugs and agro-chemicals approached the local competition authority they were allowed to merge only after it was agreed that they would out-licence the manufacture of some of their products to other companies. This was done because, the merged companies would not have achieved market dominance *per se,* but in some goods, their dominance could have the potential for abuse.

These were only some situations when multinationals merge, consequently their subsidiaries also merge automatically. These create situations of a different nature. In most cases, a developing country competition authority would hesitate to stop a merger of subsidiaries. For, even if they did, it will not stop them from acting in league, as their masters are the same.

In a globalising world, merger review cooperation between two giants will be incomplete if it doesn't take into consideration the effects in all countries.

Interestingly, the ICN, which is an informal network of competition agencies from around the world that addresses competition enforcement and policy issues of common interest, has agreed to adopt a common set of guiding principles for merger notification and review. A study group of the ICN has already identified the possible set principles and there was almost a consensus on the set except on the principle of non-discrimination. The view expressed in this regard was that countries, especially the developing and the least developed ones, might treat domestic and foreign companies differently on grounds of national/public interest and promotion of national champions.

What was striking in these debates and discussions is that they have mostly been dominated by business interests and concerns and near-absence of consumer concerns. Ironically, the very existence of merger review in the competition law enforcement mechanism is mainly to protect and promote both economic and consumer interests. Of course, unbridled merger activities, may sometimes enhance efficiency in the short run but are fraught with the danger of promoting inefficiency in the long run due to reduction in competitive pressure.

The recent announcement of Mario Monti, the EU competition commissioner, to involve European consumer groups in the merger review process, thus assumes critical significance. He has also promised to provide financial support to such groups if they require. This is a welcome step as there has been a fear that the US has recently been giving more prominence to business interests in its merger review process, and simultaneous review of mergers may lead to neglect of consumer interests even in the EU. Monti's announcement should be an eye opener for many other competition authorities, especially in developing countries, which have not taken the consumer movement seriously so far!

*ReguLetter No. 9, CUTS, December, 2002.

corporations: GE and Honeywell, because the same could lessen competition in European markets. Similarly, in the Philip Morris-Rothmans case, a merger between the US and British/South African companies was prohibited by Germany.

7.2.4 Anti-competitive practices by TNCs

Other than collusion or combinations, the size and scope of TNCs makes it possible for them to engage in a variety of anti-competitive practices to the detriment of developing economies and to consumer welfare. These could include unconscionable pricing, resale price maintenance, exclusive dealing and so on. Microsoft is a case in point. The company has been hauled up for indulging in anti-competitive practices time and again in the US and the EU. But by and large, it did not face such actions in other jurisdictions. On the face of it, it is quite clear that some of them were relevant for other countries as well. Moreover, it is difficult to believe that a globally dominant company like Microsoft did not indulge in such practices elsewhere, particularly when the regulatory framework in most other jurisdictions is much weaker.

In India, a case was filed against Microsoft (India) Pvt Ltd for indulging in restrictive trade practice of imposing restrictions on the buyers in the form of an end-user license agreement (EULA). EULA forbids the use of software by the licensee unless the buyer acquires an Access License for each computer attached to the server on which the software is loaded. The MRTP Commission found the conditions contrary to Section 52 of the Copyright Act, which permits making copies as 'adaptation' of a computer programme by lawful possession of a copy[216].

7.2.5 Cross-border predatory pricing

Cross-border predatory pricing can also lead to market distortions. The issue here is whether an enterprise or a group of enterprises (combination) is attempting to capture a particular market by driving their competitors out of business by selling at prices below the cost of production so that subsequently prices can be raised in such a way that the cost incurred due to low selling prices can be recovered. Such practices are considered to be anti-competitive in most jurisdictions. Due to some striking similarities cross-border predatory pricing is very often equated with dumping and thus actions are taken under the anti-dumping laws. Anti-dumping action is primarily a trade remedial measure, and usually operated by the trade ministries or authorities rather than by the competition authority.

However, the principle underlying anti-dumping is different from that underlying competition law in that it seeks to protect competitors and not competition. Dumping has to also meet the test of injuring local industry, and not only selling below the price it sells at home. Thus even though anti-dumping laws are considered necessary to combat cross-border predatory pricing, it is not clear how many anti-dumping cases that have been taken up by several countries would meet the tests of predation that competition principles would require. In this context, the parallel anti-dumping and competition law cases, relating to the sale of Japanese television sets in the US is interesting.

Beginning in the 1960s, US producers sought relief from low-priced imports of Japanese television sets and other consumer electronics products initially under anti-dumping and subsequently under competition and other trade remedy laws. As a result, the US decided to impose anti-dumping duties on Japanese TVs in 1971 and subsequently entered into an Orderly Market Agreement with Japanese producers in 1977, which limited Japanese exports to the US. The competition law case was finally decided by the US Supreme Court in 1986, where, in a split decision, a majority of the Court expressed the view that the market for electronics products in the US was fundamentally incapable of being successfully monopolised through a predatory pricing conspiracy. The court held that this was due to:

- the number of firms competing in the market (including other foreign firms),
- the relative ease of entry, and
- the nature and extent of change and innovation in the market.

However, the situation in most developing countries would be quite different due to the small size of markets and low levels of market contestability. Hence there would be more convergence between anti-dumping and anti-predation actions. But, ironically, until recently, the main users of anti-dumping laws were developed countries, though increasingly developing countries are taking recourse to these laws.

216 Business Line, India (16.01.01)

Initiations of anti-dumping investigations have steadily increased since 1995. About one-half of all investigations initiated by developed countries between 1995 and 1999 were targeted at developing countries, while 25 percent were targeted at other developed countries and 25 percent at transition economies. Among the investigations initiated by developing countries during the same period, roughly an equal proportion was targeted on each of the three groups of countries. Among the 7-Up countries, India and South Africa have used this measure to a very large extent. They also happen to be the two most frequent users among the developing countries, followed by Argentina. Pakistan and Sri Lanka too have drafted anti-dumping laws and begun using them.

7.3 Barriers to Import Competition

Import cartels formed by domestic importers or buyers and similar measures (such as boycotts of, or collective refusals to deal with, foreign competitors) are of concern and may be a threat to maintaining competition in the market. The best known example in this regard is the dispute between Japan and the US: the Kodak-Fuji case, relating to consumer photographic film and paper, where a national firm effectively prevented imports by controlling the distribution channel. The case, in addition to issues concerning restrictive business practices, involved related government measures as well.

In principle, a national competition law may generally be able to tackle such market access barriers for foreign supplies and suppliers, resulting from exclusionary effects of vertical restraints in the jurisdiction in question. These practices are easier to deal with as the offenders are based in the country as against the cases relating to exercising of market power in global or export markets, where the offenders are typically foreign based.

However, the issue is not so simple as it may appear. Import cartels whose function is solely to attempt to exercise monopsony power in order to get a better price from foreign suppliers may be viewed more favourably from a national efficiency and welfare perspective than cartels that also exercise market power within the country. But it may be difficult to make such distinction or to separate the two types of activities. Moreover, many such activities may be against the long-term interest of the country but yet the competition authorities might find it difficult to take appropriate action due to strong domestic lobbies. Developing countries are however relatively less prone to such practices as their national firms are weaker compared to the TNCs.

Another related concern in this regard is inadequate domestic enforcement of competition law against import cartels in markets for a country's exports. In the early 1990s such concerns prompted a revision of US guidelines regarding international enforcement, to permit application of the US antitrust laws to foreign-based activities such as import cartels that restrict US producers' access to foreign markets. However, such an approach is much more intrusive than application of the 'effects' doctrine and in effect means 'encroachment into foreign jurisdiction'. This kind of approach may be dangerous for international order and the issues are better resolved through negotiations and cooperation. To date, however, the revised US guidelines have never been employed.

7.4 Foreign Investment

Foreign direct investment has now become an important way for companies to supply foreign markets. Indeed the WTO General Agreement on Trade in Services considers the supply of services through commercial presence of a foreign supplier as a form of trade. A very rapid increase in FDI in recent years coupled with an increasing share of FDI coming through merger or acquisitions of existing firms in the host country means that increasingly competition issues of international dimensions, particularly merger and abuse of dominance of TNCs are becoming more important.

A synergy exists between investment liberalisation and the effective application of competition policy. Not only that an effective competition policy can remove obstacles to entry, it also facilitates foreign investment flows by providing a predictable legal and regulatory environment that reduces the scope of arbitrary decision-making. Control of the business practices of investors through competition law is less restrictive and distortive than other policy instruments. On the other hand, the effect of foreign direct investment will be to increase competition in local market, particularly in the investments of greenfield type. The takeover and rejuvenation of local enterprises can also have such effects.

However, there is a possibility that over time such takeovers may make the markets increasingly concentrated and become characterised by one or a small number of dominant players. The takeover of

Box 3: The Cola Saga in India

The cola soft drink case in India has an interesting history. In 1977 Coca Cola was bundled out of India, as a) it refused to disclose its formula required as per the Indian food safety law, and b) establish a local company to operate. Pepsi Cola did not operate in India those days. Following the ouster, local entrepreneurs developed local cola drinks: Thums Up, Double-7 and Campa Cola, as also in the orange and lemon flavoured sectors. Parle's Thums Up was the most successful brand and it cornered the lion's share in the market alongwith its other developments like Gold Spot (orange-flavour) and Limca (lemon-flavour).

In 1986 Pepsi Cola was allowed to set shop in India, through export obligations in processed foods. But it found it difficult to penetrate the market initially, because of strong control of Parle in the soft drink market. By and by it succeeded in penetrating the market and raised its market share to a respectable level, but Parle's dominated the market. Further, Parle's brands were also exported to countries in South and South East Asia, Africa and Middle East.

Following reforms in 1990s, Coca Cola was allowed to return to India. Looking at the tightly controlled distribution set up, it decided to buy out the three successful brands of Parle's rather than competing against them and its global arch rival: Pepsi. It is reported to have paid a sum of $80mn to Parle's for this, which many commentators found to be too high. There being no adequate legal provisions, the deal could also not be challenged.

Be that as it may, this was the best way forward for Coca Cola to re-enter India. As a result, there are now only two competitors in the India's domestic and export markets: Pepsi and Coca Cola. And they fight like cats and dogs, but on pricing they don't. Their dirty laundry consists of a long list: pinching employees; pinching distributors; fighting over advertising spaces etc. Many of these facts have emerged through news about the court battles that both have been fighting against each other.

One lesson does emerge from this saga, is that given the right circumstance, there are capabilities among domestic entrepreneurs but that too was killed in this case. Thus the potential for global competition in the soft drink sector was also nipped in the bud. This is not to say that there are entry barriers, and others cannot come forward, but it is clearly an uphill task for any risk taker. Entry barriers exist through brand dominance; intensive and extensive advertising; high investments; control over distribution systems etc.

a well-established brand Indian cola drink: 'Thums Up' by Coca Cola in India is a classic example of such a phenomenon. It brought FDI to the country that the country is desperately wooing but at a very high cost of substantial lessening of competition in the market.

Cross-border acquisitions may seem to be competition neutral when looked at from a narrow perspective. Looking at it from a narrow national market perspective a cross-border acquisition may seem to have no effect on competition. But if the acquirer has been a major exporter to the country then the acquisition may lead to lessening of effective competition in the market. Such acquisitions may be aimed at regional or global consolidation by the concerned TNCs. In the past few years the cement industry has seen such M&A activities and consolidation. The French multinational Lafarge S.A. has been particularly active. In recent years it has expanded into Southern and Eastern Africa by acquiring many local firms and hence becoming a dominant market power in the regional market.

In 1998 Lafarge acquired the South African firm Blue Circle (Pty) Limited. For the past six decades the cement industry in RSA has been dominated by three companies: Pretoria Portland Cement or PPC; Alpha Limited; and Blue Circle, the latter being the smallest of the three. Although the acquisition constituted a merger in terms of the Competition Act, 1998, this Act had not yet been promulgated. As the Maintenance and Promotion of Competition Act[217] did not contain any merger provisions, so the merger was not notified.

This acquisition gave Lafarge a 19 percent market share in South Africa and did not change the market structure; in particular in as far as seller concentration is concerned. In fact it could be argued that as wholly owned subsidiary of Lafarge the company (now called Lafarge South Africa) was better placed to compete with the two larger cement manufacturers, PPC and Alpha.[218]

217 No. 96 of 1979. South Africa's previous competition law and still in force at the time.

218 PPC and Alpha have market shares of 42 and 34 percent respectively.

The subsequent 2001 merger between Lafarge and Blue Circle PLC (registered in the United Kingdom) was not notifiable under South African law since Lafarge had already acquired the South African subsidiary of Blue Circle in 1998. However this global merger had implications for the Southern and Eastern African regional market.

In December 2000 it was announced that a joint venture of Blue Circle PLC and Lafarge S.A. would acquire the Pan African Cement Company (PAC), a wholly owned subsidiary of the Commonwealth Development Corporation (CDC). With the international merger between Lafarge and Blue Circle, the acquisition plan was changed and PAC was to be taken over by Lafarge only.

Pan African Cement held controlling interest in cement manufacturers in three countries: Malawi (Portland Cement), Tanzania (Mbeya Cement) and Zambia (Chilanga Cement). Prior to this deal Lafarge had no presence in any of these countries, therefore on the face of it the deal did not change the structure of the market in any of these countries. However, for the regional market, the deals, in combination with the merger of Lafarge and Blue Circle PLC could raise serious competition concerns.

Foreign investment through the acquisition route happened in the Sri Lankan cement sector as well. The Swiss-based Holderbank (later renamed as Holcim) took over Puttalam Cement Co., in 1996, then the largest player in the market with a market share of 28 percent. Later it took over another major player Ruhunu Cement Co. in 1999, raising competition concerns in the country. However, despite the increased market share of Holcim during the period 1991-2001, number of new players could successfully enter the market, including foreign players such as Larsen & Toubro (L&T) and Gujarat Ambuja Cement Co. from India. Thus, even if Holcim holds a dominant position in the market, it is difficult to say that it has created any significant entry barriers. Holcim also attempted to acquire L&T in India, which would have given it even more dominant position in Sri Lanka raising serious competition concerns. However, the bid was not successful.

Some major international players such as Lafarge, Italcementi and Cemex have made their foray into Indian market through the M&A route. Lafarge has become a big player, especially in eastern India. Considering the geographical size of India and the bulky nature of the good, regional markets may be more relevant from competition angle. However, it is believed that the entry of the foreign players have augured well for competition in the cement market, at least for the time being.

The cement industry has often acted in collusion for quite a long time, but could never be prosecuted by the MRTP Commission due to strict evidence requirement.

7.5 Intellectual Property Rights

Intellectual property rights may generate or contribute towards a position of market power. Anti-competitive practices involving the use of intellectual property rights are usually addressed by competition law within the basic framework relating to horizontal and vertical restraints. The issue has important international dimensions as many corporations seek and get IPR protection in multiple countries. The IP holders also typically engage in licensing arrangements with firms in different countries. The territorial nature of property rights in such agreements means that frequently national law enables them to be used by rights holders to prevent parallel imports. In many cases it has also been observed that cartels were built around patent cross-licensing schemes and thus foreclosing competition.

Some developing countries have relied upon special transfer of technology law or regulations as a means of preventing abuses in connection with the licensing of intellectual property rights. Such laws and regulations have differed from the competition law approach, especially in their focus on transactions involving foreign companies, the application of criteria and objectives perceived to be related to development and not competition. The emphasis was on *ex ante* screening for approval of technology transfer transactions. However, adoption of more open and market-oriented economic policies meant that countries have abandoned or diluted these laws and regulations.

Weakness of both competition and IPR regimes in most developing countries mean that there are not many instances of competition cases with international dimensions and related to IPR, which have come up before the competition authorities. 7-Up countries were no exception in this regard.

One such case came up in India recently, but with one of the High Courts in the country. As a response

to the removal of quantitative restrictions on import of consumer goods in the country, and prevailing lower prices due to a weak currency, some traders in India imported the Unilever brands of soap from Indonesia. However, Hindustan Lever Limited, the Indian subsidiary of Unilever and licence holder of the brand approached the High Court in Mumbai and successfully stopped such parallel imports.

Another interesting case came up before the South African competition authority. In October 2001, Cipla-Medpro (Pty) Ltd (Cipla) lodged a complaint with the Competition Commission alleging that certain brand-name pharmaceutical companies have abused their dominant position in the market by engaging in excessive pricing of their products and entering into certain exclusionary licensing and/or agency arrangements, in violation of legal restrictions on vertical and horizontal market arrangements.[219] In essence, Cipla wanted to be granted compulsory licenses to import and market some generic drugs.[220] The branded versions of these drugs are currently under patent in South Africa. The case is still under investigation.

219 Cipla-Medpro (Pty) Ltd is a joint venture between Cipla Ltd, an Indian generic pharmaceutical company, and its South African partner, Medpro Pharmaceutica.

220 Jonathan M. Berger, "Litigation Strategies to Gain Access to Treatment for HIV/AIDS: The Case of South Africa's Treatment Action Campaign", *Wisconsin International Law Journal*, Vol. 20, No. 3, 2002.

Chapter-8

Conclusions and Recommendations

This chapter is the concluding part of the final report of the 7-Up Project titled: "Pulling Up Our Socks". The project involved a comparative study of competition regimes in seven developing countries: India, Pakistan, Sri Lanka, Kenya, South Africa, Tanzania and Zambia. It was implemented over 2000-2002.

Contextual Background

The study showed a huge lack of competition culture in all the project countries, and the fact that awareness levels were quite low when the 7-Up project was taken up. Whatever awareness existed was mainly among a handful of businesses and bureaucrats. Few in the media, academia and civil society were aware, but that too was quite wanting. Surveys conducted across a section of society in each of the project countries confirmed this finding. Fortunately, due to some internal realisation and external factors, a desire to improve the competition regime was reflected across all countries. The external factors include the discussions at the WTO on trade and competition policy, which were launched in 1996 and accelerated after the 4th Ministerial Conference at Doha in November, 2001.

While the five developing countries: India (1969 and 2002), Pakistan (1971), Sri Lanka (1987 and 2003), Kenya (1989) and South Africa (1979 and 1998) had enacted competition laws much before, the two least developed countries: Zambia (1995) and Tanzania (1994) were late entrants. Ostensibly they enacted their laws under pressure from international lending institutions (ILIs) as a part of structural adjustment programmes. This did pay well in Zambia, as it was, within certain limitations, quite effective in curbing various anti-competitive practices. On the other hand, the two big ones: South Africa and India developed new laws in 1998 and 2003 respectively to cope with the changing times. The Sri Lankan parliament has also passed a new law in early 2003. However, during the project implementation it was found that Pakistan is also in the process of adopting a new law, which should come about in this year, or latest by 2004. Kenya is believed to be considering a new law as well.

Tanzaina was a case in point as its 1994 law was inoperative until recently, and changes were proposed recently, including the name, to give it a new thrust. Further, it has received generous financial assistance from donors to implement the law.

If one looks at other cases of pressure from ILIs, two cases come to mind. Firstly, Thailand which has enacted a competition law in 1999, but the implementation is badly lacking. One factor responsible for this is the unholy nexus between politicians and businessmen, and cronyism, which exists in South East Asia, thus rendering it difficult to implement the competition law even on a soft basis. The public is totally ignorant about the law. The other case is that of Indonesia, where the law is being looked at as a part of the painful transition process imposed by the ILIs. Furthermore, Indonesia has no proper rule of law which also hampers any sensible governance.

Other than Zambia and South Africa the political will was lacking badly, which was evident by the budget and quality of personnel appointed to administer the law. All other countries were lagging behind considerably in *enforcement* of otherwise reasonably adequate laws. Budgets and appropriate personnel were major drawbacks in effective implementation. India has just enacted a new law and the jury is still out as to how effective it will be. To start with the budgetary allocations are quite poor, and it has a huge agenda. The new law has been patterned on the basis of the new law enacted in the UK, which has gradual implementation: advocacy in the first year; restrictive trade practices in the second year and merger review in the third year. UK too had an old law (1973) when it changed over to a new law in 1998 to cope with changing circumstances and to align with the European Community competition law.

The applicability of the competition law varied from country to country, depending upon the economic situation. For example, the South African law has developed good jurisprudence on mergers, though it lagged behind in reaching the common man as it did not address various retail level abuses. On the other

hand, in its policy on reforms, the Indian law was diluted in 1991 to exclude merger control, and it remained in the news mainly on its actions on unfair trade practices. To that extent, and in spite of the fact that the Indian Consumer Protection Act, 1986 too covers UTPs, it had developed a popular image because of its actions on UTPs. However the new 2002 law has excluded UTPs from its coverage and it has yet to be seen as to how it will gain popularity.

Other laws, such as in Zambia, Tanzania and Sri Lanka cover UTPs, but the ones in South Africa, Pakistan, Kenya and now in India, have not covered UTPs. Many jurisdictions in the world, such as the USA, Australia and others include UTPs, which help in image building and thus public acceptance of their pure competition related cases.

Most of the laws deal with structure rather than conduct, except in the case of South Africa. India had 'structure' as its main plank in the 1969 law, but the new 2002 law has shifted entirely to 'conduct'. It was stated by the Finance and Company Affairs Minister in the Parliament: "It is not dominance, but abuse of dominance, which will form the bedrock of the new competition law".

Dealing with conduct is more complex than structure, as unless the agency has sufficient resources it cannot build up a good case for prosecution. That will be a big challenge for the new authority in India, and indeed all other developing countries.

The first phase of the 7-Up Project was designed to compare the institutional framework of the project countries' competition regimes, as that would enable a comparison which will be easy and objective. Further, it could be done within a short time frame. On the other hand, if one were to compare the performance of the competition regimes, it would entail subjective assessment. That would have been rather difficult and politically problematic. Further, it would have entailed a longer time frame. Even the basic survey about the institutional setup took a substantially longer time period. The survey questionnaire is annexed at Annexure 4.

Secondly, in both the phases, the project had another interesting component of a bottom-up approach by involving a variety of stakeholders including policy makers and competition authorities. This helped immensely in raising the profile and the basic issues of a competition regime and competition culture. The 2nd phase of the project dealt with cross-border issues that were dealt with (or not) by the competition authority, and the awareness about them among an aware cross section of stakeholders.

As part of the process, a multi-stakeholder national reference group (NRG) in each country was established to discuss the issues, the 1st phase and the 2nd phase county reports. This helped to deliberate on several issues, including subjective ones, which included the approaches to competition cases. Thus many dimensions of the competition regime in the country were discussed, both in isolation and in comparison with the countries in the project specifically and other countries outside the project area.

This chapter covers the inferences drawn from the research. This includes the discussions at the NRG and the project review meetings, which were held over time. A brief report of the NRG meetings and the review meetings are carried in appendices.

On the basis of the research, the learnings and recommendations are divided into four parts:

- Operational issues
  This part deals with the institutional framework and implementation issues mainly
- Institution and capacity building
  What type of institutional and capacity building is required
- International cooperation
  Speaks about cooperation on capacity building and handling cross-border issues etc
- Scope and coverage
  Best approaches in defining the scope and coverage of the law

8.1 Operational Issues

Although in several countries the laws themselves would benefit from some adjustments, the main problems the 7-Up countries are facing concern their implementation. In general, the competition agencies in the project countries are understaffed, lack resources, etc. See tables 7, 8 and 9 for a brief outline presented in a matrix format.

1. Inadequate budgets, especially in the South Asian countries.

Firstly, having the adequate amount of funding is one of the most crucial factors for any arrangement to be effective. Indeed the agency can be well funded but, for example, if it doesn't have the necessary

backing of the government or lacks the necessary dedicated leadership, even a well funded agency can be quite ineffective. The bottomline is the budget, and then other things can follow.

The second major issue, which afflicts the functioning of any agency in developing countries is what the Finance Ministry can allocate out of the whole budget of the government, which can be scarce and has to meet with competing demands of various ministries. The balance is the key.

It is clear that the budgets in several of the 7-Up countries are inadequate and need to be increased if they have to perform their roles. Among the seven countries, the best budgetary allocation appears to be with the South African competition regime. In absolute terms the amount allocated in 2000 for the competition regime was US$7.74mn with an annual government budget of US$23.3bn or approximately 0.033%. On the other hand, a big country like India had allocated only US$0.72mn as against total government budget of US$81.3bn, or just less than 0.0009%. *(see Table 7 on page 38).*

Expenditure in developing countries needs to be examined in the context of purchasing power parity. However in this case, rather than comparing absolute expenditure, we have taken their ratios with the whole government budget, so that such a problem does not arise. For a better comparison we have also juxtaposed the ratios of two other countries: USA, which is one of most competitive economies and Brazil as another large developing country, which can be compared with India and South Africa.

We have not looked at the case load in each of the nine competition regimes mentioned to see how the expenditure would relate to the input and output. That would require much more detailed research. However, assuming that expenditure levels compared to the total government budget would be a safer ratio to look at as the intent of the government in exhibiting that the government means business.

In a descending order, the table 11 shows how the countries' expenditure looks like.

If we take the expenditure of 0.014% in the USA as a good benchmark, then we find that Zambia's expenditure was nearly four times as much, which is rather too high. While South Africa was slightly less than three times, Kenya and Tanzania were quite close to the USA's level. Pakistan and Sri Lanka

Table 11: CA's Expenditure as a Percentage of Total Govt. Budget

Country	Percentage Expenditure of Total Govt. Budget
Zambia	0.0562
South Africa	0.0333
Kenya	0.0073
Tanzania	0.0160
Pakistan	0.0024
Sri Lanka	0.0029
India	0.0009
USA	*0.0139*
Brazil[221]	*0.0058*

were much behind, while India was the worst performer among all the nine countries exhibited above.

In the lot, the South Asians needed a great boost, with India much behind all others. Its absolute expenditure compared with Pakistan, showed that it was just US$100,000 more, while the total government budget of Pakistan was less than 10% of India's.

The second important aspect of the budget is how it is spread over various heads. Personnel costs form an important component of the expenditure, as effective implementation requires people, of a good quality. It has to be somewhat balanced with other heads. The table 12 looks at the expenditure on salaries and honoraria, in a descending order, and comparison with the two benchmarked countries.

What was seen in the detailed personnel costs, is that South Africa had a good balanced expenditure with salaries and honoraria paid to a large number of professional staff members (see table 9 for more detailed breakdown of personnel). Zambia had a very top heavy structure. In India, a large part of the salaries was spent on non-professional support staff, which is part of the culture of an overloaded government system.

221 Year 2001

Table 12: Personnel Cost as a Percentage of Total Budget

Country	Personnel Cost as a Percentage of Total Budget
Zambia	81
India	66
Kenya	54
Sri Lanka	43
South Africa	41
Tanzania	18
Pakistan	33[222]
USA	*65*
Brazil	*43*

The personnel costs do not reflect costs of training or travel etc, which are extremely desirable elements of sustaining and improving the performance of the agencies. Please see table 7 for a breakdown. From that it will be clear that only South Africa was investing well in human resource development.

Clearly the South Asian governments need to pull up their socks, if they want a more effective competition regime. Secondly, a mean needs to be struck as to how the budgets would be designed and allocated across the board in all countries. A thumb rule could be adopted to ensure that around 40-50% of the total budget be spent on personnel as salaries and honoraria.

In developing countries, a question is often asked: from where to get the money from? The amount of money which the 7-Up countries pay by way of being victim to international cartels will show where the money will come from if only they had an effective competition regime. According to a World Bank study[223] the infamous Vitamins cartel has cost the developing world nearly US$3bn. The estimated losses incurred by the 7-Up countries due to the cartel are given in table 13 below.

2. Competition authorities have difficulty to attract and retain competent and qualified staff, especially professionals.

The competition authorities also lack sufficiently skilled staff. Many of them only retain a skeleton staff and in countries where staff numbers are higher they are mainly composed of support staff and not professionals. Apart from the economists that are needed to carry out these analyses, lawyers are also needed to prepare the cases and analyse the economic facts vis-à-vis the legal provisions. Many of the competition authorities in the 7-Up countries have a shortage, and in some instances, an absence of lawyers. Therefore, there is an enormous need to attract and retain high quality and trained professionals.

There are a number of reasons why the authorities have difficulties in attracting and retaining these qualified professionals. One of the most important

Table 13: Estimated Losses in 7-Up Countries due to the Vitamins Cartel

Country	1. Estimated losses in US$mn	2. Purchasing power parity ratio	3. Effective losses in PPP$mn (1X2)	4. Ideal budget* for the CA in US$mn
India	25.71	5.19	133.43	8.13
Pakistan	36.82	4.17	153.53	1.35
Sri Lanka	N/A	3.98	N/A	0.33
Kenya	1.79	2.80	5.01	0.32
South Africa	99.93	3.03	302.78	2.32
Tanzania	0.16	1.89	0.302	0.10
Zambia	0.06	2.50	0.15	0.03

*The ideal budget is calculated at 0.01% of the annual government expenditure.

222 for 1999

223 Clarke J.L. and Evenett S.J. (2002), the Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel, World Trade Institute, Berne.

ones is their general lack of funds, which prevents them from paying attractive salaries that can compete with those paid in the private sector.

Two interesting anecdotes can add to the understanding of other reasons. In the case of South Africa, a lawyer who left the Competition Commission and joined a private firm, felt that her time in the Commission was used for more of managerial work rather than analytical work. The performance of the competition regime in South Africa has created a huge demand for competition lawyers. The authority does not have a policy of restricting staff from entering into professions directly related to its work as many countries maintain to curb the revolving door phenomenon.

In another case in India, an economist on deputation to the competition authority from the government economic service was plainly disgusted, because he did not get the opportunity to test his skills and knowledge. Further, he could not get any budget for either travelling or even purchasing relevant publications, and was reduced to being a file pusher. The economist got himself posted out.

3. Lack of databases containing market information are a handicap to enable the competition authorities to perform the economic analysis necessary in competition cases.

In order to determine whether an enterprise is abusing its dominant position or whether this dominant position is against the public interest, the authorities will first have to determine whether such an enterprise is actually dominant. This requires a complicated economic analysis, even when countries are only looking into market shares as a determinant of dominance. The same is required in assessing the possible effects on competition of a merger or acquisition. Many of the competition authorities lack the databases that should provide them with the information necessary to perform such market analyses.

If required, the competition authority could commission research from research institutions and a budget should be provided for the same. In one case, in Sri Lanka, when the local research partner's staff went to the competition authority to gather some information on the pharmaceutical sector the tables were turned around. The competition authority asked the researcher to do the research for them as they did not have any capacity and wanted to launch action.

In fact, many competition authorities do not even subscribe to the financial papers or journals to keep track of economic developments in general. The Indian competition authority does not have Internet facilities, and in several of the other project countries those facilities are quite inadequate.

4. Competition authorities do not keep a proper track of the status of cases.

One ubiquitous malady that was encountered in many of the project countries, was the unsystematic manner in which cases were dealt with. Proper tracking system or recording of cases, their disposal time etc were quite wanting. Competition authorities need to keep track of the status of the cases that are pending with them. This is not only for their own sake but also for transparency reasons vis-à-vis businesses and consumers. When trying to build a competition culture, not maintaining sufficient transparency on the part of the competition authorities could be counter productive.

8.2 Institution and Capacity Building

Much is required to be done to build the institution and the capacity to ensure a healthy competition culture in the country. Few points are elaborated below:

1. Competition issues need to be part and parcel of both the law and economics curriculum at universities and other institutes of higher education to create a broader base of professionals.

In developing countries, there is a huge shortage of professionals who can work in the area of regulation or competition. This is because, the developing countries have actually started implementing new regimes only recently. In most cases, the personnel of the competition agency are borrowed from another ministry or on deputation from an existing service of the government.

In the case of India, it has been seen that often retirees or those with some influence are appointed as commissioners, when their understanding of competition or regulation is abysmal. The professional staff are drawn from the company law service, who have experience of mainly company law enforcement rather than of a complex subject like competition. Over time they do develop a good understanding but are not exposed to any systematic method of training.

Even if proper staff is available, training and job experience does create the paradox that they will become more attractive to the private sector, thus possibly making it more difficult to retain them. This could be one reason for the high level of staff turnover within the South African competition regime.

Creating a broader base to draw staff from is therefore necessary. To this end competition and regulatory issues need to be part of the economics, accountancy and law curriculum in universities and other institutes of higher education. Further, a cadre of such personnel can also be developed, which can then be available as a pool for different agencies to draw upon. This could be somewhat like the civil service, but having a provision of lateral entry at higher levels rather than be restricted to fresh entries.

2. A 'competition culture' needs to be created. This will help to prevent government and business opposition to and interference in the decisions of the authority. To create such a culture a broad multi-stakeholder advocacy programme should be undertaken. A strong consumer movement is crucial in the creation and sustenance of a competition culture.

The competition agencies in several project countries not only face problems in implementing and enforcing the law with regard to international issues, but also face opposition on the domestic front. Even when competition agencies are *de jure* independent, their independence is threatened and made obsolete if their decisions are overruled or not carried out by the government. The *vanaspati ghee* case in Pakistan is a good (or rather bad) example of this. To prevent further cases like this one, and to aid the competition authorities in future decisions, a 'competition culture' must be created. This will involve broad advocacy work explaining the benefits of competition regulation in the face of liberalising markets to business and consumer communities as well as to politicians.

Generally, the competition authorities in the 7-Up countries have not done much advocacy work to create awareness. Their already constrained budgets are mostly spent on salaries and establishment costs, leaving very little for research and advocacy. The only exception is South Africa where the Competition Commission has engaged in a broad range of advocacy activities. To assist them in their advocacy work, the competition authorities could involve their countries' struggling consumer organisations by resourcing and building their capacities.

Unlike other authorities, the Zambia Competition Commission is quite active in taking the message across the whole country. It regularly organises periodic meetings in the capital: Lusaka and districts. It has also celebrated a National Competition Day to highlight the issues, and CUTS has cooperated with it to publish posters and small booklets on the competition law[224] .

8.3 International Cooperation

1. Foreign competition authorities could assist in on the job training programmes to develop knowledge in specific areas.

In most countries competition law is either a new area or up until recently was not given much priority. This is another reason for the shortage of qualified personnel that are familiar with the issues of competition law and policy. Constant on the job training and assisting personnel to pursue higher education could redress that problem. This could be done through cooperation with foreign competition agencies, from both developed and developing countries.

The South African experience provides a good example whereby experts from the Antitrust Division of the United States' Department of Justice assisted the South African Competition Commission in dealing with mergers. The Commission also encourages staff to pursue higher education by providing financial assistance. The competition authorities in other countries rarely provide such training for their staff, due to their restrained budgets.

South-South cooperation on training will be much more useful, because of several common factors which prevail in developing countries. Similarly, cooperation among the transition countries will be of greater value than getting assistance from elsewhere. For this purpose, seminars, workshops, placement etc, with a systematic follow up system will be very useful.

224 For more on this subject, please see "Friends of competition – How to build a healthy competition culture in developing and transition countries", CUTS, 2003

2. International donors could finance training and advocacy programmes. This would alleviate the strained budgets of the competition authorities in many of the 7-Up countries without threatening their independence.

As stated, the South African competition authorities are the exception in many cases. They are substantially better equipped in all regards. Their funding seems to be sufficient and at a similar level with developed countries like Norway. The majority of their funds are obtained through notification and process fees from merger cases. The Competition Commission is therefore also financially quite independent. This, however, may not work in all the project countries. Merger activity differs across countries and may not be very substantial in many countries, especially small ones, thus notification fees may not be a viable source of income.

Another possibility for competition authorities to increase their financial resources while at the same time making them less dependent on government funds, would be to grant them a percentage of the fines imposed on companies that violate the competition laws. A problem with this is that the authorities would have a perverse incentive to impose excessive fines on these companies. This would diminish their credibility as an independent regulator and would therefore probably not be the best way to increase the authorities' resources.

Nevertheless, most of the competition agencies are certainly in need of extra financial resources. Although increased government funding is a possibility, especially in countries where the authority's budget as a percentage of that of the government is low. In countries like Zambia and Tanzania where the relative budget is already high, this may not be desirable in the face of so many other urgent problems. Foreign donors could, therefore, play a role in setting up and providing specific training programmes and finance advocacy activities to create a competition culture. They could also provide resources to establish and maintain libraries and databases. This type of support would alleviate the authorities' budgetary problems without interfering in their ability to make their own decisions based on their own priorities.

3. Better cooperation and coordination among the CAs are required, especially to deal with cases of international dimension.

Apart from staff training programmes, cooperation with foreign competition authorities is also required for dealing with cross-border issues. Increasingly, the competition agencies in the 7-Up countries are faced with international mergers and anti-competitive practices. Whether countries have special provisions for extra-territorial jurisdiction or apply the 'effects' doctrine is not important when they have no means to enforce their decisions. Often the companies involved are beyond the reach of the competition agencies, which also causes problems in obtaining the information necessary to make a decision. Cooperation with foreign agencies could help in this regard. A multilateral framework for cooperation will be quite useful, so that demands for information are not treated in a partisan manner.

8.4 Scope and Coverage

A full evaluation of having and implementing a competition law requires an assessment of its effectiveness. This effectiveness is measured by the extent to which the objectives of a country's competition law and policy are obtained. Objectives vary from country to country and are influenced by their specific circumstances and needs.

An evaluation of a competition law and policy's results vis-à-vis its objectives is by its very nature difficult, given the fact that market realities are constantly changing. In the 7-Up group this difficulty is enhanced by the fact that most of the countries have only recently enacted competition legislation, making it too early to see the full effects of the competition law and policy. Nevertheless, certain problem areas and possible solutions can be identified.

1. Competition policy and law should focus on consumer welfare and efficiency while at the same time take cognisance of a country's overall public policy.

Although consumer welfare and economic efficiency are generally the core objectives of competition law and policy, the legislation in the 7-Up countries also reflects many other development needs. For instance, the Zambian competition law hopes to encourage innovation, ensure fair distribution and reduce unemployment. In Tanzania, merger evaluations must take account of the impact on employment, competitiveness in export markets and the ability to face import competition.

The advancement of social and economic welfare, the promotion of small and medium-sized enterprises,

and greater spread of ownership are some of the objectives of the South African Competition Act of 1998. These broad objectives reflect the fact that competition law and policy are not stand-alone issues, but are an integrated part of a country's overall public policy.

On the other hand these multiple objectives create possibilities for lobbying by different stakeholders and can lead to an inconsistent application of competition law. In implementing competition law authorities should certainly consider a country's wider economic and development policies and objectives, however including them as objectives of the law itself suggests that competition law is a tool for attaining them. Arguably competition law and policy are not the most apt tools for the promotion of employment or the advancement of historically disadvantaged persons. A focus on consumer welfare and economic efficiency, while taking regard of other policies, might therefore be preferable.

In general, the laws of the project countries are comprehensive enough to deal with the variety of practices and activities that infringe on competition in their markets. The three key areas that the competition laws in all project countries deal with are (i) restrictive trade (or business) practices; (ii) the control of monopoly power or a dominant position; and (iii) mergers and acquisitions.

2. Restrictive Trade Practices should be categorised in those that are prohibited per se and those that are subject to a rule of reason, case-by-case, approach with the onus, once anti-competitive behaviour is established, on the companies involved to justify them. Categorisation into RTPs that are prohibited per se should be rationalised.

With respect to restrictive trade practices all 7-Up countries apply a 'rule of reason' analysis to at least the majority of these cases. Although they are deemed *prima facie* anti-competitive the majority are not prohibited *per se*. Except for Sri Lanka the onus to justify them is on the companies involved. In Sri Lanka the competition authority must establish that the practice is against the public interest. Placing the onus on the companies involved seems a better option to reduce the burden on the authorities.

Several countries prohibit a number of restrictive trade practices *per se*. In general these practices are considered to be the most serious restrictions on competition. However, the reasons why a distinction is made are not always clear. The Tanzanian and Kenyan law, for instance, prohibit predatory pricing and collusive tendering *per se* (i.e. persons engaged in these practices shall be guilty of an offence), whereas agreements to divide markets or refusal to sell, which can be equally or even more damaging to competition and consumers, are considered to be legally unenforceable in a court of law. Persons committing these kind of restrictive trade practices are only guilty of an offence after they refuse to comply with orders from the authorities to stop the practices. This has caused much confusion, even among enforcement agencies. Therefore the categorisation of *per se* prohibited practices should be rationalised.

3. The size of a company's market share could be the main factor in determining the existence of dominance. However, other factors also need to be taken into account.

When determining whether or not a company holds a dominant position, the 7-Up countries heavily rely on the size of that company's market share. There are, however, a number of difficulties in determining a company's market power by the size of its market share. These include the question on how to define the relevant market as well as market entry issues. Very large market shares can in themselves be evidence of a dominant situation. Where to draw the line, however, is very much dependent on a country's specific circumstances. Although taking market shares as the main factor in determining dominance seems to be a good approach, especially given the authorities' capabilities, other factors need to be taken into account to determine whether or not a company is, to an extent, capable of operating independently from its customers and competitors.

4. Some countries still follow a structure- oriented approach in their competition law enforcement, which may consider turning to a behavioural approach.

In controlling monopoly power or a dominant position, the countries have adopted a more or less behavioural approach. It is not dominance itself that is prohibited, but its abuse. The one notable exception to this is Pakistan's attitude towards the concentration of 'personal' power. Due to historical developments that led to the concentration of wealth and power in the

hands of a few families, Pakistan's MRTPO structurally prohibits these concentrations. It is questionable if this provision is still relevant in the current economic reality. For example, the extant Indian competition law had the same approach. In the new competition law, the same has been changed to 'abuse of dominance' approach rather than dominance *per se*.

5. Although vertical mergers are generally considered to be less harmful to competition, the laws should at least have adequate provisions to deal with them ex ante since the de-merger process is complicated.

In the case of Kenya, Tanzania and Zambia only *horizontal* combinations need to be notified and approved. Although in general horizontal mergers are considered to constitute a greater threat to competition than *vertical* mergers, there could be instances where these mergers are just as competition restrictive, for instance when that merger results in either upstream or downstream dominance. Therefore the law should at least have provisions to deal with them before they are effectuated, since the de-merger process is a complicated one.

6. Only those combinations above a certain threshold should require investigation and approval. These thresholds should be commensurate with a country's economic reality.

While looking into the possible anti-competitive effects of a proposed merger the project countries also base their analysis on market share. Many countries set a threshold before they evaluate a merger and the same holds true for notification. Pre-notification and approval of *all* mergers and acquisitions is required in Pakistan and Sri Lanka.

Although Sri Lanka only recognises a transaction as a merger when it will result in a situation of monopolistic or monopsonistic dominance, thus in effect setting a threshold for both notification and approval for only those mergers that may result in such a situation. The key issue once again is the level of the threshold.

Since the de-merger process is complicated the threshold should not be too high, as this would increase the chances of having to deal with unscrambling later. However, the threshold for approval should be high enough to cover only large deals/enterprises. This will reduce the workload on the competition authority and avoid overzealous regulation. Moreover, the process of approving combinations is a source of learning for the competition authority. It facilitates the maintenance and use of databases.

7. Exemptions should be well defined and limited. The economic and/or social rationale on which they are based should be clearly articulated.

Worldwide, several types of exemptions have been prominent: sector specific (including regulated sectors), enterprise specific (state owned enterprises or SMEs), and practice or agreement specific (R&D co-operation, standardisation, rationalisation etc.). While there is no consensus on the desirability of these exemptions, many of the 7-Up countries also include them in their laws. Some argue that they are unwarranted, since they reduce efficiency and buyers' choice. Others argue that these exemptions serve the public interest. In that sense exemptions form part of the expression of the objectives of competition law.

As competition policy and law are part of a country's overall public policy, and thus a tool for serving the public interest, it is clear that a competition law should not be too rigid. Competition policy does not exist in a vacuum. A competition law must therefore be able to aptly deal with (and support) a country's varying public needs. This holds especially true for developing countries.

Unfortunately it is difficult to ascertain the public interest and the possibilities of government failure are numerous. As is the case with having too many objectives, having too many avenues for exemptions could create multiple possibilities for lobbying by different stakeholders. This could lead to inconsistent application of the competition law and could undermine long-term competitiveness, economic growth and jobs.

In this regard the interface between competition and regulation is also important. Informal consultations between the competition authority and the sector specific regulators may not be good enough. Especially in smaller countries, the competition authorities could supervise competition in all sectors of the economy. This should be clearly defined in order to avoid any conflict. In larger countries, where the regulatory authorities have sufficient capacity to

deal with competition in their sector, these regulated sectors may be totally exempted from the purview of the competition authority.

8.5 The Way Forward

Developing countries in general have much to gain by learning from the experiences of other countries. This applies to those countries which have not yet enacted competition laws, as well as to those which are attempting to implement existing policies. While looking at the experiences of developed countries with a long history in competition law and policy has its own merits, developing countries that have had some experience with competition law also provide a useful point of reference. These examples may be more relevant since they are likely to face similar problems. It is hoped that this report will facilitate this process by providing useful insights into the strengths and weaknesses of the competition policy regimes in the 7-Up project countries, and also inspire other countries to draw lessons and advice.

Annexure-1: The Acts

Country	Year	Act	Abbreviation
India	1969	The Monopolies and Restrictive Trade Practices Act	MRTP, 1969
	2002	The Competition Act	CA, 2002
Pakistan	1971	The Monopolies & Restrictive Trade Practices (Control & Prevention) Ordinance	MRTPO
Sri Lanka	2003	Consumer Protection Authority Act	CPAA
	1987	Fair Trading Commission Act	FTCA
Kenya*	1989	Restrictive Trade Practices, Monopolies and Price Control Act	RTPMPC Act
South Africa**	1998	The Competition Act	CA, 1998
Tanzania	1994	Fair Trade Practices Act (no 4)	FTPA
Zambia***	1995	Competition and Fair Trading Act	CFTA

*Competition Law in Kenya predates World War II though the first formal legislation was the Price Control Ordinance of 1956 renamed the Price Control Act of 1956 and revised in 1972.
** The Act was passed by Parliament in October 1998, and came into force on September 1, 1999. The previous law, the Maintenance and Promotion of Competition Act, 1979 was considered to be ineffective, and hence, was replaced with the new Act.
***Came into force largely as a consequence of the conditionality set by the International Monetary Fund and the World Bank.

Annexure-2

Project Partnership Arrangement

For the purpose of the project management, in each of the selected seven countries, with the exception of Kenya and South Africa, two partners were identified i.e. 'main' and 'associate' partners. In general, the identified research institution in each country was the main partner, while the chosen consumer organisation (or NGO) was the associate partner. The primary responsibility of the project management in each country was with the main partner: the research institution, to ensure the quality of output.

One person in each of the selected countries was appointed as the research coordinator and was affiliated to the main party, the research institution. The research coordinator was the main paper writer. However, in some cases like Kenya and South Africa, the research institution engaged a researcher from outside.

The project-partners were identified from the lists gathered from various suggestions, internal files, networking etc. However, the partners were finalised only after first hand assessment of their capacity and interest.

The responsibilities of these partners and researchers included preparation of the first phase country report on the basis of the information collected from the competition authorities and secondary sources, organizing of National Reference Group meetings, conducting surveys and doing three case studies during the second phase and preparing the case study reports. Besides these, they were also to send news clippings and other articles for the purposes of the newsletters produced during the project implementation.

Some changes were made during the course of two years and finally the project was implemented along with the following partners:

COUNTRY PARTNERS			
1.	India	**National Council of Applied Economic Research** Parisila Bhawan, 11 Indraprastha Estate, New Delhi-110 002 Ph: +91.11.337 9861-63/65 Fax: +91.11.332 7164/9788 Email: infor@ncaer.org, Website: www.ncaer.org	**CUTS Centre for International Trade, Economics & Environment** D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India Ph.: 91.141.220 7482, Fax: 91.141.220 7486 Email: cuts@cuts.org, Website: www.cuts.org
2.	Kenya	**Institute of Economic Affairs** ACK Garden House, 5th Floor (Wing D), Opp Bishop's Road, Nairobi, Kenya Ph.: (254-2) 717402, 716231, 721262, Fax: (254-2) 716231 Email: instecon@nbnet.co.ke, Website: www.iea.or.ke	
3.	Pakistan	**Sustainable Development Policy Institute** 3, UN Boulevard, Diplomatic Enclave 1, G-5, Islamabad - Pakistan Ph: +92.51.2270674-6/2278134/2278136 Fax: +92.51.2278135 Email: main@sdpi.org, Website: www.sdpi.org	**The Network for Consumer Protection** 40-A, Ramzan Plaza, G-9 Markaz Islamabad - Pakistan Ph: +92.51.2261085/2256895 Fax: +92.51.2262495 E-mail: main@thenetwork.org.pk, Website: www.thenetwork.org.pk
4.	South Africa	**Institute for Global Dialogue** 8th Floor, Braamfontein Centre 23, Jarissen Street, Braamfontein Johannesburg. P. O. Box 32571, South Africa 2017 Ph.: +27.11.339 6585, Fax: +27.11.339 6616 Email: info@igd.org.za, Website: www.igd.org.za	
5.	Sri Lanka	**Law & Society Trust** 3, Kynsey Terrace, Colombo 8, Sri Lanka Ph: +94.1.691 228/684 845/989 843 Fax: +94.1.686 843 Email: info@lawandsocietytrust.org, Website: www.lawandsocietytrust.org	**Institute of Policy Studies** 99, St. Michael's Road, Colombo 3, Sri Lanka Ph: +94.1.431 368/378/383/408 Fax: +94.1.431 395 Email: ips@sri.lanka.net Website: www.ips.lk
6.	Tanzania	**Economic and Social Research Foundation** PO Box 31226, 51 Uporoto Street, Dar es Salaam, Tanzania Ph: +255.22.276 0260/276 0758 Fax: +255.22.260 2649 Email: esrf@esrf.or.tz, Website: www.esrf.or.tz	
7.	Zambia	**CUTS Africa Resource Centre** 4th Floor, Main Post Office Building P.O. Box 37113, Cairo Road Lusaka, Zambia Ph: +260.1.22 4992, Fax: +260.1.22 2789 Email: cutsarc@zamnet.zm Website: www.cuts.org	**Zambia Consumers Association** Suite 91, 2nd Floor Afcom House Big Corner Zambia Way/Obote Avenue, P.O. Box 21641, Kitwe, Zambia Ph: +260.2.224191, Fax: +260.2.224193 Email: zaca@zamnet.zm

Annexure-3: Comparison of the 7-Up Country Laws

Annexure Table 1: Objectives of Competition Law in 7-Up Project Countries	
UNCTAD Model Law	To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.
World Bank-OECD Model Law	To maintain and enhance competition in order ultimately to enhance consumer welfare.
India 1969 ***2002***	Prevention of concentration of economic power that is or that may lead to the common detriment. Specifically: (1) Control of monopolies; (2) Prohibition of monopolistic trade practices; (3) Prohibition of restrictive trade practices; and (4) Prohibition of unfair trade practices. *Establishment of a Commission to: (1) Prevent practices having adverse effect on competition; (2) Promote and sustain competition in markets; and (3) Protect the interests of consumers and to ensure freedom of trade.*
Pakistan.	The broad objectives of the law are to provide measures against: (1) Undue concentration of individual economic power; (2) Monopoly power; and (3) Restrictive trade practices.
Sri Lanka 1987 ***2003***	The objectives of the FTCA are: (1) To control monopolies, mergers and anti-competitive practices; and (2) to formulate and implement a national price policy. • *The promotion of effective competiton and the protection of consumers.* • *Regulation of internal trade.*
Kenya	The objective of Kenya's competition law is to encourage competition in the economy by: (1) Prohibiting restrictive trade practices; and (2) Controlling monopolies, concentrations of economic power and prices.
South Africa	The purpose of this *Act* is to promote and maintain competition in the Republic in order to: (1) Promote the efficiency, adaptability and development of the economy; (2) Provide consumers with competitive prices and product choices; (3) Promote employment and advance the social and economic welfare of South Africans; (4) Expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic; (5) Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (6) Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.
Tanzania	The main objectives of the Act are to: (1) encourage competition in the economy by prohibiting restrictive trade practices, regulating monopolies, concentration of economic power and prices; (2) protect the consumer; and (3) provide for other related matters.
Zambia	The Act has the following objectives: (1) Encouraging competition in the economy by prohibiting anti-competition trade practices; (2) Regulating monopolies and concentration of economic power so as to protect consumer welfare; (3) Strengthening the efficiency of production and distribution of goods and services; and (4) Securing the best possible conditions for the freedom of trade and expansion of entrepreneurship base.

Annexure Table 2a: Coverage of Entities	
UNCTAD Model Law	• All enterprises, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property. • Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorise, engage in or aid the commission of restrictive practices prohibited by the law. • Does not apply to the sovereign acts of the State, to acts of local governments, or to acts of persons compelled or supervised by the State or local governments.
World Bank-OECD Model Law	• All areas of commercial economic activity. • Does not derogate the privileges and protection conferred by other laws protecting intellectual property but it does apply to the use of such property in such a manner as to cause the anti-competitive effects prohibited in the competition law.
India 1969	• The 1984 amendment has enlarged the scope of the Act by bringing public sector into the fold of the law incorporating provisions for controlling unfair trade practices, while 1991 amendment reduced its scope by removing from control the situations of aggregate concentration. • There are, of course, a few entities like defence undertakings, which are still outside the ambit of the Act.
2002	• *All types of enterprises and persons.* • *All areas of commercial activity.* • *Provides discretionary powers to the Central Government to exempt from the Act certain (1) class of enterprises for national security and public interest; (2) practices/agreements under the obligation of a treaty/international agreement; and (3) enterprise that performs a sovereign function.*
Pakistan	• All private economic entities.
Sri Lanka	• All types of enterprises. • *The new 2003 law exempts government institutions and government sponsored transactions from the purview of the legislation.*
Kenya	• Consumers, customers, distributors, monopoly, undertakings, retailer, supplier, trade association, and wholesaler are all defined in the interpretation of the Act. • Government agencies, professional associations are generally subject to the same competition laws unless exempted by an Act of Parliament.
South Africa	• The Act applies to all economic activity within, or having effect within the Republic of South Africa, except to (a) collective bargaining within the meaning of the Constitution and the Labour Relations Act, 1995; (b) a collective agreement as defined in the Labour Relations Act; (c) the rules of a professional association to the extent that they are exempted in Schedule; (d) acts subject to or authorised by *public regulation*; or (e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.
Tanzania	• Consumers, customers, distributors, monopoly, undertakings, retailer, supplier, trade association, and wholesaler are all defined in the interpretation of the Act. • Government agencies, professional associations are generally subject to the law unless exempted by an Act of Parliament.
Zambia	• The Act applies to all economic agents in relation to the supply and demand of all goods and services with a few exceptions. • Any category of agreements, decisions and concerted practices whose objective is to prevent, restrict or distort competition in the country or any substantial part of it and declared anti-competitive trade practices are prohibited by the Act.

Annexure Table 2b: Extra-territorial Jurisdiction & Cross Border Abuses	
UNCTAD Model Law	• Not explicitly mentioned.
World Bank-OECD Model Law	• The law is applicable to all matters specified in having substantial effects in the country, including those, that results from acts done outside the country.
India, 1969 *2002*	• An important provision in the MRTP Act is its extra-territorial reach in respect of prohibited trade practices, a part of which is perpetrated within India. This provision had been interpreted as 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. However, in a case the Supreme Court did not concur with the interpretation of the CA that the existing provisions allowed extra-teritorrial jurisdiction. • *Specific and detailed coverage of extra-teritorrial reach of the law has been provided.*
Pakistan	• The law is silent in this regard.
Sri Lanka	• This aspect is not explicitly dealt with in both the 1997 and 2003 laws.
Kenya	• Does not address cross-border abuses and extra-territorial jurisdiction.
South Africa	• The Act applies to all economic activities within, or having effect within the Republic of South Africa. • In this way, it provides for jurisdiction over mergers and for action against firms where the firms' primary domicile is not South Africa. • In practice, the Commission and Tribunal have recognised that it is difficult to oppose large international mergers that have already been approved in the USA or Europe.
Tanzania	• The powers are limited to the national territory and do not have extraterritorial application.
Zambia	• A merger effected abroad by transnational enterprises is held to be a merger completed in Zambia if the enterprises are represented or resident in Zambia. • An entity that enters into agreement as a consequence of provisions in respect to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade is protected by the Act.

Annexure Table 3a: Monopolisation, Dominance & Abuse	
UNCTAD Model Law	A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power: • Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market • Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development • Acts or behaviour considered as abusive • Predatory behaviour. • Discriminatory conditions. • Resale price maintenance including in exported and imported goods. • Restriction on parallel imports of branded goods where the purpose of restrictions is to maintain artificially high prices. • When not for ensuring the achievement of legitimate business purposes, refusals to deal, no-compete restraints, distribution restraints and tying restraints.
World Bank-OECD Model Law	• A firm has a dominant position if it can profitably and materially restrain or reduce competition in a market for a significant period of time. The position of a firm is not dominant unless its share of the relevant market exceeds 35 percent. • It prohibits abuse of dominance including creating obstacles to the entry of competing firms or to the expansion of existing competitors or eliminating competing firms from the market. However, it does not prohibit actions by a firm that creates obstacles to the entry of new firms or reduce the competitiveness of existing firms solely by increasing the efficiency of the firm taking those actions or that pass the benefits of greater efficiency on to the consumers. • In case of no other remedy available the competition authority would be able to reorganise or divide the abusing firm provided that the resulting entities would be economically viable.
India, 1969	• The basis of determining dominance is whether an undertaking has a share of one-fourth or more in the production, supplies, distribution or control of goods or services. • The Act contains a section, not affected by the 1991 amendment, on concentration of economic power, which allows the government to order division of an undertaking or severance of inter-connections between undertakings. • However, there has been no effective investigation by the MRTP Commission all these years to invoke this section.
2002	• *Prohibits abuse of dominant position by any enterprise.* • *Dominant position is a position of strength that enables an enterprise to operate independently of the competitive forces operating in the relevant market and affect the competitors or consumers adversely.* • *All acts listed in the UNCTAD version are covered.*
Pakistan	• The law prohibits creation or maintenance of unreasonable monopoly power in any market. • The law provides a number of possible remedies for situations of unreasonable monopoly power. These include : • the termination of interlocks or mergers by the divestiture of shares or of a position as director or officer which is held by an individual or of control or management of the undertaking.

Annexure Table 3a: Monopolisation, Dominance & Abuse (Contd...)	
Sri Lanka	• Market share alone is not sufficient to declare a monopoly as illegal, • A second test determining whether the monopoly so determined is contrary to the public interest) needs to be satisfied. • Only if the second test is answered in the affirmative will the FTC proceed to the remedy stage. • *No substanial change in approach under the 2003 law.*
Kenya	• The Act enumerates factors that may render unwarranted concentrations of economic power prejudicial to the public interest. These factors include: • Raising unreasonable product or service costs, product prices and company profits, • Reduction or limiting of competition or • Deterioration in the quality of goods and services.
South Africa	• Abuse of dominance depends on identification of a firm as dominant based on its market share being at least 45%, or less where it has market power (with the onus on the Commission to demonstrate this). • A series of acts are prohibited by a firm defined as dominant. These are: ▪ Excessive pricing, price discrimination ▪ Refusing access to an essential facility, and ▪ Exclusionary acts (unless pro-competitive gains can be demonstrated).
Tanzania	• The Act does not prevent or prohibit monopolies or enterprises seeking to be monopolies "*per se*". • It seeks to impose restrictions where monopolies are not in the public interest and are ".. Prejudicial to the public interest." • In this respect the "detrimental effect on the economy must outweigh the efficiency advantages…." of economies of scale. • Restraining the abuse of dominant market position is one of the most important elements of the Act.
Zambia	• Dominant position exists if a firm substantially controls business throughout the country or a substantial part of it. • The position is abused if such a firm is engaged in limiting access to markets by other entities or unduly restrains competition or involved in any other act that could adversely affect trade or the economy in general.

Annexure Table 3b: Restrictive Trade Practices	
UNCTAD Model Law	Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal: • Agreements fixing prices or other terms of sale including in international trade • Collusive tendering • Market or customer allocation • Restraints on production or sale, including by quota • Concerted refusal to purchase or supply • Collective denials of access to an arrangement, or association, which is crucial to competition.
World Bank-OECD Model Law	It prohibits agreements between firms, among other things, that are principally meant for: • Fixing or setting prices, tariffs, discounts, surcharges, or any other charges. • Fixing or setting the quantity of output • Fixing or setting prices at auctions or in any other form of bidding • Dividing the market by any means • Eliminating from market actual or potential sellers or purchasers • Refusing to deal with actual or potential sellers or purchasers An agreement other than those mentioned above is also prohibited if it has or would likely to have as its result a significant limitation of competition.
India, 1969	Under the MRTPA, all agreements relating to RTPs are required to be registered with the DGIR, however, investigation could be launched or action taken only when the practice is prejudicial to public interest. The practices listed in the Act: • Obstruction to the flow of capital or resources • Manipulation of price, delivery conditions, etc. • Restrictions on choice of buyers and sellers • Tie-up Sales/full-line forcing • Exclusive dealing • Collective price-fixation/parallel pricing • Discriminatory dealings • Resale price maintenance • Territorial restrictions/withholding of supply • Restrictions on employing specific method or machinery • Exclusion/boycott/refusal to deal or supply • Predatory pricing
2002	• *Most of the practices listed above are included and four of them are presumed to be anti-competitive.* • *In addition, prohibits practices that limit investment and technical development.*
Pakistan	• Unreasonably restrictive trade practices are practices that unreasonably prevent, restrain or lessen competition. • These practices include agreements between actual or potential competitors to (1) fix prices, (2) divide markets, (3) limit production, distribution, technical development or investment or (4) boycott competitors. • The charge of anti competitive practice alone is not enough; it is essential to prove that such a practice was against public interest. • In this event the FTC has the power to remedy the situation by issuing an order to terminate such practice.
Sri Lanka	• Different types of RTPs are included in the Act. But the practices themselves cannot be the basis for taking any action. The CA has to establish that the practices are against the public interest. • *The new law takes more or less similar approach.*

Annexure Table 3b: Restrictive Trade Practices (Contd...)	
Kenya	• Kenya's competition law refers to restraints to trade as RTPs, which "have the purpose of excluding others from participating in similar or other economic activities". • Specific examples include: (1) refusal to sell good or services, (2) discriminatory pricing, (3) tied purchasing, (4) resale price maintenance, (5) market allocation, (6) collusive tendering and bidding, (7) predatory pricing
South Africa	• A practice is prohibited if it 'has the effect of substantially preventing or lessening competition in a market'. • There are also specific types of horizontal practices that are prohibited per se. These include (1) price fixing, (2) dividing markets or (3) Collusive tendering.
Tanzania	The following categories of agreements are designated as restrictive trade practices: • Agreements that (1) Reduce or eradicate the opportunities of others to take part in the production or distribution of goods or services; (2) Reduce or eliminate the opportunities of paying a fair market price to acquire or purchase the goods or services by arrangement or agreement between manufacturers, whole sellers, retailers or contractors. • Discriminatory agreement or arrangement between sellers or between sellers and buyer to grant rebates to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers not to sell/ buy goods in any particular form or kind to buyers/sellers;
Zambia	• Arrangement or agreement between persons whether as producers, wholesalers or retailers or buyers to limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods, or allocate territories or markets for the disposal of goods. • The Act prohibits: (1) price fixing, (2) predatory behaviour, (3) discriminatory pricing, (4) exclusive dealing, (5) bundling and tying arrangements and resale price maintenance, (6) collusive tendering, (7) market or customer allocation, sales/production, (8) refusal to supply and (9) Collective denials of access to an arrangement.

Annexure Table 3c: Mergers & Acquisitions	
UNCTAD Model Law	• Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature should be notified when: • At least one of the enterprises is established within the country; and • The resultant market share in the country, or any substantial part of it, is likely to create market power in the relevant market, especially where there is high degree of market concentration, barriers to entry or lack of substitutes. • Should be prohibited when: • The proposed transaction substantially increases the ability to exercise market power • The resultant market share will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.
World Bank-OECD Model Law	• Concentration shall be deemed to arise when two or more previously independent firms merge, amalgamate, or combine the whole or a part of their businesses; or one or more natural or legal persons already controlling at least one firm acquire, whether by purchase of securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other firms • Concentrations that will probably lead to a significant limitation of competition are prohibited.
India, 1969 *2002*	• No pre-notification. Powers to unscramble a merger if found to have an adverse effect on competition. • *Prohibits M&As having appreciable adverse effect on competition. If desired by the entities, it also has provisions for review of combinations above a moderately high threshold in assets or turnover. Pre-notification optional.*
Pakistan	• Pre-notification and approval required for all M&As • The law prohibits anti-competitive mergers and acquisitions and interlocks between firms.
Sri Lanka	• As a matter of procedure all mergers and acquisitions resulting in a merger situation need to be notified in writing to the FTC. • After an investigation, if it is found that the proposed merger is not likely to operate against the public interest, the FTC may authorise it. • *Under the 2003 law, notification would not be required, but the CA would have the power to investigate and suggest appropriate action.*
Kenya	• Mergers and takeovers in Kenya must be consummated with the prior approval of the Minister. • The criteria for determining whether mergers and takeovers are or are not prejudicial to the interests of Kenyans include • Increased productivity, competitiveness and employment creation potential and or • Enhancement of capital intensiveness as opposed to labour intensive technology.
South Africa	• The Act provides for compulsory pre-merger notification, subject to the merger being above thresholds set in terms of the assets and/or turnover of the merging entities. • The main criterion in consideration of a merger is whether it will substantially prevent or lessen competition. • If this is the case, then technological, pro-competitive, efficiency or other public interest concerns are taken into account.

Annexure Table 3c: Mergers & Acquisitions	
Tanzania	• Prior approval of the proposed merger transaction by the relevant Minister is required before consummation. • The Commissioner is required to carry out thorough investigation of the situation under review and following this process he makes his recommendation to the relevant Minister. • The Act provides a set of criteria for evaluation and recommendation. The Minister would normally be expected to accept the recommendation but is not obliged to do so. • The Act however, provides the right of appeal from the Minister's decision to the Competition Tribunal.
Zambia	• The law prohibits any merger or take-over without authority from the ZCC if it involves two or more independent enterprises engaged in the manufacture or distribution of substantially similar goods or providing substantially similar services. • If a merger is made in contravention of the Act, such a merger shall not have a legal effect. • However, if a merger involves entities dealing in dissimilar goods and services, an authorisation application is not required.

Annexure Table 3d: Unfair Trade Practices	
UNCTAD Model Law	No specific suggestion.
World Bank-OECD Model Law	• The distribution of false or misleading information that is capable of harming the business interests of another firm. • The distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods. • False or misleading comparison of goods in the process of advertising. • Fraudulent use of another's trademark, firm name, or product labelling or packaging. • Unauthorised receipt, use or dissemination of confidential scientific, technical, production, business, or trade information.
India, 1969 *2002*	This category was introduced by the 1984 amendment to cover activities such as misleading advertising as well as sales promotion schemes like lotteries and contests. Under the Indian law, unfair trade practices fall under the following categories: • 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 *Provisions relating to unfair trade practices removed from the new law. The Consumer Protection Act, 1986 which also covers UTPs, will now have exclusive jurisdiction.*
Pakistan	Not included
Sri Lanka	Not explicitly included in the Act. Presumably covered under section 14 of the law covering anti-competitive practices. *The new law has taken a unified approach to dealing with competition and consumer protection issues. Thus, UTPs are an integral part of the law.*
Kenya	Not included
South Africa	Not included
Tanzania	In addition to other unfair practices, the Fair Trade Practices Act prohibits: • Misrepresentations, • Misleading advertising and conduct, • Bait and switch, • Harassment and coercion. It imposes the obligation to: • Label prices in shops to increase transparency and hence competition, • The need for statement and conformity with safety standards and warning requirements, • Labelling product information, product recall requirements, imposition of standards as to quality fitness for purpose, basic warranties and indemnities and the like to prevent unfair trade practices.
Zambia	The Act provides that a person shall not: • Withhold or destroy goods or render unserviceable or destroy means of production with the aim of increasing price • Exclude liability of defective goods • In connection with the supply of goods or services, make any warranty limited to a particular area • Falsely represent about the style, model, origin, age, sponsorship, approval, performance etc. of product or service. • Misleading conduct about the nature, price, availability etc. • Supply any product that may cause injury or does not conform to standards.

Annexure Table 4a: Nature of the Enforcement Agency	
UNCTAD Model Law	• No specific suggestion
World Bank- OECD Model Law	• An independent and autonomous and accountable competition agency • Specialized court to hear competition cases • Competition court could adopt procedures and rules of evidence specially suited to competition cases • Composition of the court could be tailored to the requirements of competition cases.
India, 1969	• Under the MRTP Act, a Commission has been established (Chair- High/Supreme Court judge) • Members with capacity of dealing with problems in economics, law, commerce, accountancy, industry, public affairs or administration • The Commission is assisted by the Director General of Investigation and Registration (DG) for carrying out investigations • Decisions of the Commission can be appealed against in the Supreme Court
2002	• *Competition Commission of India (Chairperson and 2-10 members - to be appointed by the Central government)* • *Special knowledge and specific experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or any other matter which, in the opinion of the central government, be useful to the Commission* • *Decisions of the Commission can be appealed against in the Supreme Court*
Pakistan	• The law constitutes a statutory authority, the Monopoly Control Authority to administer the law.
Sri Lanka	• The Fair Trading Commission (FTC), a body corporate with seven members appointed by the Ministry of Internal and International Commerce and Food (MIICF). • The members or the commissioners of the FTC are required to have extensive experience in the fields of Industry, Law, Trade, Commerce or Administration. • Under the new law two bodies will be established: Consumer Protection Authority to investigate practices/cases and Consumer Protection Council to adjudicate competition cases.
Kenya	• Provides for the appointment of the Monopolies and Prices Commissioner
South Africa	• Competition Commission with primary responsibility for determining and investigating cases under the Act, and • A Competition Tribunal to rule on most cases. • A Competition Appeal Court was also established, as a specialised division of the High Court of South Africa.
Tanzania	• The institutional framework of the Fair Trade Practices Act consists of two levels of implementation, • The Fair Trade Practices Commissioner and • The Appeals Tribunal

Zambia	• The competition law in Zambia is enforced through the Zambia Competition Commission (ZCC).
	• The ZCC consists of 13 commissioners and two officials, the Executive Director and the Secretary who constitute the Board.
	  ▪ One commissioner each represents the Ministries of Finance and Economic Development, and Commerce, Trade and Industry.
	  ▪ One representative from a statutory Government Department, the Zambia Bureau of Standards.
	  ▪ The rest of the commissioners (10) represent Non Governmental Organisations (NGOs).

Annexure Table 4b: Status, Power and the Functions of the Enforcement Agency	
UNCTAD Model Law	• Making inquiries and investigations, including as a result of receipt of complaints • Taking the necessary decisions, including imposition of sanctions, or recommending the same to a responsible minister • Undertaking studies, publishing reports and providing information to the public • Making and issuing regulations • Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy • Promoting exchange of information with other states
World Bank-OECD Model Law	• Independent from any government department and receives its budget from and reports directly to the (President of_______) /legislature of the country • The competition office shall have the right to make submissions to state administrative authorities engaged in designing or administering legislation or regulation that could affect competition in any market. When hearings are held with regard to the adoption or administrations of such laws and regulations, the competition office shall have the right to intervene in such proceedings and also the right to publish such submissions and interventions.
India, 1969 *2002*	• MRTPC is a quasi-judicial body • The MRTP Act provides for fines and criminal penalties for violation of its provisions. • It arms the designated agency, the Director-General of Investigation and Registration, with extensive investigative powers (including suo moto powers), and provides for a quasi-judicial MRTP Commission with investigative, prosecutorial and adjudicative powers. • *Competition Commission of India (CCI) will be established with investigative, prosecutorial and adjudicative powers. It will also have advocacy functions.* • *The Act provides for fines and criminal penalties for violation of its provisions.* • *CCI will be assisted by the Director-General, with extensive investigative powers. However, the DG will not have any suo moto power.*
Pakistan	• The authority has recommendatory, investigative and legislative powers. • For proceeding on an enquiry, the authority has the power vested in a civil court under the Code of Civil Procedure, 1908, in respect of certain matters. The authority's main functions are: • To register undertakings, individuals and agreements; • To conduct enquiries into the general economic conditions of the country, with particular reference to the concentration of economic power and the existence or growth of monopoly power and restrictive trade practices; • To conduct enquiries in individual cases, to give advice to persons or undertakings seeking such advice to determine whether or not a certain course of action was consistent with the provisions of the law.
Sri Lanka	• The FTC has the power, either on its own motion or on a complaint made by another, to investigate: ▪ A monopoly situation, ▪ Merger situation or ▪ The prevalence of any anti-competitive practices. • FTC has the authority to review the price of any article and hold an inquiry on the price of the commodity. • *Under the 2003 law, Consumer Protection Authority (CPA) will have investigative and prosecutorial power, while the Consumer Protection Council will have adjudicatory powers. CPA will however have the adjudicatory power in consumer protection-related cases.*

Annexure Table 4b: Status, Power and the Functions of the Enforcement Agency (Contd...)	
Kenya	• The role of the Commission is to receive complaints and investigate them while also initiating investigations and making recommendations to the Minister on what action to be taken on possible breaches of the Act. • The Restrictive Trade Practices Tribunal established under Section 64 of the Act operates independently as the Court of first appeal and falls administratively under the Ministry of Finance and Planning.
South Africa	• The institutions are independent of Government. • The President appoints the members of the Competition Tribunal on the recommendation of the Minister of Trade and Industry. • The Competition Commissioner is appointed by the Minister (normally following a process of advertisement).
Tanzania	• The current Fair Trade Practices Commission is not independent of the hierarchical structure of the parent ministry. • Trade Practices Tribunal has been established as the appellate body • The Commissioner for Trade Practices is responsible to monitor, investigate, evaluate, prosecute, issue orders, impose penalties or otherwise resolve alleged contravention. • The Tribunal has jurisdiction to hear and determine any complaint relating to trade practice, to inquire into any matter referred to it and to issue orders. • Appeals from decisions of the Tribunal are limited to judicial review.
Zambia	• The ZCC is empowered to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair-trading in the country. • Ministerial over-ride.

Annexure Table 4c: Sanctions and Relief	
UNCTAD Model Law	The imposition of sanction for: • Violations of the law • Failure to comply with decisions or orders of the CA or of the appropriate judicial authority • Failure to supply information or documents required within the time limits specified • Furnishing false or misleading information Sanctions could include: • Fines (in proportion to gravity of the offence or illicit gain) • Imprisonment (major violations) • Interim orders or injunctions • Cease and desist, public disclosure or apology etc. • Divestiture or rescission (M&As or restrictive contract) • Restitution to injured consumers • Finding of prima facie evidence of liability in private actions
World Bank-OECD Model Law	• The competition office (or appropriate court or tribunal) may issue orders prohibiting firms from carrying on the anti-competitive or unfair practices, and if necessary, requiring such firms to take other specified actions to eliminate the harmful effects of such practices and to ensure against recurrence of such practices. • Fines for cartel or restrictive agreements, serious or repeated abuse of dominance, unfair competition and to ensure M&A notification compliance. • Interim injunctions whenever necessary • Parties may apply for advance ruling, which would be binding on the competition office. Advance ruling is for a limited period but can be renewed or modified or revoked under certain conditions.
India, 1969 *2002*	• direction to discontinue a trade practice and not to repeat the same; • cease and desist order; • temporary injunction, restraining an errant undertaking from continuing an alleged trade practice; • compensation for loss suffered or injury sustained on account of RTP, UTP or MTP; • recommendation to the Central government, division of undertakings or severance of interconnection between undertakings, if their working is prejudicial to public interest or has led or is leading to MTP or RTP; and • To direct parties to issue corrective advertisement and to modify agreements which contain restrictive clauses. *The proposed Competition Commission of India will have the power to:* • *direct the parties to discontinue and not to re-enter into any such agreement that has been declared void under the law* • *direct the parties to discontinue such practices which in its view may be construed as the abuse of dominant position;* • *impose such penalty on each of the parties, which shall not be more than ten per cent of the average of the turnover for the last three preceding financial years;* • *award specified compensation to the parties;* • *direct that specified modifications be made to the agreements; and* • *recommend to the Central Government for the division of an undertaking enjoying dominant position.*
Pakistan	• The remedies provided in the law for restrictive trade practices include orders requiring firms to discontinue such practices and affirmative actions to restore competition. • Penalties are imposed if a person or an undertaking fails to carry out the directions of the authority under the law or has wilfully failed to register a registrable situation or has furnished false information to the authority. • However, the law guides the authority not to impose any penalties without giving full opportunity to the parties concerned to establish that the practices followed by them, or the ownership pattern of their firms, do not lead to infringement of the law.

Annexure Table 4c: Sanctions and Relief (Contd...)	
Sri Lanka	• Refusal to authorize a proposed merger where it is likely to operate against the public interest; • Where the monopoly, merger or anti-competitive practice is against the public interest: ▪ The division of any business by sale of any part of the undertaking or asset including transfer or vesting of property, rights, liabilities or obligations ▪ The appointment of a person to conduct such activities on terms specified by the FTC; ▪ Termination of any anti-competitive practice and ▪ Take any other action that the FTC may consider necessary. • Penalties enforceable under the Act are extensive, but these broad powers are curtailed by the inability of the FTC to make interim, or provisional orders which bind a party to the decisions of the FTC, for alleged violations of Sections 12-14 of the FTCA. • A person who contravenes or fails to comply with any provision of the FTCA or regulation made thereunder, or an order made under Section 15 (with regard to mergers, monopolies and anti-competitive practices shall be liable to a fine up to LKR.5000 or imprisonment up to one year or both. • In addition, the court can order such person to refrain from carrying on the business in respect of which the order was made. • *The 2003 law provides for similar sanctions and relief, with higher levels of fines.*
Kenya	• The Orders issued by the Minister require offenders to desist from the annulled practices and in very special circumstances, compensate the competitor for losses suffered by assisting in certain specified ways. • The compensation is not intended to be necessarily monetary. • Generally, the level of fines levied under the Act is extremely low.
South Africa	• The Competition Tribunal may make an appropriate order in relation to a prohibited practice including. • Injuncting any prohibited practice. • Ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice. • Imposing an administrative penalty. • Ordering divestiture, declaring conduct of a firm to be prohibited, declaring the whole or any part of an agreement to be void etc. • The Tribunal may grant an interim relief if it is reasonable and just to do so.
Tanzania	• Sanctions/Penalties – In respect of certain RBPs the Act provides for the imposition via the courts, further compensatory relief in favour of the plaintiff and punishment of the defendant by means of fines and/or imprisonment. • Certain breach situations are treated as criminal offences; these appear to be the serious RBPs such as predatory trade practices and collusive tendering. Individuals can have jail sentences and fines imposed upon them by the courts on application. • An interim order may be made by the Commissioner as a result of the defendant's response and may issues a stop order on the defendant if the findings of the investigation are indicative of RBP and negotiate and further extract a consent agreement which is published in the Gazette.
Zambia	Any person who contravenes or fails to comply with any provision of the Act or any regulations under the Act, for which no penalty is provided: • Omits or refuses to furnish any information or document when required by the commission or knowingly furnishes any false information to the commission. • Shall be guilty of an offence and shall be liable upon conviction to fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years or both.

Annexure-4

SURVEY QUESTIONNAIRE

Comparative Study of Competition Regimes of Seven Developing Countries of the Commonwealth

General guidance

If there are multiple agencies for enforcement of the Competition Law, then information will be collected from all such agencies, which are exclusively dealing with competition issues.

For collecting objective information the investigator may try to depend on official records rather than somebody's personal memory as far as possible. Attach documents/sheets where required.

For collecting subjective information the investigator should try to interview all the relevant persons (depending on the question) at the CA or at least a good representative sample. In some questions, it has been indicated by (*Multiple Respondents*), but the investigator may ask various persons for other questions also using his/her own judgement.

Data sets should be *for a minimum of 5 years wherever possible*, unless otherwise indicated. If collected data differs from suggested time scale due to unavoidable reasons, please note it explicitly

All nominal data should be reported in national currencies and the relevant exchange rate should be mentioned in parentheses.

In case the data is not available in the format as indicated in the questionnaire, please try to process the data available and put it in the desired format.

Please note that the multiple visits may be required to get the questionnaire filled up.

Use additional sheets wherever required.

I. Infrastructure & Facilities

1. Total office space (in sq. mt.)

2. Telephone/fax/internet/e-mail
   (Specify the number of telephone/fax lines/e mail/internet connections)

3. Computers/printers
   (Describe in numbers)

4. Photocopier (specify in numbers)

5. Space for library (in sq. mt.)

6. Library staff

7. No. of volumes

8. No. of periodicals subscribed

9. No. of newspapers subscribed (domestic/foreign)

10. Arrangement for news scanning/clipping

11. Maintenance of data base of industries:
    a. Domestic
    b. Foreign/global

12. Do you have access to data-base(s) maintained by foreign CAs or other agencies?

II. Staff Composition

13. How is the CA structured? (get an organisation chart)

14. What is the staffing strength (sanctioned & existing)?

	1996		1997		1998		1999		2000	
	Sanc.	Exist.	Sanc.	Exist.	Sanc.	Exist.	Sanc.	Exist.	Sanc.	Exist.
Member (full-time)										
Member (part-time)										
Professionals										
Support Staff										
Total										
NB: The Chairperson of the commission is included among the members as part-time or full-time as the case may be.										

15. What are the professional/technical background of members and other staff present currently?

	Economics/ Commerce/Finance	Law	General Admn.	MIS/Systems	Others
Member (full-time)					
Member (part-time)					
Professionals					
Support Staff					
Total					

16. How many Members (Governing Committee), serving currently, (both full time and part time) have been associated with the following kinds of profession/organisation either in the past or at present? (*Please note that one member may be associated with more than one category*)

	Full time Members	**Part time Members**
Government		
Judiciary		
Business		
Consumer groups		
Other civil society organisations		
Any other		

17. How are the different categories of staff distributed over different functional areas at present?

	M&As	**Anti-competitive practices**	**Unfair trade practices**	**Research & investigation**	**Finance & administration**	**Other**	**Total**
Economics							
Law							
General Admin.							
MIS/System							
Other							
Total							
NB: If one person does more than one task please define it in decimal percentage. E.g. a staff spends half time on M&As and half on RTPs, then please indicate 0.5 under each.							

18. What are the procedures for appointment of members and other staff? (*Describe in brief and attach documents if any*)

19. What are the procedures for dismissal of members and other staff? (*Describe in brief and attach documents if any*)

20. Staff turnover (entry and exit of staff over the last five years)

	1996		**1997**		**1998**		**1999**		**2000**	
	Entry	**Exist.**	**Entry**	**Exist.**	**Entry**	**Exist.**	**Entry**	**Exist.**	**Entry**	**Exist.**
Member (full-time)										
Member (part-time)										
Professionals										
Support Staff										
Total										

21. Are salaries and benefits of the staff comparable to the private sector and/or government departments or autonomous agencies *(Multiple respondents)*? (*If CA has fixed salary structure, get a copy, if available*)

    a. Full-time Members
    b. Part-time Members
    c. Professionals
    d. Support staff

22. (a) Is it difficult to recruit the required staff with appropriate qualifications/skills *(Multiple respondents)*?

    a. Full-time Members
    b. Part-time Members
    c. Professionals
    d. Support staff

(b) If yes, then what are the reasons (hurdles) *(Multiple respondents)*?

    a. Full-time Members
    b. Part-time Members
    c. Professionals
    d. Support staff

23. Is there any regular training programme for the staff at every level (*collect training manual/report if available*) *(Multiple respondents)*?

24. Where and how are the training programmes organised *(Multiple respondents)*?

25. Are the staff members sent out for training *(Multiple respondents)*?

26. What is the system of evaluation of staff performance (*collect manual/report if available*) *(Multiple respondents)*?

III. Budget and costs

27. What is the annual budget of the CA (Both nominal and as a proportion of GDP and Federal Govt. Budget)?

Year	**Budget of CA**	**Budget of Federal Govt.**	**(2) as % of (3)**	**GDP**	**(2) as % of (5)**
(1)	(2)	(3)	(4)	(5)	(6)
1996					
1997					
1998					
1999					
2000					

28. How is the budget estimate arrived at?

29. Who approves the budget?

30. Who manages the budget?

31. If there is a shortfall in the budget, how is it met?

32. If there is an excess or saving, how is it accounted for?

33. What are the sources of funding for the budget?

	1996	1997	1998	1999	2000
Govt. grant					
Proceeds from fines					
Filing/processing fees					
Total					
NB: The blank rows may be utilised by the investigator to provide information on any other source of funding, if applicable.					

34. The Pattern of Expenditure

	1996	1997	1998	1999	2000
Salary & Honorarium etc.					
Establishment Cost					
Books/periodicals etc.					
Research & Investigation					
Printing/Publications					
Meeting/Conferences					
Total					
NB: The blank rows may be utilised by the investigator to provide information on expenditure on other heads if available and felt useful. The investigators can also collect copies of Balance Sheet & Operating Statement if available.					

35. Is the expenditure audited?

(a) by a govt. agency ☐ (b) by a private audit body ☐

IV. Extent of autonomy

36. What is the status of the CA?

(a) Adjudicative body ☐ (b) Quasi-Adjudicative body ☐

(c) Administrative body ☐ (d) Other (specify) ☐

37. To whom is the CA accountable? (*multiple answers possible, please tick all the relevant options and describe in one line*)

a) a) Parliament ☐ ....

b) Specific legislation ☐ ....

c) Independent body ☐ ....

d) Government department ☐ ....

38. What powers and functions does the authority have? *(Multiple answers possible, please tick all the relevant options and describe in brief, e.g. power to search premises during investigation, fines, divestment orders*)

a) Investigative ☐ ....
....
....

b) Prosecutorial ☐ ....
....
....

c) Adjudicative ☐ ....
....
....

d) Advocacy
i) general ☐ ....
ii) statutory ☐ ....

39. Does CA keep a track of the trade agreements made in the country?

40. Is it mandatory for the parties to get the trade agreements registered with the CA?

41. Whether the adjudicative, prosecutorial and investigative functions are mixed up or clearly defined?

42. If clearly defined, what is the hierarchy and the extent of autonomy enjoyed by the different wings?

43. Are the decisions of the CA:
a) Binding ☐
b) A recommendation, subject to confirmation ☐

If subject to confirmation, then:
a) Who makes the final decision? ....
b) How often the recommendations have been accepted/rejected? (Approximate percentage of cases accepted) ....

V. Cases, Exceptions and Exemptions

44. Who can lodge a complaint? (*Multiple answers possible, please tick all the relevant options)*

a) Private individuals ☐
b) Private companies ☐
c) Public sector/parastatal co. ☐
d) Consumer org./NGOs ☐
e) Govt. departments/organisations ☐
f) On its own (CA) ☐
g) Any other, please specify ☐

45. Does CA make a distinction between information and complaint?

46. If yes, what is the difference between information and complaint?

47. Is investigation carried out for:
    a) All complaints?
    b) All information?

48. If not, what are the criteria, in general, that leads to an investigation vis-à-vis:

a) a complaint?

b) an information?

(*E.g. identity of complaint, importance of breach of competition law, types of practices, amount involved, sectors concerned, availability of resources etc.*)

49. Have any complaints/information been rejected outright without any investigation being carried out? If yes, give examples.

a) Complaint

b) Information

50. What are the criteria for rejecting complaints/information outright, if any?
    a) Complaint

    b) information

51. Is there any provision under which a complaint/information is directly sent for adjudication without any investigation? Give examples.

52. If yes, what are the criteria for invoking such provision?
   a) complaint

   b) information

53. Number of complaints/cases

Year	1991-1995	1996	1997	1998	1999	2000
Number of Complaints lodged						
Number of complaints rejected before investigation						
Number of complaints taken for investigation						
Number of complaints rejected after investigation						
Number of complaints taken for adjudication:						
a. After investigation						
b. Without investigation						
Total (a+b)						

54. Different types of complaints/cases during 1996-2000

	M&As competitive practices	**Anti-trade practices**	**Unfair & investigation**	**Other/ Miscellaneous**	**Total**
Number of Complaints lodged					
Number of complaints rejected before investigation					
Number of complaints taken for investigation					
Number of complaints rejected after investigation					
Number of complaints taken for adjudication:					
a. After investigation					
b. Without investigation					
Total (a+b)					

55. Who brought forward these complaints (1996-2000)?

	CA	Pvt. Co.	Public/ parastatal	Consumer Org./NGO	Govt.	Pvt. Indiv
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

56. How the complaints have been dealt with for different categories of complainants (1996-2000)?

	CA	Pvt. Co.	Public Parastatal	Consumer Org./NGO	Govt.	Pvt. India
Number of Complaints lodged						
Number of complaints rejected before investigation						
Number of complaints taken for investigations						
Number of complaints rejected after investigation						
Number of complaints taken for adjudication:						
a. After investigation						
b. Without investigation						
Total (a+b)						

57. Time taken for completion of investigation (**from the date of lodging complaint**) for different types of cases (1996-2000)

Completed by(Months): →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

58. Status of pending (**from the date of lodging complaint)** investigation (present number) for different types of cases

Months Pending For: →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

59. Time taken for completion of adjudication (**from the date of lodging complaint**) for different types of cases (1996-2000)

Completed by(Months): →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

60. Time taken for completion of adjudication (**from the date of reference to tribunal/adjudicative wing**) for different types of cases (1996-2000)

Completed by(Months): →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

61. Status of pending (**from the date of lodging complaint)** adjudication (present number) for different types of cases

Months Pending For: →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

62. Status of pending (**from the date of reference to tribunal/adjudicative wing)** adjudication (present number) for different types of cases

Months Pending For: →	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
Merger & Acquisition						
Anti-competitive practices						
Unfair Trade Practices						
Others/Miscellaneous						
Total						

63. Time taken for completion of investigation (**from the date of lodging complaint)** for different types of complainants (1996-2000)

Completed by (Months): → **Type of Complainant** ↓	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

64. Status of pending investigation (present number) for different types of complainants **(from the date of lodging complaint)**

Months Pending for: → **Type of Complainant** ↓	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

65. Time taken for completion of adjudication (**from the date of lodging complaint**) for different types of complainants (1996-2000)

Completed by (Months): → **Type of Complainant ↓**	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

66. Time taken for completion of adjudication (**from the date of reference to the tribunal/adjudicative wing)** for different types of complainants (1996-2000)

Completed by (Months): → **Type of Complainant ↓**	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

67. Status of pending judgement (present number) for different types of complainants **(from the date of lodging complaint)**

Months Pending for: → **Type of Complainant ↓**	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

68. Status of pending judgement (present number) for different types of complainants **(from the date of reference to tribunal/adjudicative wing)**

Months Pending for: → **Type of Complainant ↓**	**Less than 1**	**1-3**	**3-6**	**6-12**	**12-24**	**More than 24**
CA						
Pvt. Com						
Public/parastat						
Consumer Org./NGO						
Govt.						
Pvt. India						
Total						

69. What are the grounds of appeal and/or criteria on basis of which appeal can be made?

70. What are the procedures for appeal to higher authority/court?

71. Is there a possibility of review/revision of CA's order?

72. If yes, what are the grounds/criteria for such review or revision?

73. What are the procedures of review/revision?

74. How is non-compliance with CA's orders dealt with?

75. What are the obstacles that the CA faces in carrying out its functions *(Multiple respondents)*?

(a) Investigative

(b) Prosecutorial

(c) Adjudicative

(d) Advocacy

76. Is enough information available to deal with the cases/situation *(Multiple respondents)*?

a) Usually ☐
c) Sometimes ☐
e) Rarely ☐
b) Often ☐
d) Occasionally ☐
f) Never ☐

77. What are the sources of information used in dealing with cases?

78. Does the CA conduct market/economic survey/study/research etc.?

79. If yes, is it done on a regular basis or occasionally?

80. Does the CA have its own capacity or engages outside consultant (or both) for the above exercise?

81. Have any cases come up which have cross border implications? If yes, give details (*number of cases over the last five years*):

	M&As	**Anti-competitive practices**	**Unfair trade practices**	**Others Miscellaneous**	**Total**
Neighbouring countries					
OECD countries					
Others					
Total					

82. Is there any bilateral/regional co-operation arrangement, permanent or *ad hoc*?

83. If no, whether there is any need for such an arrangement?

84. If yes, whether the arrangement is formal or informal?

85. What language is used in the proceedings under the CA?

86. What are the areas/sectors that do not fall under the jurisdiction of CA?

87. What are the areas/sectors dealt by separate regulatory agencies (RAs)?

88. Do the RAs operate at federal and/or provincial levels?

89. Is there any co-ordination between CA & RAs?

90. If yes, then what kind of arrangement is there?

91. Are the areas of jurisdiction clearly demarcated between CA and RAs?

92. If not, then what are the areas of overlap?

93. How are decisions taken in overlapping areas?

94. (a) If any, which are the sectors/areas not covered by CA or RAs?

(b) What have been the reasons behind such exemption?

(c) Is there any other mechanism to deal with these sectors/areas?

95. Does the CA do price control/surveillance also?

VI. Outreach & Advocacy

96. Is there an annual report? (*get copies if available*)

a) Main contents of the report

b) Availability of the report (No. of copies printed etc.)

97. Does the authority issue periodical press releases or organise press conferences?

a) How many and when conferences have been organised (last one year)?

b) How many press releases have been issued (last one year)?

98. Has the authority released any education material for public or businesses? (*get copies if available*)

99. Does the CA organise any Conference/Seminar/Workshop on competition issues?

100. Does the CA involve consumer or other civil society groups in its advocacy/outreach programme? If yes, please give details.

101. Does the CA publish the decisions and cases that it takes forward? If so, at what stage?

102. General Suggestions/comments of the respondent(s):

103. General Suggestions/comments of the investigator:

NOTE: The investigator may collect any other information if he/she feels important. However, attempt should be made to get more of statistical information. Please also note that filling up of many of the columns will require substantial calculations, which can be done at home/own office but the relevant raw data/information may be collected at the CA's office.

Annexure-5

What the Stakeholders Think on Competition Issues: Reflections from NRG Meetings in 7-Up Countries

Introduction

One of the important components of the 7-Up project was the formation of a National Reference Group (NRG) in each of the project countries. NRGs were formed to deliberate on the inputs prepared in each country and create a base that would be used for launching advocacy for a healthy competition culture. The NRGs comprised of representatives of the following categories of organisations/persons:

- Consumer organisations and other civil society organisations with demonstrated interest in economic issues
- Research institutions, academia, experts (economists and lawyers)
- Chambers of Commerce
- Competition & Regulatory Authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or Parliamentarians
- Media

NRGs in all the project countries met several times during the first and second phase of the project. The deliberations in these meetings were not limited to the draft country reports. The participants discussed all the issues that they thought important to instill a healthy competition culture in the economy. A brief synthesis of what came out of discussions in these meetings is presented below:

The Competition Law

Out of the seven countries, in three, the competition laws were relatively new, two countries were in the process of adopting a new law while two others were considering adopting a new law. In the countries with a new law (Tanzania, Zambia and South Africa), the NRG meetings deliberated mainly on the issues of enforcement and the interface between the competition authority and the regulatory authorities. In the countries that were in the process of adopting a new law (India[225] and Sri Lanka), the NRG attempted to evaluate the existing competition regime and on the basis of that came out with some suggestions regarding the proposed competition law to make it more effective. In the other two countries (Kenya and Pakistan[226]) the NRG members were almost unanimous in feeling the need for a new competition law or at least a thorough review of the existing law in the changed economic scenario both at home and outside.

This shows that there is an overwhelming consensus regarding the need for an appropriate competition law in all countries. However, the general feel that has been reflected in these meetings is that the effectiveness of the law depends on the following factors:

- The way the law is drafted;
- The way the law is enforced;
- The degree of autonomy enjoyed by the competition authority including the way it is funded;
- Continuous monitoring of market situations; and
- Policy environment in the country

225 The Indian Parliament passed the new competiton law in 2002.

226 Since then Pakistan has drafted a new competition law which is being discussed within the government.

There was a strong recommendation from many of the NRGs that the competition law should explicitly deal with the abuse of intellectual property rights (IPRs). The national competition authority is the ideal body to weigh up the anti-competitive effects of a licensing agreement. Even TRIPs has a provision to allow the national governments to deal with this.

In most of the 7-Up countries, there is no comprehensive consumer protection law. The NRGs in these countries strongly felt the need for such a law to complement the competition law. Code of conduct for advertising was another issue that came up in discussions. Advertising is important, as it is channel through which business provides information to the consumers. Thus misleading information can cause serious harm to consumer interest.

Objectives, Scope & Public Policy Context

There was some agreement over the basic objectives that a competition law or policy would try to achieve. These are:

- Consumer welfare
- Economic efficiency
- Checking undue concentration

However, individual countries, although recognise these objectives in their competition law, they usually combine these with other objectives to make them in line with the overall policy and goals of the government.

That being the case, the NRGs naturally were interested in discussing the issue of objectives of the competition law. The issue was a major point of discussion in South Africa. There was a feeling among a section of NRG members that the objective of promoting employment and advancing socio-economic welfare for all South Africans may be in conflict with other main objectives, namely, to promote efficiency, adaptability and development of the economy and to provide consumers with competitive prices and product choices.

The issue also came for discussion in the Indian NRG meeting. Some also expressed concern that the new competition law may be used to harass private business.

Protection of domestic industries was another concern that repeatedly came in the discussions in these meetings. In all these countries NRGs were of the opinion that the competition law should be able to address their development concerns and protect their national champions from unfair competition from the mighty Trans-National Corporations (TNCs). Particularly because even the largest enterprises in these nations are quite small compared to the TNCs.

This concern was more pronounced in the African countries. Particularly in Zambia, it raised a stormy debate where Chilanga Cement was taken over by Lafarge. The Zambia Competition Commission allowed it with the condition that Lafarge will not close down the factory. However, there was a general feeling that the primary motive behind the takeover was to close the factory and eventually serve the Zambian market from outside. They feared, in due course, Lafarge will find some excuse to close down the factory.

In South Africa also this was a major point of discussion and section of the NRG viewed that the competition regime cannot ignore the racial dimension of the economic structure in the country. Hence taking employment out of the equation could be potentially dangerous. It was suggested that even while looking at mergers, the competition authority should look at the potential job loss side by side with the impact on the consumers.

Enforcement Mechanisms

This was another area of concern for all the NRG members. In the majority of 7-Up countries, the existing competition authority does not enjoy adequate autonomy, which everybody agreed is a must for an effective competition regime. A competition authority essentially arbitrates between business, the consumers and the government, especially when government retains a significant stake in providing many goods and services to consumers.

This is particularly true in the cases of Kenya and Tanzania. In both of them, the competition authorities come under a government ministry. Another concern that the groups expressed in these countries was that competition authorities there are a "one person commission" and not a multi-member body. It was pointed out that in a situation where one person is vested with massive authority there is a tendency to misuse the power.

The issue came up for discussion even in Pakistan where people felt that the Monopoly Control Authority needs more functional and financial autonomy. But this will need substantial changes in the existing competition law or new legislation. In India the existing competition authority enjoys substantial autonomy and even the proposed new Act envisages an autonomous competition authority. However, concerns were expressed, that certain provisions in the proposed Act have the potential of curbing its autonomy.

One peculiar but important issue that was raised in Indian NRG was related to the age of the Members and Chairperson in the proposed commission. The participants felt that it was too high especially in case of Chairperson who can serve till 70 years of age. The past experience in India has shown that these bodies get filled up by retired bureaucrats and judges and as a result the commission becomes over-bureaucratised.

One important aspect of enforcement is the kind of punishment given to the offenders under the competition law. Penalties imposed on the offenders are relatively low. In some cases the authorities have power only to issue cease and desist orders. In such a situation, the imposed penalties cannot work as a deterrent. A business can indulge in anti-competitive practices under the assumption that it will stop such activities once it comes under the scrutiny of the competition authority until then it is well and good.

In the area of enforcement it was observed that the most difficult issue to handle was cartel cases. There were number of complaints on cartels, especially in India. However, they could not be proved both due to definitional problems as well as lack of clinching evidence even though prima facie there were sufficient grounds to suspect existence of cartels. In this regard it was suggested that high fines with criminal liability combined with whistleblower protection and leniency programmes could help.

It was also suggested in one of the NRG meetings that the competition authority should monitor the prices on a regular basis so that it is in a better position to detect anti-competitive practices and take appropriate measures.

They were equally concerned about the effectiveness of domestic competition law to take care of anti-competitive practices in the globalising environment. However, they stopped short of recommending a multilateral competition framework as they were not very sure of the implications of such a framework.

Interface with Regulatory Bodies

A concern was expressed in several of the NRG meetings that the competition policy is made complicated by the fact that there are various sectoral regulators who also manage competition separately from the competition authorities. In Kenya it was suggested that the competition authority should take the ultimate responsibility for competition in a broad range of economic activities and to achieve this, it is absolutely necessary to create a firm working relationship between the competition authority and all sectoral regulatory authorities.

The issue was discussed in Indian NRG meeting as well. It was observed that even in the new competition Bill, no attempt was made to sort the overlapping area of functioning of other utility regulators and the competition authority. The house was of the opinion that the competition authority should take precedence over the regulators when some competition issue is involved. In fact the competition authority should act as the apex coordinating agency and the watchdog to ensure fair competition in all sectors of the economy.

Exceptions & Exemptions

This is an important area that the participants discussed at length in some the NRG meetings especially where state enterprises are exempted from the competition law provisions. For example in Kenya, the law explicitly precludes action or investigation against state owned enterprises and professional bodies that are

governed by separate statutes. The members felt that this seriously harms consumer interest since state owned enterprises are major cause of lack of competition in many sectors in Kenya. The participants also opined that many of the service/utility providers still under state control should be privatised with proper regulatory mechanisms put in place.

In Sri Lanka the state enterprises are excluded from the purview of the proposed Bill which is potentially dangerous and the NRG was unanimous in saying that they must not be excluded.

Cross-border Issues

The cross-border competition issues came up for discussion mainly in the NRG meetings held during the second phase of the project. One important suggestion that came up in the African countries is that there was a need to take a regional approach to competition policy enforcement. This is because companies operating in the region were framing their strategies keeping a regional perspective in view as the region was integrating fast. It was also pointed out, one competition authority, viz., Zambia Competition Commission has already taken a regional approach in handling a number of cases.

In the context of recent wave of mergers and acquisitions with international spillovers, it was felt by the NRG members in all the countries that many of them caused competition problems in the project countries. However, the project countries, wherever they did, evaluated only those cases where at least one of them were based there or had a subsidiary. Except in South Africa and Zambia, the NRGs felt that handling (or non-handling) of such cases was not up to the desired mark. None of the competition authorities took any action on an M&A activity that took outside their territory and none of the involved parties had local presence, even if it could raise competition concerns. Doubts were expressed if they could do anything in such cases.

Similarly, the NRG members expressed concerns that in none of the countries any action was taken on the international cartels, many of who have been quite damaging to developing countries as recent research has shown. Inaction in this regard was noted with regret particularly in India where, some preliminary information about the vitamins cartel was collected by CUTS and handed over to the competition authorities for necessary action. However, they came up with the conclusion that no case could be made. The NRG meetings in India expressed doubt if any serious attempt was made to investigate the case.

The most interesting and also probably the most controversial cross-border case that was handled by the competition authorities in the project countries is the case of ANSAC export cartel of soda ash that operates from the US. The India competition authority put an injunction on imports from ANSAC as a cartel, which was upheld by the Supreme Court of India in its interim order.

The case became controversial as the USTR got involve into it which reportedly threatened that up to US$1bn of India's duty-free imports under the Generalised System of Preferences into the US could be jeopardised over the embargo on US soda ash. Government of India reduced the import duty on soda ash allegedly due to US pressure. However, in the final verdict the Supreme Court set aside the injunction saying that MRTPC did not have any extra-territorial jurisdiction.

The same ANSAC case was handled in South Africa as well. However, according to the South African Competition Commissioner Menzi Similane the termination of ANSAC's cartel activities in South Africa has been agreed upon in principle.

It was more or less agreed by the NRG members in the project countries that even if it was not so easy to effectively deal with cross-border cases, countries should better have adequate legal provisions, i.e., extra-territorial jurisdiction. In this regard it was pointed out in an Indian NRG meeting that the new Competition Bill already included explicit provision for extra-territorial jurisdiction.

Advocacy

The NRGs also felt that it was essential to have good advocacy and a strong support base to enforce the laws effectively. At the same time they recognised the need for a strong consumer movement in ensuring that. They also recognised that the consumer movement in these countries (with the exception of India) was rather weak, and needs to be strengthened. In fact in South Africa one of the participants in the meeting was quite confident in saying, "I don't think there is any major disaster about the Competition Policy and Law. What needs to be done is to increase the ability of the consumer to participate better and more effectively."

For example, in one of the countries, the competition authority handled some 68 cases over 1998-2000, but not a single complaint was received from any consumer organisation or such other NGOs. In the African region, in some countries, consumer organisations simply do not exist. In some others where they exist are highly constrained by lack of funds and manpower with adequate expertise. In some of the African countries the NRGs felt that in view of the weak consumer movement in the region, cooperation between sub-Saharan Africa and South Asia (particularly India where consumer movement is relatively strong) should be promoted in the area of consumer movement.

It was also emphasised in one of the meetings that there is a need for social audit of all state regulatory functions. The best agencies to do such work will be the consumer organisations. This will require adequate capacity building of the consumer organisations.

Annexure-6

Brief Proceedings of Phase-I Review Meeting

Brief Proceedings

The Phase I culmination meeting of the project was held on 7-8th September in Goa, India. The meeting involved:

- sharing phase-I country report of each project country;
- discussion on the compiled and comparative analysis of all these reports;
- lowlights and highlights of the Phase-I;
- brainstorm on shaping the Phase-II; and
- workshop on understanding cross-border competition concerns

International experts from various organisations such as the UNCTAD, WTO, OECD, European Commission, World Bank, Consumers International, International Development Research Centre also participated as resource persons, besides partners and researchers, to take stock of the progress of the project and share their experiences about the subject.

Following are the brief highlights of the meeting.

The Meeting presented the results of the first year of the Project which examined and compared the domestic competition regimes of India, Pakistan, Sri Lanka, South Africa, Kenya, Zambia and Tanzania. The study focused on how the differences in economic structure and policies of these countries affect their competition policy requirements. The project revealed the importance of a vibrant consumer movement for the meaningful enforcement of competition law. However, most of the project countries lack consumer awareness of these issues.

"What emerged as a very crucial recommendation, is that the consumer movements in developing countries must be strengthened if competition policy is to be implemented effectively" noted Mr Pradeep S Mehta, secretary general of CUTS. "Consumer awareness of competition issues is vital to create a vibrant national competition culture that will stimulate equitable growth".

The Meeting launched the second phase of the project which will examine cross-border competition concerns such as international cartels and the effects of cross-border mergers and acquisitions in developing country markets. The second phase is expected to generate valuable insight into developing country interests in relation to multilateral discussions on these issues.

"India would be the first country to support a multilateral competition arrangement that made the UNCTAD Competition Rules and Principles a binding agreement,"said Dr V S Seshadri, Joint Secretary, Ministry of Commerce, at one of the sessions on the international scenario on competition policy. However, he opposed the EU's thrust for multilateral competition policy at the WTO, saying it would not be in the interest of developing countries. The discussion of new issues at the WTO could only come after progress was made on implementation issues. He said the WTO Working Group on Trade and Competition Policy was overstepping its mandate by discussing multilateral competition policy rather than establishing whether there is a concrete relationship between trade and competition policy. Before negotiating multilateral competition policy at the WTO, he said that developing countries needed to have enough experience with competition policy at the domestic level to understand its pros and cons.

Frederic Jenny, Chairman of the WTO Working Group on Trade & Competition Policy, said that the Project would facilitate much needed communication between competition authorities and trade officials on competition abuses which affect trade and vice versa. Jenny emphasised the unique role of CUTS in bridging the gap between competition officials and other stakeholders.

Emphasising the main objective of UNCTAD of a more efficient and more equitable world economy through a competition-rules-based globalisation process, Philippe Brusick, Head of Competition and Consumer Policy Branch, UNCTAD, commended the achievements and future role of the project in strengthening the competition culture in all the project countries.

The Meeting launched the second phase of the project which will examine cross-border competition concerns such as international cartels and the effects of mega-mergers in developing country markets. The second phase is expected to generate valuable insight into developing country interests in relation to multilateral discussions on these issues.

This opportunity was also utilised to have two closed door fringe meetings in the context of the 7-Up Project. One was a meeting of the partners, researchers and the consultants on the 6th September. It was a full day meeting, one half of which was devoted to take stock of the problems faced during the implementation of the first phase of the Project and the possible solutions in order to avoid them in the second phase.

The second half of the meeting on 6th September focused on Phase II of the Project. Further, to have a closer look at Phase II, another meeting of the same group (partners, researchers and advisers) was organised after lunch on 8th September. On the basis of these meetings, an action plan for Phase II was drafted and has been sent to the consultants for their comments. It would be sent to partners and researchers as soon as it is finalised.

A meeting with the Project Advisory Committee was organised in the evening of the 8th September. The purpose of this meeting was to discuss the substantial issues that had emerged during the Phase-I culmination meeting and to clear the way forward. It was a brief meeting and some important issues were discussed and resolved.

Annexure-7

Brief Proceedings of Phase-II Review Meeting

The phase-II review meeting of the 7-Up Project was organised on 5-6th July 2002 at Geneva. The purpose of this meeting was to deliberate upon the work-in-progress synthesis report of the the project and discuss the case studies done during the second phase and plan the way ahead. The following is a brief report of the proceedings of the meeting:

The programme started with a brief inaugural session that was addressed by Pradeep S Mehta and Christian Rogg, welcoming the participants. This was followed by a presentation of key findings of the phase-I of the project as contained in the work-in-progress synthesis report. The presentation highlighted the legal and implementation issues for all project countries and gave a comparative analysis.

Among the main points that came out during the presentation and subsequent discussion was that there was a vast range of objectives of the competition law in 'transition' countries, depending in part on the date of writing of law. Competition law is particularly useful for developing countries to regulate inflows of Foreign Direct Investment, as is demonstrated by some of the case studies.

Law is not all that matters, its proper implementation is equally important. The agencies can fail to use the powers and the governments are seen to pressurise nominally independent authorities. The constraints identified in this regard were the lack of funds, absence of adequate information, unavailability of expertise, etc. The budget constraints are very crucial. However, it is not just the budget or the size of the market over which it has jurisdiction that makes a competition authority effective.

It was emphasised that investigative and adjudicatory functions of the competition authorities should be separated and there should be transparency as well. There is an emerging need for regional agencies, especially, where regional markets are emerging and also in face of link with anti-dumping. But regional competition policy cannot be a substitute for contingent protection without losing sight of its aim.

Concern was also expressed about the inclusion of public interest objectives and it was suggested that these were better achieved through other policies and laws as their inclusion in the competition law could lead to confusion and inconsistency. There is a vigourous debate on the question of whether RTPs should be classified as per se illegal or should be considered on a case-by-case basis. For a resource-constrained CA it would be more sensible to collect data when cases arise and not to make notification of mergers mandatory. Merging firms want certainty so that they have an incentive to notify voluntarily if the merger would give rise to competition concerns.

The involvement of the existing institutions, universities, etc for furthering competition law and capacity building was emphasised. Staff training is very important and exchange of officials was suggested. Media can also play a significant role in promoting a healthy competition culture.

The next substantive sessions of the meeting discussed the cross-border competition issues as came out during the second phase of the project. The country researchers or their representatives made presentations on the basis of comparative analysis of similar case studies.

The merger of Coca Cola and Cadbury Schweppes was studies in India and Zambia. In Zambia, the issues of concern were distribution network, price fixing and exclusive territories. India does not have a merger review provision. Neither the merger raised any competition concern there as Cadbury Schweppes had an

insignificant market share prior to the merger. Looking at the way the case was handled in Zambia, it could be concluded that since these were mere small local branches of TNCs, CAs can only argue the case for effects on domestic competition and analysis of the likely post merger situation is difficult. The undertakings were negotiated and agreed upon by the merged entity but enforcing compliance of agreed undertakings is a problem.

In the context of the discussions on case studies on the merger of Glaxo Wellcome and Smithkline Beecham, it was observed that pharmaceuticals sector has been very active in M&As. What is needed is specific merger provisions in the competition law itself and an impartial, powerful and pro-active competition authority to deal with such cases. There should be cooperation between the CAs of different countries so that they could learn from each other. Interaction with civil society organisations is also equally important.

The issue of international cartel was also discussed at the meeting. It was noted with regret that none of the 7-Up countries dealt with any of the international cartels. The case of India was even more unfortunate where CUTS collected some preliminary information regarding the vitamins cartel and handed over the same to the competition authorities. However, the CAs came out with the conclusion that no case could be made. Further details were not available and there was sufficient doubt if the CAs took the issue seriously. It was pointed out in this regard that Brazil, the only developing country to initiate action against the vitamins cartel, provides a useful example of how cooperation can work. US Compeition Authorities were not able to supply confidential business information but they gave the Brazilian Authority assistance on how to go about investigating the case.

The regional dimension of competition policy was also discussed at the meeting. The issue has assumed critical significance in southern and eastern Africa now as the region has made sufficient progress in regional economic integration. The firms in the region are now making business strategies keeping in view the regional markets and hence lot of ati-competitive practices are taking place at the regional level. In the absence of a regional competition policy and a competition law in most of its neighbouring countries, the Zambian competition authority, has considered the impact on regional market in a number of cases.

India and Pakistan are Federal states and competition is regulated at federal levels, what is the scope for competition regulation at local state levels? In COMESA and SADC, competition is regulated at national levels – where this exists – but how will regional level regulation be achieved and enforced? Will it be at supra-state level or through an international agency? These were some of the issues that were discussed in the meeting.

Both India and South Africa have investigated the case of the American Natural Soda Ash Corporation (ANSAC), an export cartel that operates worldwide. Case studies were done in both countries. In both countries, the cartel argued in its defence that it was benefiting consumers by supplying at lower prices. In South Africa, the issue of jurisdiction has been quite problematic, with ANSAC arguing that the South African CA does not have jurisdiction over it. The same issue came up in India as well.

While in South Africa the case was headed for a settlement with ANSAC agreeing, in principle, to the termination of its cartel activities in South Africa, in India the case was still hanging with the Supreme Court. However, the case became controversial as the USTR got involved into it, which reportedly threatened that up to US$1bn of India's duty-free imports under the Generalised System of Preferences into the US could be jeopardised over the embargo on US soda ash. Government of India reduced the import duty on soda ash allegedly due to US pressure. The case illustrates the overlap between trade and competition issues.

The discussion on international cooperation revolved raised the questions: (i) Has there been any cooperation? If yes, what kind of cooperation - informal cooperation at the level of the CA or formalized cooperation agreement between two governments or regional cooperation arrangement? If not, would cooperation have been useful .

It was noted that except for South Africa, cooperation on competition has almost been absent. There are a number of reasons for these countries not going for any kind of cooperation or are unwilling to approach other CAs for assistance. There is a general sense of apathy and disinterest in pursuing cases (low political priority, salary scales lower than that of other public sector entities etc.). There is, somewhat legitimate fear of awkward policy transfer and there are political economy issues like public perception of external interference in domestic issues (eg. privatization program).

Cooperation arrangements can be very beneficial for developing countries particularly when they lack resources and experience to deal with complex anti-competitive practices of MNCs. It would provide them with an opportunity to learn and exchange information. This might also reduce jurisdictional disputes and give an opportunity to create “islands of good governance”.

State of Discussions at the WTO Working Group on Interaction between Trade and Competition Policy was also briefly discussed at the meeting. A brief presentation on the proposed possible elements of a multilateral framework on competition policy was made. It was emphasised that some developing countries are concerned that competition policy would restrict their ability to use industrial policy and support small businesses according to their national development strategy. However, competition policy and law can be structured in such a way to ensure that these objectives are not compromised. It was also pointed out that any committee set up under the WTO for Competition should not be limited to narrow monitoring of the agreement but should be a forum for international debate on competition and its interface with trade and regulatory policies and laws.

The last session of the meeting was on the way ahead to promote healthy competition culture, especially in developing countries. Discussions were mainly based on the experiences gathered during the implementation of the project and the suggestion made by different stakeholders in the project countries and other experts during several meetings organised at different levels.

But before going for a discussion on the way ahead some concluding observations on the previous sessions were made:

- Success in implementing competition law in developing countries is a matter of credibility as well as resources.
- Political will is crucial to success. In several cases, it is seen that the CA may have the will to try and act even when the government is blocking it.
- Personality of CA head may be important
- Case studies show that it is possible to impose conditions on mergers of MNCs.
- Alleged predation did arise in the case studies: allegations of unfairly cheap imports is a key concern in some countries, like Zambia.
- There is very little cooperation as yet, but where it was requested, it paid off. However, there might be a need for an asymmetric agreement so that developing country Authorities would not have to respond to information requests in the same way.

On the basis of the presentations made under this session, certain common needs were identified for all countries of the project. The important ones are:

- Cooperation between regulatory authorities and CA: a regulatory forum exists in South Africa but it might be more on paper than in practice.
- Necessity of a strong consumer movement. It is reasonably strong in India and growing Pakistan but not so in other countries.
- The laws need to be translated in simple language and people need to be educated
- Zambia Competition Commission has the best structure. Though all stakeholders are not fully educated, this is the only CA which has maximum representation

For a small country, there is not necessarily a need for a separate consumer protection law but the competition law can be further improved upon to include consumer protection provisions.

CUTS Centre for Competition, Investment & Economic Regulation

Mission

To be a centre of excellence on regulatory issues

Goals

Develop healthy competition regimes in developing countries through research and advocacy.

Strengthen capacity of state and non-state actors on relevant issues, particularly in developing countries.

Foster an enabling environment for the economy and promote effective regulatory frameworks.

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The 7-Up Project is remarkable for a number of reasons. It is centered on the difficult, and still little known, issue of competition law and competition law enforcement in developing countries. It uses comparisons between the national experiences of seven developing countries which have adopted, with varying degrees of success, a competition law instrument and explores the reasons for their successes and failures. It addresses the issues of competition law enforcement in the wider context of the political economy of economic development in each country. Finally, it also addresses cross border issues.

The wealth of observations gathered in each country for this project, and the use of this information for the purpose of making international comparisons make this project unique and one of the most useful contributions to the evaluation of the usefulness and the limits of competition law for economic development.

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Price: US$50, Rs. 500
+20% Packing/Postage

ISBN 81-87222-74-3

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