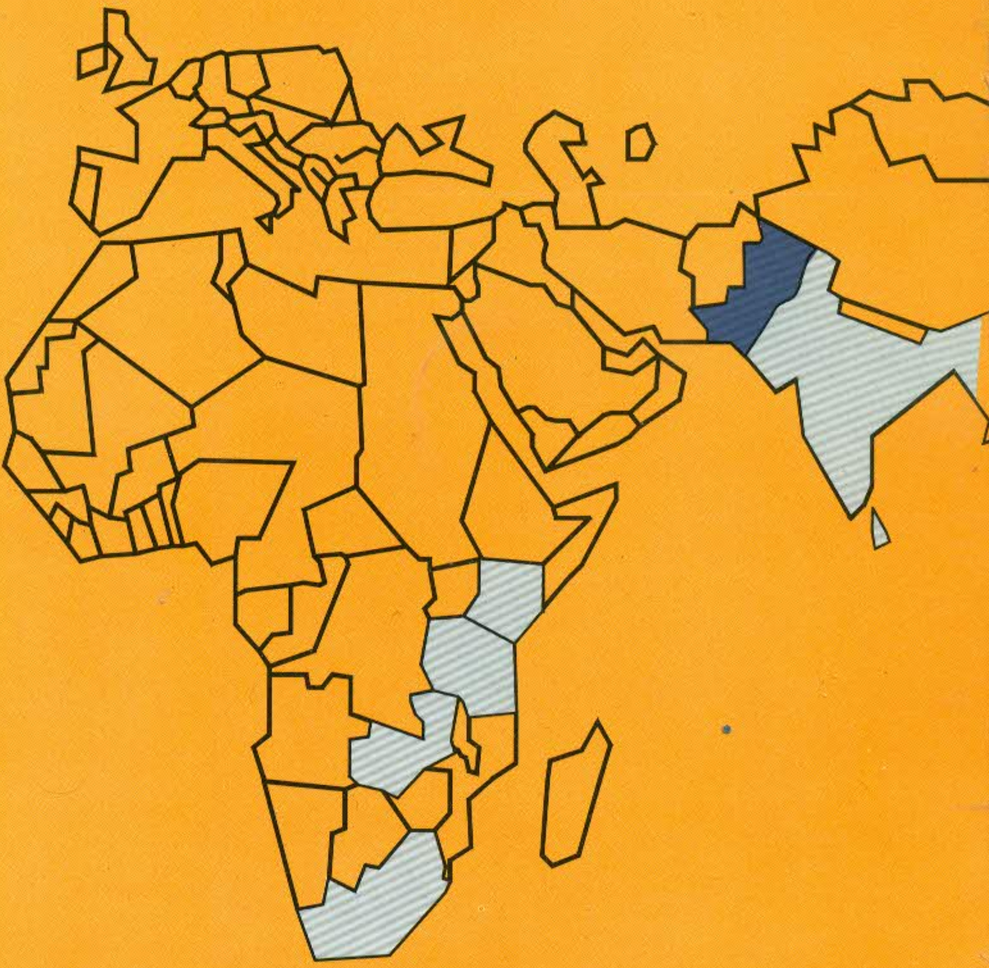
COMPETITION REGIME IN PAKISTAN

– WAITING FOR A SHAKE-UP



Sustainable Development Policy Institute

TheNetwork for Consumer Protection

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LIST OF ABBREVIATIONS	
APCMA	All Pakistan Cement Manufacturers Association
CLA	Corporate Law Authority
CPA	Consumer Protection Act
CPC	Consumer Protection Council
CPI	Consumer Price Index
CRCP	Consumer Rights Commission of Pakistan
CUTS	Consumer Unity & Trust Society
FBS	Federal Bureau of Statistics
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GNP	Gross National Product
HRD	Human Resource Development
IDEVCO	Integrated Development Consultants
IMF	International Monetary Fund
IPP	Independent Power Producers
IPR	Intellectual Property Rights
Km	Kilometre
KSE	Karachi Stock Exchange
MCA	Monopoly Control Authority
MRTPO	Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance
NEPRA	National Electric Power Regulatory Authority
NWFP	North West Frontier Province
OGRA	Oil and Gas Regulatory Authority
PIA	Pakistan International Airlines
PTA	Pakistan Telecommunication Authority
PTCL	Pakistan Telecommunication Company Limited
PVGMA	Pakistan Vanaspati Ghee Manufacturers Association
Rs.	Pakistan Rupees
SME	Small and Medium Enterprise
SMEDA	Small and Medium Enterprises Development Authority
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organisation
US$	United States Dollars
WAPDA	Water and Power Development Authority
WTO	World Trade Organisation

FOREWORD

The rules relating to competition are one aspect of a broad range of policies to increase competition in an economy. If the law is framed and enforced correctly, frictions with other policies will be minimised, and the result will be enhanced efficiency and transparency in the economy, as well as a broader range of choice for consumers. In a market economy, competition is necessary to ensure that the pursuit of profit by private enterprises is compatible with the public interest. Competition policy and law not only provides a well functioning market for existing companies, it also removes market entry barriers to newcomers.

In an increasingly globalised world, with falling barriers to international trade, the competition regime needs to be strengthened. It is perhaps the only effective tool left for governments to deal with the restrictive trade practices of trans-national corporations and provide a level playing field for smaller domestic firms. This requires a dynamic approach, adjusting to changes in the global economy. The work of the WTO Working Group on Competition Policy and the introduction of elements of competition into bilateral and regional trading agreements reflect this need. Pakistan's law, the Monopolies and Restrictive Trade Practices (control and prevention) Ordinance, 1970, is much the same as when it was enacted. Since the international economic environment has changed dramatically, we have drafted a new competition law. In this context, this report, by the Sustainable Development Policy Institute (SDPI) is very important.

The report describes the role assigned to the Monopoly Control Authority, and its performance, constraints, achievements etc. It points out some weaknesses in the law and calls for remedies. Moreover, it calls for the MCA to systematically publicise its work. The new draft law represents an effort to shift from a monopolies law to a competition law and is a step in the right direction. We are striving to get the message across that competition law protects both businesses and consumers, in terms of increased market transparency, adaptability and efficiency. This would help to bring about voluntary compliance and promote a competition culture. In this sense, competition advocacy and information provision need more attention.

As far as co-operation at the regional level is concerned, it is interesting to note that the Monopoly Control Authority has floated the proposal that competition policy should be an item on the SAARC trade secretaries/ ministers' meeting agenda. In 1999 the MCA also organised two regional workshops entitled 'Harmonization of Competition Law and Policy as an Integral Part of Economic Cooperation'. A follow up workshop was organised in 2001 on 'Competition Law and Policy: Recent Initiatives'. The aim was to consider the restrictive trade practices of TNCs in the age of globalisation, to enhance the capacity of developing countries to combat them, to tackle with the issues of mergers and acquisitions and to bridge the gap between developing and developed country policies.

Effective competition law and policy would lead to a fairer world for all – not only consumers, but businesses and governments too.

Saleem Asghar Mian
Chairman,
Monopoly Control Authority,
Pakistan

PREFACE

Developing countries share a common concern about the lack of a comprehensive legal framework to deal with anti-competitive practices of firms and governments in order to achieve developmental goals. Ensuring fair internal competition is key to the healthy functioning of a market economy. Though a number of developing countries have some form of competition policy, for a variety of reasons, including implementation, the law has not been very effective in dealing with anti-competitive practices. Also, the globalisation process fostered by trade and investment liberalisation adds complex dimensions to the whole issue of competition policy. For example, how does one ensure a level playing field when a multinational firm is larger than the combined output of all the firms in the industry?

In the light of this need, the Consumer Unity & Trust Society (CUTS) has launched a project to produce a comparative study of the competition regimes of seven developing countries of the Commonwealth. This study, entitled the '7-Up Project', aims to identify measures to help developing countries to develop and strengthen their competition laws and tackle cross-border abuses of a regional or an international nature. The Pakistan country report is a part of the output of the 7-Up Project. The report looks at various aspects of the competition culture and regulatory processes in Pakistan. It also explores the interface of various economic policies with competition. This report will be used as an advocacy document that will raise the profile of competition policy at the national level.

Finally, I would like to acknowledge the efforts put in by the country researcher, Sajid Kazmi, in preparing this report amidst several constraints.

Shahrukh Rafi Khan
Executive Director,
Sustainable Development Policy Institute,
Pakistan

CHAPTER-I

Introduction

In the wake of a speedy process of globalisation and liberalisation, developing country governments strongly feel the need to have comprehensive legal framework where this is non-existent, or to modify existing legislation to deal with anti-competitive practices of domestic and foreign firms. Competition policy is a broad policy area including both competition legislation and other policies such as trade liberalisation, privatisation and investment policies that foster a culture of competition in an economy. The concentration of economic power in a few hands during the 1960s necessitated the introduction of competition legislation.

This report introduces the existing competition legislation and competition policy issues in Pakistan. The report is set out as follows. Chapter one gives background information in terms of the location, size, population, GDP and literacy of Pakistan. This chapter also discusses the economic performance of the country over the years, deals with the nature of markets and competition in Pakistan, and provides a brief overview of the available literature on industrial concentration, establishing a case for a well-defined competition policy. Chapter three deals with the social and economic policies of the government that affect competition. Chapter four gives a detailed account of competition law in Pakistan. Chapter five explains the institutional and procedural aspects of the competition regime in Pakistan. Chapter six discusses the capabilities of the competition authority in terms of infrastructure. Chapter seven analyses the existing competition law and gives recommendations on how to improve upon the existing legislation and the capacity of the competition authority. Chapter eight concludes the discussion.

1.1 General Background

Pakistan won its independence on August 14th 1947. It is Asia's seventh largest country, occupying the northwestern portion of South Asia. It covers an area of 307,374 square miles (796,095 square km). The country extends for more than 990 miles (1,600 km) from south to north and 550 miles (880 km at its widest span) from west to east. It shares borders with Afghanistan in the north, China in northeast, India in the east and southeast, and Iran in the west. It has a 1,064 km long coastline. The religion of 95 percent of the population is Islam; the remaining 5 percent is composed of Christians, Hindus and others. Its population is 137.51 million, of which 71.35 million (51.89 percent) are male and 66.12 million (48.08 percent) are female.[1]

The population growth rate is 2.8 percent. The adult literacy rate is 45 percent. The rate for males is 59 percent and for females 30 percent.[2] The total labour force is 40.40 million, of which 28.01 million or 69.3 percent is in rural areas and 12.39 million or 30.7 percent is in urban areas. The total employed labour force is estimated at 38.02 million, of which 26.62 million or 70 percent is in rural areas and 11.4 million or 30 percent is in urban areas. Open unemployment is 6.1 percent. The problem of unemployment is greater in urban areas as compared to rural areas.

The unemployment rate in urban areas is 7.9 percent as compared to rural areas where it is 4.98 percent.[3] The rate of inflation as measured by the overall CPI was 5.7 percent in 1999 and 3.6 percent in 2000.[4] Per capita GDP is US$446 and real GDP registered a growth rate of 2.6 percent in 2000, as against 3.9 percent in 1999.[5] This fall is attributed to unprecedented drought conditions. Agriculture, with a 26.3 percent share in real GDP, is the largest among the commodity producing sectors, followed by manufacturing with 15.1 percent.[6] The major exports are cotton, rice, textiles, leather goods, carpets, sports goods, surgical instruments and fruits. The major imports are petroleum, machinery and transport equipment, edible oil and iron ore.

1.2 The Nature of the Market and Competition in Pakistan

The market in Pakistan, as elsewhere, is a mixture of monopolistic competition and oligopoly. Although perfect competition exists under ideal conditions such as in local agriculture where farmers are price takers, generally one finds a mixture of competition and monopoly – monopolistic competition. The public sector includes civil and armed force enterprises, which are heavily subsidised. State subsidies to such organisations render the private sector non-competitive and hamper their growth. The lack of capital is a real entry barrier, especially in the case of small and medium enterprises. This is particularly the case due to public sector financial institution lending being politically influenced.

Although perfect competition exists under ideal conditions such as in local agriculture where farmers are price takers, generally one finds a mixture of competition and monopoly – monopolistic competition.

1.2.1 Literature Review on Economic Concentration in Pakistan

The history of the growth of Pakistan's corporate sector makes competition policy interventions essential. During the 1960s, the industrial sector was thriving and achieved a very high growth rate. But this high growth rate was accompanied by another menace – concentration of wealth in the hands of 22 big business houses, as pointed out by Haq (1974). According to him, these twenty-two families owned and controlled 66 percent of the industrial assets and 87 percent of the banking and insurance assets in the country. This culminated in the nationalisation of industry during the Zulfiqar Ali Bhutto regime in 1972. Papanek (1967) has also shown that 60 industrial groups controlled 61 percent of all private industrial assets and 44 percent of all private industrial sales in Pakistan during the 1960s. According to him, out of 3000 firms in Pakistan in 1959, only 24 controlled almost 50 percent of private industrial assets.

He further found out that seven industrial families controlled 25 percent of assets while 15 families owned about 75 percent of shares in banks and insurance companies. White (1974) found that in 1968, 43 families owned 49 percent of all the enlisted companies on the Karachi Stock Exchange (KSE), controlling 53 percent of the total assets. Amjad (1977) also concluded that there existed a clear positive relationship between profitability in the manufacturing sector and concentration in the production of manufactured goods. White (1974) estimated the average four-firm concentration ratio at 70 percent for 82 Pakistani industries. This high rate of concentration resulted in windfall profits for the industrialists in Pakistan as confirmed by White (1974), Sharwani (1976) and Amjad (1977). This situation resulted from policy-makers responding to special interests in the hope of promoting industrialisation. Although more recent research is needed, the absence of structural changes suggests that there is a need for a well-defined competition policy.

1.2.2 The Need for a Competition Regime

According to economic theory, monopoly, duopoly, oligopoly and other forms of imperfect competition are against consumer interests. This is because these market structures lead to higher prices and lower production than a more competitive market environment. Monopoly pricing is undesirable because it compels consumers to consume less even though they are willing to pay enough to cover the extra production cost that their consumption entails. This is referred to as a dead-weight loss. Thus, dead-weight loss or inefficiency of monopoly provides the scope for policy intervention. Perfect competition is another extreme, characterised by, among other things, no producer control over prices. Although perfect competition is nearly non-existent in the real world situation, it serves as a benchmark to evaluate to what extent the other forms of market deviate from full efficiency under ideal conditions. Monopolistic competition and oligopoly fall in between these two extremes.

Monopoly pricing is undesirable because it compels consumers to consume less even though they are willing to pay enough to cover the extra production cost that their consumption entails.

Governments have a mandate to regulate market conditions and give relief to consumers. On the macro level, such interventions on the part of governments are important to promote both healthy growth of the economy and social justice. The US government passed the famous Sherman Anti-trust Act in 1890, which prohibited monopolies. The presidency of Theodore Roosevelt is famous for anti-trust legislation, and he is known in American History as 'Teddy, the Trust Buster'.

The Economic and Social Council of the United Nations recognises that there are strong linkages between consumer protection and social and economic development. The UN General Assembly adopted the Guidelines for consumer protection by consensus in 1985, after extensive discussions and negotiations. These guidelines recognise that consumers often face imbalances in economic terms because of uneven bargaining power. Along with other objectives, it emphasises that it will assist countries in curbing abusive business practices by all enterprises at the national and international levels, which adversely affect consumers, and encourage the development of market conditions that provide consumers with greater *choice at lower prices.*

CHAPTER-II

The Economic Performance of the Country

Large fiscal and current account deficits are major sources of macroeconomic imbalances in Pakistan's economy. They have also contributed to a huge build up of public and external deficit, putting pressure on resources. Pakistan has failed to enhance revenues, and expenditure requirements have grown and further widened the resource gap. A decline in foreign exchange inflows and stagnating exports have exacerbated the macroeconomic imbalances. Such trends cannot be sustained in the long-run and their persistence requires long adjustment periods. Any delay in taking corrective measures will lead to the further accumulation of debt.

Large fiscal and current account deficits are major sources of macroeconomic imbalances in Pakistan's economy.

Shares of various components of GDP have changed over time. The share of the commodity producing sector has changed from 61 percent in 1969/70 to 149.7 percent in 2000/01 and that of the services sector has grown from 38.4 percent to 50.3 percent in the corresponding period. The share of the agriculture sector within the commodity producing sector has changed from 38.4 percent to 24.7 percent, whereas the share of the manufacturing sector has remained stagnant in this period.[7]

Public sector industries played a vital role in building the industrial base of the country, and during the 1970s, the public sector provided impetus to large scale and capital goods producing industries. Following the global wave of privatisation, Pakistan also started to reduce the direct role of government in managing industries, and the overall share of the public sector in large-scale industry declined considerably over the years. Presently, the Ministry of Industry and Production controls nine holding corporations and 40 industrial units compared with 101 units in 1991.[8] There has also been a partial divestiture of Pakistan International Airlines (PIA) and Pakistan Telecommunication Company (PTCL).

Pakistan's performance in attracting foreign direct investment is poor. During 1994-95, FDI was as high as US$1,532 million and it dropped to US$104 million during July-Mar, 2000-01. During this period, foreign portfolio investments were negative.[9] Several factors were responsible for Pakistan's poor performance in attracting foreign private investment. These include saturation in investment in the power sector, the East Asian financial crisis, and poor handling of Independent Power Producers (IPP) in the past.[10] Economic sanctions in May 1998 further aggravated the problem, and foreign investors were reluctant to come to Pakistan.

Public sector industries played a vital role in building the industrial base of the country, and during the 1970s, the public sector provided impetus to large scale and capital goods producing industries.

The freezing of foreign currency accounts has also played an important role in keeping foreign investors, as well as expatriate Pakistani investors away. Now that the IPP issue has been settled, and economic sanctions are loosing their bite, the country is witnessing increased interest from foreign investors. During the later half of the 1990s, the power sector dominated in attracting FDI but now, with the saturation of this sector, the sectoral composition of FDI is changing and increased interest of foreign investors has been witnessed in the communications, oil and gas and information technology sectors.

Pakistan has suffered from a deficit in the balance of payments throughout its history, with the exception of a couple of years when there was a surplus. There is a high commodity and market concentration in its exports.

Pakistan has suffered from a deficit in the balance of payments throughout its history, with the exception of a couple of years when there was a surplus. There is a high commodity and market concentration in its exports. The composition of exports has changed over time; the share of primary commodities has gone down from 39.9 percent in the 1970s to 13 percent in the 1990s and, if taken together, semi-manufactured and manufactured goods accounted for 86 percent of total exports during this period. Imports too are highly concentrated in machinery, petroleum and petroleum products, chemicals, transport equipment, edible oil, fertiliser, iron and steel, and tea. The import bill of oil has increased from 19 percent to 31 percent of total imports in the last five years.[11]

CHAPTER-III

Interface of Economic Policies with Competition

Various economic and social policies of government affect competition, of which trade policy, industrial policy and privatisation policy are the most important. These policies, if used judiciously alongside a competition legislation can promote a culture of competition in an economy. Some countries do not have competition legislation and only have a well thought out competition policy. Malaysia is a case in point. The next few paragraphs will discuss the interface of these policies with the level of competition.

3.1 Trade Policy

Pakistan has liberalised its trade regime, both on its own and as part of various trade agreements, and has reduced its negative list.

Pakistan's trade pattern has seen periodical variations over the fifty years of its economic history. It started as a primary goods exporter and now exports manufactured and semi-manufactured goods. As mentioned in the last chapter, one trend, which is observed throughout its history, is that it was and is a net importer of goods and services, with the exception of only two years.[12] It maintained an overvalued exchange rate for a long period of time. Certain other policies, whilst causing serious distortions in the economy, have contributed to promoting industrialisation and exports.[13]

Another important feature of trade policy was high tariff walls, which are being lowered continuously under IMF sponsored structural adjustment programmes and WTO compulsions. Pakistan has thus liberalised its trade regime, both on its own and as part of various trade agreements, and has reduced its negative list (of banned items). Its exports are also characterised by high commodity concentration. For example, on average, cotton-based exports account for 60 percent of major exports.[14] The objective of trade policy in 2000-01 was to gradually convert the economy from a relatively closed, inward looking economy with high tariff walls, to an open and outward looking economy with low tariffs.

The high cost of capital makes Pakistani exports uncompetitive in the world market, and the new trade policy has introduced an export credit guarantee framework with equity participation from the International Finance Corporation and the Asian Development Bank.

The new trade policy has set an export target of US$10 billion for the current year. The strategy to achieve this target is to diversify exports, export higher value added goods, export non-traditional goods, and provide special incentives for the textiles sector. The high cost of capital makes Pakistani exports uncompetitive in the world market, and the new trade policy has introduced an export credit guarantee framework with equity participation from the International Finance Corporation and the Asian Development Bank. Globalisation has necessitated liberalisation and economic managers have recommended lesser controls on the economy to enable market forces to promote efficiency and create competition. Recently, Pakistan has enacted anti-dumping laws to protect domestic firms from unfair import competition. The success of both competition legislation and anti-dumping laws has yet to be evaluated.

Hoekman and Mavroidis (1995) point out that the underlying aims of trade policy revolve around raising revenues via tariffs, protection of specific industries, shifting the terms of trade of the country, attaining foreign or security policy goals, and restricting consumption of certain goods. Pakistan's trade policy has also had a special tilt towards the textiles sector, as this is regarded as the backbone of the economy. A specially appointed committee of the government approved Textile Vision 2005 to promote textiles as an important industry. The justification for such efforts is no doubt based on its size and its contribution to foreign exchange earnings, but such measures could be a potential threat to competition.

Analysing the various trade regimes, Zaidi (1990) emphasises the need to remove structural weaknesses. As a policy prescription, he recommends export bias in our policy making, and suggests that besides supply-side incentives, quality control, provision of infrastructure like communications and energy, and direct incentives to exporters are vital for export led growth.

The privatisation programme started in 1990 as a policy prescription of the structural adjustment programme.

3.2 Privatisation Policy

The privatisation programme started in 1990 as a policy prescription of the structural adjustment programme. Buzz-words like down-sizing, right-sizing and debt-retirement through the proceeds of privatisation surrounded the project. Initially, a Disinvestments and Deregulation Committee was established, which was dissolved in 1991 and replaced by the present day Privatisation Commission. The mission statement of the Privatisation Commission (1999: p1) includes the fostering of competition, along with other objectives. Thus it states:

> *The Privatisation Commission is committed to facilitate the Government's policy of de-regulation and liberalisation of the national economy through transparent and equitable privatisation of state owned enterprises. Privatisation is envisaged to foster competition, ensuring greater capital investment, competitiveness, and modernisation, resulting in enhancement of employment and provision of improved quality of products and services to the consumers and reduction in the fiscal burden.*

Privatisation policy has short-, medium- and long-term programmes. Privatisation policy attaches much importance to the deregulation and liberalisation of the economy. It emphasises the need to create a liberal economic environment that fosters domestic and international investment, which is conducive to promoting competition. It also recommends safeguarding the interests of consumers and investors by formulating a regulatory framework prior to divestiture in strategic sectors such as telecommunications, power, oil and gas, and railways. So far, it has privatised 109 units. Since its inception, the process of privatisation has faced severe criticism on the grounds of lack of transparency. Its practise created doubts about its seriousness in changing the market structure. Its focus seemed to be on replacing state owned monopolies with private ones, with no net benefits to consumers.

Since its inception, the process of privatisation has faced severe criticism on the grounds of lack of transparency. Its practise created doubts about its seriousness in changing the market structure. Its focus seemed to be on replacing state owned monopolies with private ones, with no net benefits to consumers.

3.3 Industrial Policy

As mentioned in section 3.1, Pakistan's industrial sector flourished during the 1960s, which has been named the 'development decade'. This is a controversial point to some economic observers. The rich received the benefits of the process as they were thought to generate more savings, giving way to capital growth and development. A few regions were promoted at the expense of the others. In the 1960s, the promotion of crony capital led to an enormous concentration of wealth in a few hands. The 1970s were marked by nationalisation of the private sector. The process of deregulation and liberalisation started again in the 1980s with the denationalisation of small manufacturing units. A UNIDO study mentions important initiatives in this regard as follows:[15]

> *An increase in the investment sanction limit; drastic reduction in the list of specified industries (which require government sanction); reduction of tariffs on a number of raw materials, intermediate and capital goods; introduction of a three-year liberal trade policy; and upgrading of an Industrial Incentives Reform Cell (IIRC) into a Tariff Commission in 1989 to make recommendations on fiscal anomalies and effective protection. A series of measures ... introduced to deregulate industrial operations in the cement, oil-seeds, and fertiliser industries. Private investment ... permitted in cement production and State-owned enterprises ... allowed to vary their prices. Subsidies ... substantially reduced and cement imports permitted. A similar package of deregulation and reform was adopted for the oil-seeds sector and a major divesture programme was initiated by the public ghee corporation.*

The practice of having a free and tied list was discontinued, as mentioned elsewhere in the paper. A negative list was introduced which meant that all goods and services were importable except for those on the list. Non-tariff barriers were replaced by tariffs. These are being lowered gradually. The average tariff rate is 30 percent at present, reduced from 90 percent in 1995 and 45 percent in 1997. These and other such policies were meant to directly or indirectly increase competition in the market and make more and better choices available to consumers.

3.4 Small and Medium Enterprise Policy

Although the SME sector has a lot of potential in terms of value addition and employment generation, government policies are always biased against it.[16] The share of SMEs in manufacturing sector value added has increased from 27 percent in 1980/81 to 35 percent in 1997/98.[17] Furthermore, its capital requirements to provide employment are very low as compared to large-scale industry. The lack of commitment by the government to support SMEs is reflected in the fact that in the last four years, all of the investment in small-scale manufacturing has come from the private sector. Its growth is hampered by a lack of credit and unequal allocation of credit is an entry barrier. The financial sector is not very supportive of SMEs.

The lack of commitment by the government to support SMEs is reflected in the fact that in the last four years, all of the investment in small-scale manufacturing has come from the private sector.

The newly established micro-credit bank and the establishment of the Small and Medium Enterprises Development Authority (SMEDA), to cater to the credit needs of the sector, is a positive step in this regard and will hopefully address the issue of credit constraints. The provision of access to capital will play an important role in fostering competition, supporting existing players, and encouraging new entrants. But, here again a note of caution is required since the earlier experience with the public sector banks was that there was an inappropriate and politically influenced policy of lending. This has led way to the piling up of a portfolio of non-performing loans by public sector banks. Furthermore, outdated government regulatory policies, like the state zoning policy also affect the growth of SMEs.

3.5 Investment Policy

Foreign investment, on repatriable basis, is now allowed in all the sectors except sectors of strategic importance.[18] There is a legal framework available to facilitate foreign private investment.

Investment policy provides an integrated strategy for creating an investor friendly environment, with a focus on further opening up of the economy and marketing the potentials of all economic sectors for foreign direct investment. There has been a constant decline in foreign direct investment in Pakistan. The IPP issue further complicated the situation because it was not dealt with properly. Previously, only the manufacturing sector was open to foreign investment. Foreign investment, on repatriable basis, is now allowed in all the sectors except sectors of strategic importance.[18] There is a legal framework available to facilitate foreign private investment.

There is complete freedom of choice on the location of industry, and full repatriation of capital, profits and dividends from all activities. There is no customs duty on imported raw materials used in the export producing sector, and no customs duty on imports of plants, machinery and equipment for industries falling under categories A and B.[19] First year allowance, re-investment allowance and industrial building depreciation allowance are some of the other incentives available to both local and foreign firms. The Investment (Promotion and Protection) Act 1976 and the Protection of Economic Reforms Act No. XII, 1992, bear special mention in this regard. Besides this, Pakistan is also a signatory to the Multilateral Investment Guarantee Agency.[20]

Other measures taken to make the investment environment more conducive include the replacement of the duty drawbacks system, the liberalisation of the foreign exchange regime, and the abolition of elaborate controls on the transfer of technology. Now there are no restrictions on nationals and foreigners on possessing and taking out foreign currency, opening bank accounts and holding certificates in foreign currency.

3.6 Intellectual Property Rights (IPRs)

With the negotiation of TRIPS, the discipline of anti-competitive behaviour after IPRs are granted assumes a great importance for any competition authority.

Intellectual property rights provide exclusive rights within a designated market to produce and sell a product, service or technology resulting from some form of intellectual creation. Protection measures may be in the form of patents, copyrights, trademarks or effective sui generis systems. IPRs may result in market power by limiting competition, leading to monopoly behaviour by owners. With the negotiation of TRIPS, the discipline of anti-competitive behaviour after IPRs are granted assumes a great importance for any competition authority. Special judicial and legal expertise is required to deal with the abuse of IPRs. Cartelisation of horizontal competitors through licensing agreements, fixing prices, limiting output, and market division; exclusionary effects of license agreements raising entry barriers; purchase of exclusive rights to competing technologies and products; and non-price predation are some of the challenges to be faced by competition authorities.

CHAPTER-IV

Competition Law

4.1 A Brief History of the Legislation

The decade of the 1960s was characterised in Pakistan's economic history as an era of high economic growth led by the expansion of the industrial sector. Special incentives were given to the private sector, which consequently grew at an unprecedented rate. This unbridled growth brought, in its wake, the problem of the concentration of wealth in a few hands. In the late 1960s, Z. A. Bhutto's Peoples Party capitalised on popular discontent with this situation and engaged in nationalisation. In fact, the concentration of economic power necessitated the establishment of a competition regime in Pakistan. The Central government circulated a draft Anti-Monopoly and Restrictive Trade Practices Law for public opinion, along with the 1969-70 budget. This law was commented upon by the press, chambers of commerce and industry, and the public. In February 1970, the then President and Chief Martial Law Administrator, General Agha Muhammad Yahya Khan, promulgated the "Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance", which came into force on August 17, 1971.

4.2 The Monopolies and Restrictive Trade Practices Ordinance, 1971

4.2.1 Objectives of the Law

The broad objectives of the law are to provide measures against:

- Undue concentration of individual economic power
- Monopoly power
- Restrictive trade practices

4.2.2 Scope of the Law

The law spells out the situations which shall be deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices.

The law spells out the situations which shall be deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The law prohibits these clearly defined situations and collects information about them, through the process of registration.

The law is split up into six chapters, covering all aspects of the legislation. Chapter I defines various terms used in the law. Chapter II prohibits certain specified situations. Chapter III provides for the creation of a Monopoly Control Authority to administer the law. Chapter IV lays down the functions and powers of the Authority. Chapter V relates to registration and Chapter VI deals with penalties, appeals and other miscellaneous matters. The important provisions of the law are discussed in the succeeding paragraphs.

4.2.3 Undue Concentration of Economic Power

The law prohibits the undue concentration of economic power. Any non-public undertaking with assets exceeding 300 million rupees is prohibited by the law.[21] An undertaking has been defined as 'any concern, institution, establishment or enterprise engaged in the production of goods or in the provision or control of any service'.[22] This implies that private companies, partnerships or individuals should not own any enterprise exceeding the 300 million limit. In the case of an undertaking with assets worth 300 million rupees owned by a public company, the provision prohibiting undue concentration of economic power will be applicable if an individual holds or controls shares carrying fifty percent or more of the voting power in the undertaking.

The law defines control as the power to exercise a controlling influence over the management or the policies of the undertaking, and in relation to shares, the power to exercise a controlling influence over the voting rights attached to such shares.

For the purposes of determining ownership or control, the individual is defined to include the individual's spouse, his brothers and sisters, and any of his lineal ascendants or descendants.[23] The law defines control as the power to exercise a controlling influence over the management or the policies of the undertaking, and in relation to shares, the power to exercise a controlling influence over the voting rights attached to such shares. The Monopoly Control Authority has been given the power to vary, by rule, the existing percentage of shareholding or the quantum of the value of assets which may result in undue concentration of economic power.

During 1999, the MCA investigated 265 cases under section 4(b). The MCA asked 55 undertakings to explain the nature of their dealings, and found that the dealings of four undertakings were detrimental to the interests of their shareholders. Some of the cases were still being processed at the end of the fiscal year ending June 1999.[24] One of these cases was the investigation into the calcium-carbide monopoly. Upon a complaint from an importer, the MCA initiated an inquiry against the Sin-Pak Electro Chemical Company. The company was the only manufacturer and distributor of calcium carbide, and allegedly had the ability to set non-competitive prices and restrict output. The MCA called for more information, which it is still waiting for.

4.2.4 Monopolies

The law prohibits the creation or maintenance of unreasonable monopoly power in any market. The market has been defined as the geographic region in which competition in the production or sale of such goods, or the provision of such services, takes place. The law does not set out any particular market share as a criterion for determining monopoly power of a single firm. The size of a single firm may reflect economies of scale, particularly in a developing country like Pakistan. Accordingly, single firm monopoly power situations have not been prohibited per se, but certain situations require registration to determine whether or not they need regulation. The MCA will regulate these situations on a case-by-case basis.

The law establishes a presumption of unreasonable monopoly power where competing undertakings with a market share of twenty percent or more are interlocked through common management or control, or through common partners, directors, or officers, or where any individual holds twenty percent or more of the stocks in each of the competing undertakings.

The law establishes a presumption of unreasonable monopoly power where competing undertakings with a market share of twenty percent or more are interlocked through common management or control, or through common partners, directors, or officers, or where any individual holds twenty percent or more of the stocks in each of the competing undertakings. The prohibition of such cases is aimed at breaking up situations where a family group controls two or more companies in the same market, with a combined market share of twenty percent or more. The law prevents new interlocks by requiring firms to offer additional shares of their undertakings to the public. If the major family groups purchased substantial shares in each others companies, the competition structure of the economy might be impaired and hence such practice is restrained.

The law sets out such instances in which monopoly power may be justified i.e., situations that give rise to monopoly power that contributes substantially to efficiency, technological progress or the growth of exports. However, the law places the onus of establishing such a justification on the person or company concerned. They must show that the otherwise prohibited situation is in fact necessary to achieve one of the benefits mentioned, and that the benefits are not outweighed by the costs of the loss of competition.

The MCA has investigated 103 cases of unreasonable monopoly power, and initiated proceedings where a violation of the provisions of the Ordinance was observed.

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; the prohibition of proposed acquisition; and limitations on the amount of loans which may be made by a financial institution to any single borrower or to a borrower associated with it, or limits on the investments of financial institutions in associated undertakings.

The MCA has investigated 103 cases of unreasonable monopoly power, and initiated proceedings where a violation of the provisions of the Ordinance was observed. The cases included Exide and Automotive Batteries, Lackson Tobacco Company Ltd. & Premier Tobacco Company Ltd., Phillips Electrical Industries of Pakistan, Boc Pakistan Ltd, Kohinoor Chemical/Mercantile Industries Group and Hoechst & Clariant, PTCL.

4.2.5 Mergers and Acquisitions

The law also prohibits anti-competitive mergers and acquisitions. Although at the time of the promulgation of the law such situations were not common in Pakistan, this provision has been very helpful in the wake of the current wave of globalisation and liberalisation. Mergers adversely affect consumers by limiting their choice and via their influence over the determination of market prices. The law prohibits the merger of companies when such a merger is likely to create monopoly power or substantially lessen competition. This is necessary to prevent evasion of the interlock prohibition by the merger of unlawfully interlocked firms. The law prohibits financial institutions from making loans to associated firms on preferential terms.

The law prohibits the merger of companies when such a merger is likely to create monopoly power or substantially lessen competition. This is necessary to prevent evasion of the interlock prohibition by the merger of unlawfully interlocked firms.

On June 26, 1996, the directors of the M/s Pakistan Industrial Promoters (Pvt.) Ltd. (Polka) and Unilever Group, UK (Walls) appeared before the MCA to explain the transfer of shares of the Polka Group to the Walls Group. The Authority allowed the merger upon fulfilment of following conditions:

i) The assets proposed to be transferred are to be evaluated by an independent and reputable chartered accountancy firm, and the information will be provided to the Authority within a month of the completion of the event.
ii) The details of the tangible assets bought by the prospective purchasers must be provided to the Authority within six months of the finalisation of the acquisition transaction.
iii) The party concerned is required to provide information to the Authority about plant capacity and output, prices of important raw materials and retail prices of products, showing taxes separately, on a quarterly basis.
iv) The party concerned is required to provide information about the projected gains accruing on account of the proposed acquisition within one month of the order.
v) The announcement of a reduction in prices should preferably coincide

with the announcement of the acquisition, and a copy of the same should be supplied to the Authority.

The Authority evaluated the market share due to the acquisition and it constituted unreasonable monopoly power. The parties were given a hearing and they justified the monopoly on the premise of increased efficiency, transfer of technology and increased exports. Rizvi (1996) termed it the awakening of a consumer friendly dragon. She quotes the then chairman of the MCA as saying:

> *"The present government has taken the desired steps to invigorate the MCA, enabling it to play its due role of protecting interests of consumers and ensuring social justice without hampering rapid capital formation and economic development and thereby promoting responsible and 'enlightened capitalism'."*

Although the Authority has dealt with mergers and acquisition cases from time to time, it does not differentiate between mergers by national companies and foreign country mergers.

Although the Authority has dealt with mergers and acquisition cases from time to time, it does not differentiate between mergers by national companies and foreign country mergers. In the famous case of the merger of Lipton and Brooke Bond, the Authority was able to deal with it as a normal merger since both these companies had commercial presence in Pakistan. The MCA conducted an inquiry upon a resolution sent to it by Pakistan Tea Association, in which it had supported the proposed merger of Lever Brothers Pakistan Limited and Brooke Bond Pakistan Limited, and contended that it saw no adverse effects on the market of the said merger. As the MCA had allowed the merger based on certain conditions, no action was taken against Pakistan Tea Association.

The law does not have any special provision for cross-border abuses. Moreover, as regards competition law, the Authority has not yet entered into any bilateral or regional co-operation agreements.

In the pharmaceutical sector, due to parent company mergers abroad, subsidiaries have also merged. The MCA examined the mergers of Glaxo & Wellcome and Cynamid & Wyeth. The MCA sought information from the companies concerned to determine the market share of these undertakings with respect to specific products. Information was also sought from the Pharma Bureau of Information and Statistics, the Pakistan Pharmaceutical Manufacturers Association, and the Ministry of Health. The replies from these undertakings are under review.

4.2.6 Unreasonably Restrictive Trade Practices

The law defines unreasonably restrictive trade practices as any practice that unreasonably prevents, restrains or lessens competition, and lists a number of practices that are presumed to be restrictive in nature. These include agreements between actual or potential competitors to fix prices; divide markets; limit production, distribution, technical development or investment; or boycott competitors. It also includes fixing minimum resale prices, which prevent wholesalers or retailers from selling below a certain stipulated price, and tying arrangements, which require a customer to purchase one product in order to obtain a different one.

In addition to these practices, the authority may identify others that are found to be unreasonably restrictive. For example, it might find that restrictions in distribution agreements, which limit the customers or territories of distributors, are unreasonably restrictive in certain circumstances. An agreement has been defined to include any arrangement or understanding, whether or not it is in writing, and whether or not it is intended to be legally enforceable. This would mean that unwritten collusive arrangements would fall within the definition of an agreement. This is an important provision because restrictive agreements and arrangements are quite often not settled in writing, but by word of mouth between competitors in social clubs or in more formal settings such as the meetings of Chambers of Commerce and Industry. Sometimes competitors tacitly agree to make one of them a price leader while the others follow his/her prices, as quoted in the press. In this case there is no need for a written agreement.

The law sets out the circumstances in which restrictive trade practices may be justified, i.e. practices which contribute substantially to efficiency, technological progress or exports.

As in the case of monopoly power, the law sets out the circumstances in which restrictive trade practices may be justified, i.e. practices which contribute substantially to efficiency, technological progress or exports. The onus of establishing such a justification will, of course, be on the person or company involved in the arrangement.

The MCA noticed that Pakistan Tobacco Company Limited increased its range of prices from 6 to 30 percent, and Lackson Tobacco Company Limited raised its range from 12 to 78 percent during the same period of time. Under section 11 of the MRTPO, 1970, market division between the two was identified and the companies were asked to provide their methodology for fixing prices. This case is also under review.

Other instances where the MCA has investigated unreasonably restrictive trade practices are:[25]

The Cement Manufacturers Cartel

The MCA noticed a simultaneous and uniform price increase to the tune of Rs. 100 per bag by cement manufacturers in October 1998. The MCA initiated an enquiry to look into the causes of such price increases. All Pakistan Cement Manufacturers Association (APCMA) and individual manufacturing units attributed this price increase to an increase in the cost of inputs and the high taxation regime. They were of the view that due to low demand and low prices during preceding years, it was the only way for cement manufacturers to minimise losses and avoid the closure of smaller units.

Cement manufacturers were of the view that in the face of suppressed demand in June 1998, one of the manufacturers lowered prices from Rs. 208 per 50kg bag to Rs. 156, and the rest followed suit for fear of being kicked out of the market since there is not much difference in the quality of cement produced by various manufacturers. On the results of its enquiry, the MCA refuted the argument by the APCMA regarding substantial increases in input prices. It found that there had been no increase in lease money, furnace oil prices or excise duty since June 1997. On the contrary, during the period mentioned, the level of taxation had been reduced and the price of furnace oil fell by Rs. 800 per ton. There was only a marginal increase in electricity tariffs.

The MCA concluded that the price increase had no economic justification and was motivated by the desire to increase profit margins unreasonably. It established that the action of APCMA and individual units contravened the provisions of section 3 along with section 6 of the MRTPO.

The MCA concluded that the price increase had no economic justification and was motivated by the desire to increase profit margins unreasonably. It established that the action of APCMA and individual units contravened the provisions of section 3 along with section 6 of the MRTPO. The manufacturers, under tacit agreement through cartel formation, had increased prices against the public interest.

After a detailed enquiry and discussion, the MCA took action in the public interest, and ordered the APCMA to break the cartel, revert to the price level that prevailed prior to the increase, and remove restrictions on capacity utilisation with immediate effect. It further directed the utilisation of full production capacity, which was calculated to lower overhead expenses, and hence overall costs. Moreover, the MCA ordered a deposit of the sum of Rs. 4.25 billion earned by the industry as additional revenue from price increases between mid October 1998 and February 1999, to the *Baitul Mal*, and the same to be disbursed to consumers on duly verified claims.[26] The MCA further imposed a fine of Rs. 100,000 on each individual unit, and in the case of continued non-compliance another Rs. 10,000 per day.

The controversy continued and cement manufacturers refused to lower their prices. Wholesalers and dealers stopped buying cement fearing that a fall in prices would lead to losses. Cement manufacturers moved against the orders of the Authority in provincial high courts and obtained stay orders. Finally, the Ministry of Commerce intervened, and after negotiations excise duty was lowered and prices were set at Rs. 200 per 50 Kg bag.

A serious issue here is the jurisdiction of the authority. Once the MCA had taken up an issue, it should have been left to the judgement of the MCA and there should not have been any interference in its working.

The Vegetable Ghee Cartel

In December 1998, upon a price hike in different brands of vegetable ghee and cooking oil, the MCA initiated an enquiry. The MCA collected information relating to production capacity, costs, sales, profits and market prices, and found out that prices increased sharply in October 1998. The Dalda/Planta, Mujahid, Habib, Gul, Shama and Tullo brands controlled 35 percent of the market, and there was the possibility that they could act as market leaders. Moreover, prices of these brands were nine percent higher on average than the rest, and they were utilising only 79 percent of their capacity. The companies attributed this sharp increase in prices to volatile conditions in the international market.

According to the MCA's findings, the prices of imported edible oil decreased in the international market from US$750 in May 1998 to US$510 per metric ton in March 1999 in the case of palm oil, and from US$682 to US$405 per metric ton in the case of soybean oil during the same period. In addition to this, the government also lowered regulatory duty on edible oil in March 1999.

The MCA noted that the government, instead of directing the undertakings to set a reasonable price, fixed the price at Rs. 52 per Kg through negotiations with the Pakistan Vanaspati Ghee Manufacturers Association.

The MCA noted that the government, instead of directing the undertakings to set a reasonable price, fixed the price at Rs. 52 per Kg through negotiations with the Pakistan Vanaspati Ghee Manufacturers Association (PVGMA). As a result, the companies who were charging lower prices prior to these negotiations, raised their prices to Rs. 52 per Kg, whereas the companies charging higher prices did not lower their prices, causing injury to consumers. This did not pass on the benefits of reduced regulatory duty on imported edible oil to consumers. According to the MCA's observations, the PVGMA provided a platform to its members for taking a collusive action. The MCA asked the companies to furnish information and justify the price increase. The case was under review until June 1999.

4.3 Consumer Protection Law

The Federal Government enacted the Islamabad Consumer Protection Act (CPA) on October 18th 1995 to protect the consumer from inadequate information and impediments to competitive behaviour in the market.

The promulgation of the Monopolies and Restrictive Trade Practices Ordinance was the first step towards the promotion of a competition culture. The Federal Government enacted the Islamabad Consumer Protection Act (CPA) on October 18th 1995 to protect the consumer from inadequate information and impediments to competitive behaviour in the market. The Islamabad CPA defines unfair trade practices and emphasises the provision of sufficient information regarding all aspects of a product. The Act prohibits the provision of false information and also defines hoarding and black marketing as unfair, since both these acts are restrictive in nature. The Act takes into account safety concerns and addresses trade practices that cause loss or injury through adulteration, and selling of expired drugs, food items and commodities unfit for human consumption. Any such action is regarded as unfair. Misleading advertisement is also punishable under the law. The Act also prohibits the charging of prices in excess of the prices set by any regulatory authority.

The Act provides for the setting up of a Consumer Protection Council (CPC), consisting of prominent citizens, legislators and government officials. The Council is supposed to create awareness on consumer rights, and formulate policies in the interests of consumers to prevent the marketing of hazardous goods, compensate against unfair trade practices, fight the exploitation of consumers, maintain easy availability of essential items, and provide information regarding the quality, quantity, purity, standards and prices of goods and services.

Consumer Protection Council consisting of prominent citizens, legislators and government officials. The Council is supposed to create awareness about consumer rights, and formulate policies in the interests of consumers.

The Act also establishes an authority to adjudicate disputes. The CPC or any individual consumer can take a case to the Authority, and the Authority, in turn may award a maximum punishment of two years or impose a fine of up to Rs. 40,000 or both, if it finds that the rights of consumers have been violated. The law has a provision for a hearing of the accused party. It is pertinent to note that after a lapse of more than six years, the government has not constituted the CPC. Moreover, no ministry is ready to take this up, and confusion prevails as to who will take the lead and initiate the process. So far the CPA has not been invoked in any court.

Khan and Mansoor (1996), while commenting upon the Islamabad CPA, emphasise the need to create awareness, provide information, establish standards of quality, and provide speedy redress to the affectees. They also recommend the extension of the CPA to the rest of the country. Prior to this, there was no legal provision to protect the rights of consumers in Pakistan. There was no legal recourse available to consumers for redress against any sort of injury. Since consumer protection is a provincial subject, every province is supposed to have its own legislation regarding consumer protection. The Islamabad CPA was followed by the North West Frontier Province (NWFP) CPA in 1997, which is more or less a replica of the Islamabad CPA.[27]

Along with consumer protection laws, some other legislation also exists such as state regulation of various state-run utilities, regulatory frameworks, drug laws, food laws and standards and quality measures in Pakistan.

The problem with these Acts is that they are restrictive in their scope, redress measures are lengthy and expensive and the penalties given are inadequate. This makes them largely ineffective. There is no such legislation in other parts of the country. Along with consumer protection laws, some other legislation also exists such as state regulation of various state-run utilities, regulatory frameworks, drug laws, food laws and standards and quality measures in Pakistan. These include the Pakistan Telecommunication Authority (PTA), the Oil and Gas Regulatory Authority

(OGRA), the National Electric Power Regulatory Authority (NEPRA), Pakistan Electronic Media Regulatory Authority (PEMRA) Drug Acts (1940, 1976), the West Pakistan Pure Food Ordinance (1960), the Cantonment Pure Food Act (1966), the Pakistan Hotels and Restaurants Act (1976), the Federal Ombudsman Order (1983), and the Pakistan Standards and Quality Control Authority Act (1996).

The consumer movement in Pakistan is at a nascent stage, and there are quite a few civil society organisations working for consumer rights.

The consumer movement in Pakistan is at a nascent stage, and there are quite a few civil society organisations working for consumer rights. The Network for Consumer Protection, the Consumer Rights Commission of Pakistan, Consumer Watch, Sarif Mahaz and Punjab Lok Sujag are few notable organisations in this regard.

The Consumer Rights Commission of Pakistan, an independent, non-profit and non-governmental organisation, has drafted a model consumer protection act in an effort to get a fair deal for consumers in Pakistan.

The Consumer Rights Commission of Pakistan (CRCP), an independent, non-profit and non-governmental organisation, has drafted a model consumer protection law in an effort to get a fair deal for consumers in Pakistan. This is a laudable effort to equip the consumer movement in particular, and consumers in general, with appropriate legislation and statutes for consumer protection and for the establishment of redress mechanisms.

4.4 Links between the MCA and other Regulatory Authorities

Some of the other regulatory authorities dealing with the utilities like, NEPRA, PTA, OGRA work independently and only seek advice from the MCA from time to time. They are not legally bound to consult the MCA.

As mentioned earlier, some of the other regulatory authorities dealing with the utilities are NEPRA, PTA, OGRA, and some newly established authorities such as the Atomic Energy Regulatory Authority. These authorities work independently and only seek advice from the MCA from time to time. They are not legally bound to consult the MCA. Section 25 of the MRTPO states, among others points, that this ordinance shall not apply to:

> *...any undertaking which is owned by a body corporate established by the Government by law or whose Chief Executive is appointed by or with the approval of the Central Government or by a provincial Government,*
>
> *or*
>
> *...to anything done by any person or undertaking in pursuance of any order of the Central Government or a Provincial Government...*[28]

CHAPTER-V

Institutional and Procedural Aspects of the Competition Regime

5.1 The Monopoly Control Authority

The law constitutes a statutory authority, the Monopoly Control Authority, to administer the law. It consists of three members, each appointed by the Federal Government for five years. The Authority is vested with the power to appoint officers and members of staff on such terms and conditions as it may determine. There are 128 employees, including twenty other officers, working in various capacities. A detailed organisational chart is given in Annex III.

The nationalisation process of 1972 limited the scope of the Monopolies and Restrictive Trade Practices Ordinance. Therefore, during the 1970s and 1980s, the MCA's emphasis was on diversification of the capital resources of undertakings.

The nationalisation process of 1972 limited the scope of the Monopolies and Restrictive Trade Practices Ordinance. Therefore, during the 1970s and 1980s, the MCA's emphasis was on diversification of the capital resources of undertakings. To this end, a large number of private companies with a total value of assets not less than the prescribed limit under the law were converted into public limited companies. The Monopoly Control Authority was reduced from an independent body to become one of the many departments of the Corporate Law Authority (CLA) during the military government of Zia-ul-Haq. In 1994, the Nawaz Sharif government restored its independent status and de-linked it from the CLA.

The authority is an autonomous organisation and there is no interference from the government.

In the 1990s, the need for a shift from asset-based investigation to market-based investigation was felt, in view of the changing economic scenario. In 1997-98, the MCA examined 500 cases, and fifty appeals/writ petitions were filed in the High Court and the Supreme Court against the orders of the Authority. The appeal decisions have enabled the MCA to resolve various controversial issues regarding the implementation of the law. These issues include determination of the value of assets, conversion of companies, the public interest, mergers, and definition of associated undertakings. During 1998-99, there were eleven posts lying vacant due to resource constraints.[29]

The law clearly states that no person shall be appointed as a member of the authority if he has or acquires any such financial or other interest that is likely to prejudicially affect his functions as a member.

The authority is an autonomous organisation and there is no interference from the government. It is possible to appeal against the orders of the authority in the High Court. In some countries, the law also specifies the qualifications that any person should have in order to become a member of the authority. For example, in Peru, members of the Multi-Sectoral Free Competition Commission must have a professional degree and at least ten years of experience in their respective field of knowledge.[30] In Brazil, members of the Administrative Economic Protection Council are chosen among citizens reputed for their legal and economic knowledge and unblemished reputations.[31] In Pakistan, there are no such provisions. Normally, officers from various service groups of the civil service of Pakistan are appointed as members. The law does however clearly state that no person shall be appointed as a member of the authority if he has or acquires any such financial or other interest that is likely to prejudicially affect his functions as a member.

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; and to conduct enquiries in individual cases to give advice to persons or undertakings to determine whether or not a certain course of action is consistent with the provisions of the law.

5.2 Powers

The authority has discretionary, recommendatory, investigative and legislative powers. To proceed with an enquiry, the authority has the power vested in a civil court under the Code of Civil Procedure, 1908, with respect to certain matters.[32] The authority has also been empowered to make recommendations to the central or provincial governments with regard to governmental actions that might affect the concentration of economic power, monopolies, or restrictive trade practices. This provision reflects the fact that government actions might have a very important effect on competition. While the government would of course not always be bound by the Authority's recommendations, it would at least be aware of the competitive implications of its actions.

The law empowers the authority to issue general orders amplifying the scope of the law. It emphasises that the authority should exercise this power only after following procedures that are fair to the affected persons.

The law empowers the authority to issue general orders amplifying the scope of the law. This was essential to provide the authority with flexibility. Since it is not possible to incorporate all the situations that need to be prohibited in the law, this gives the authority some leverage in circumstances not mentioned clearly in the law. There is always the chance that such discretionary powers could be misused. The law emphasises that the authority should exercise this power only after following procedures that are fair to the affected persons.

The authority has the power to prescribe by general order the circumstances in which it will be deemed that undue concentration of economic power or unreasonable monopoly power or unreasonably restrictive trade practices have come about. The authority is required to conduct an enquiry and give a reasonable opportunity to the affected persons to plead their case. The authority notifies its intent to issue a general order in a certain area. Then the authority is required to publish the draft general order in the official gazette for eliciting public opinion. The final order has to be issued after considering objections and suggestions received by the authority from any person or undertaking with respect to the draft general order.

The authority is permitted to identify which situations are inconsistent with the law on a case-by-case basis.

The authority is permitted to identify which situations are inconsistent with the law on a case-by-case basis. In the case of a general order, the authority is required to give the affected persons a show-cause notice and an opportunity to be heard. If the authority first proceeds to issue a general order, it will have to conduct an additional proceeding before issuing an enforceable order against a particular person or firm. The Authority could rely on its general order to resolve general issues about whether a particular kind of practice adversely affects competition in such a subsequent proceeding.

The Authority has other necessary powers to obtain accounts and documents, and for collecting information for the purpose of the Ordinance. The orders of the authority have been specifically related to the situation being investigated, i.e. separate remedies have been provided for situations of concentration of economic power, monopoly power, and restrictive trade practices. The Authority has also been empowered to issue interim orders that are necessary in situations where there is an infringement of the provisions of the law but the issue of a final order is likely to take some time. In this situation, again, the affected persons will be given an opportunity to explain their case before the interim order is passed. The authority has also been empowered to conduct special enquiries on its own initiative, upon a reference from the government or after a public complaint.

It has been provided that the law will not be applicable to government owned undertakings, statutory undertakings or undertakings with which the government is associated in the matter of appointment of their chief executives.

The authority has the power to call for information relating to undertakings by a general or special order. It also has the power to make rules to carry out the purposes of the law. It has been provided that the law will not be applicable to government owned undertakings, statutory undertakings or undertakings with which the government is associated in the matter of appointment of their chief executives. Actions taken by undertakings in pursuance of government orders are also outside the jurisdiction of the law. Similarly, the provisions of the law do not govern anything done by a trade union or its members for carrying out the purposes of the trade union. The government has the power to withdraw these exemptions by notification in the Official Gazette.

5.3 Prevention of Restrictive Business Practices and Undue Economic Power

The Authority prevents restrictive business practices and undue concentration of economic power by dispersing corporate ownership. The procedure adopted to reduce the concentration of economic power is to create a larger association of inactive partners while retaining the seed capital of the entrepreneurs in an appropriate proportion. This is expected to eliminate the somewhat narrow, largely family oriented attitude of entrepreneurs and bring professional management into control of enterprises now managed and controlled by big business-family groups.

The law provides safeguards to the accused by the issuance of a show-cause notice, with ample time for a response to any inquiries made by the authority. If there exists a concentration of economic power, the authority takes action to prevent it in the public interest in the following three ways, as prescribed in the law:

i. Private limited companies may be required to convert themselves into public limited companies within a specified time and in a specified manner;
ii. Controlling shareholders of public limited companies may be required to disinvest a specified part of the stocks and shares owned by them to the general public, including the National Investment Trust and other such institutions, within a specified time and in a specified manner; or
iii. Conditions or circumstances may be prescribed under which associated undertakings may deal with each other.

The remedies provided in the law for restrictive trade practices include orders requiring firms to discontinue such practices and affirmative actions to restore competition.

5.4 Registration

Through the registration requirement, the Authority collects information relevant to the market share of firms or undertakings. Information so collected will help the authority to investigate the effects of the situation, and to judge if any of the prohibitory provisions of the law are applicable to it or not. The law enumerates in clear terms the situations in which registration must take place. For the purposes of registration, market shares are to be calculated with reference to the Monthly Statistical Bulletin of the Federal Bureau of Statistics (FBS). The authority also has the power to prescribe any other basis for determining market share, as in the case of the Polka-Walls merger. Since there was no data available with the FBS, the MCA relied upon the data provided by the parties, who in turn hired Integrated Development Consultants (IDEVCO) to measure the joint market share of Polka-Walls along with those of other competitors.

The authority also has the power to prescribe registration in other situations. The law spells out which information should be given for the purposes of registration and by whom the application should be made. The authority keeps and maintains separate registers for the registration of undertakings, individuals and agreements that are subject to registration under the law. The registers are open to public inspection, but the authority is empowered to treat the trade secrets of a person or undertaking as confidential. The law also provides for the cancellation of registration in situations where the law is no longer applicable because of a change in the circumstances on the basis of which the registration was made.

Penalties are imposed if a person or an undertaking fails to carry out the directions of the authority under the law, or has willfully failed to register a registerable situation, or has furnished false information to the authority.

5.5 Penalties and Appeals

Penalties are imposed if a person or an undertaking fails to carry out the directions of the authority under the law, or has willfully failed to register a registerable situation, or has furnished false information to the authority. The person or undertaking is liable to monetary penalties amounting to Rs. 100,000, and an additional Rs. 10,000 per day for continuous defiance.[33]

The law also sets out very clearly that the authority is not liable to pay any compensation or damages for any loss or injury suffered by a person or undertaking on account of the termination of any agreement or employment, or divestment of any share or property in pursuance of any order made under the law. However, the law guides the authority not to impose any penalties without giving a 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.

The MCA examined the accounts of Singer Pakistan Limited under sections 19 (a) & (b) that deal with penalties and appeals, and found that the company had acquired a 75 percent market share. The company had shown Singer Sewing Machine Company as its associated undertaking. A show cause notice was served to the undertaking and the company replied that the two companies had merged in 1995. However, the company submitted that both companies were maintained as separate legal entities and Singer Pakistan Limited had never denied its association with the Singer Sewing Machine Company. The company supplied requisite information regarding management both pre- and post-1995, and the impact on the pricing and distribution structure. By request from the company, a further hearing was adjourned and the matter is still under process.

Similarly, under section 21 (the Supply of Information Rule), the MCA initiated a case against Al Asif Sugar Mills Limited, because the company had not supplied information for the year 1997. The case was heard and the MCA, taking a lenient view, vacated the notice.

Any person or undertaking aggrieved by an order of the authority may appeal against it to the High Court within sixty days of the receipt of the order. It may do this on the grounds that the order is contrary to the law, or that the order has failed to determine some material issue of law, or that there has been a substantial error or defect in following the procedure provided in the law, which may have produced an error or defect in the order.

CHAPTER-VI

Capabilities of the Competition Authority

There are some basic guiding principles followed by competition authorities in other countries. These include autonomy, independence and accountability. If we judge the MCA on the basis of these basic principles, it would appear that it is autonomous since it is a quasi-judicial statutory body. But if we look at its performance over the years, we see that it remained ineffective for almost 25 years after its establishment. It only started asserting itself in the mid-1990s, and it had to face a lot of interference in its functioning. The cement cartel is a case in point. It is dependent upon the federal government, which provides its annual budgetary allocation through grants. Any short-fall in its budgetary requirements is met through supplementary grants by the federal government. The details of budget allocations over time are given in table 1. Column 3 shows budget allocations in real terms, using the prices prevailing in 1990. This shows a decline in budgetary allocations over time:

Table 1: Budgetary Allocation of the Federal Government to the MCA

Year	Allocation (Rs. Mn)	Deflated (Base: 1990)
1995-96	20.79	12.29
1996-97	12.81	6.77
1997-98	16.24	7.96
1998-99	16.46	7.63
1999-2000	14.88	6.75

Source: Monopoly Control Authority

Details of the 1999-2000 budget are provided in table 2 below. It is interesting and highly unusual that the amount allocated and the amount spent coincides exactly with the budgeted amounts.

Table 2: Budget Details 1999-2000

Head of Account	Budget (Rs)	Allocated (Rs)	Actual (Rs)
Establishment Charges	9,165,000	9,165,000	9,165,000
Purchase of durable goods	0	0	0
Repair of durable goods	250,000	250,000	250,000
Commodities and Services	4,866,000	4,866,000	4,866,000
Entertainment and Gifts	5,000	5,000	5,000
Loans and Advances	250,000	250,000	250,000
Misc. Expenditure	344,000	344,000	344,000
Total	**14,880,000**	**14,880,000**	**14,880,000**

Source: Monopoly Control Authority

The MCA has limited professional manpower, inadequate physical infrastructure, and a limited database on market/industry related information. Officials at the MCA lack the training to tackle the very complex issue of assessing market power. The MCA does not have any regular in-house training programmes. The Authority may have to depend upon the information provided by the company or individual under question as regards the market share, as in the case of the Polka-Unilever merger. There are two tiers of officials at the MCA; bureaucrats, and technocrats, the former being the privileged ones. Only the top bureaucrats get a chance to attend various meetings and training courses, and the technocrats are often ignored.

Lack of staff trained in the latest investigative techniques is an obstacle that the Authority faces in carrying out its functions. The Authority is also not well equipped to deal with the complex issues arising from the granting of intellectual property rights.

One important area of concern is staff strength and their levels of qualification. Lack of staff trained in the latest investigative techniques is an obstacle that the Authority faces in carrying out its functions. The work of the Authority requires personnel trained in regulatory economics to grapple with the intricacies of the issues related to regulation, but no staff members have such qualifications. Furthermore, the Authority is also not well equipped to deal with the complex issues arising from the granting of intellectual property rights. Data show that there is very low staff turnover, and people without the qualifications to match the changing needs of the authority are staying in its employment. Related to this, our survey shows that the salaries of the MCA staff are not competitive, and it is very difficult to hire promising people on the existing terms and conditions. The vibrant private sector attracts highly qualified professionals, offering attractive packages, and there is no incentive for young professionals to join any government office, nor the MCA in particular, (other than the civil service, which has its own benefits).

As mentioned earlier, investigations are carried out under the MCA's supply of information rules. Between 1996 and 2000, it accepted 65 complaints for investigation under section 5 of the law dealing with mergers and acquisitions and rejected 49. During the same period, it entertained 597 cases of anti-competitive behaviour and after investigation, rejected 568 complaints. Similarly, it entertained 33 complaints of unfair trade practices and rejected 27 of them. The numbers of complaints taken for adjudication were 16, 29 and 6 in cases of mergers & acquisitions, anti-competitive practices and unfair trade practices respectively. There was no record available regarding the status of cases pending judgement, due to lack of co-ordination among various wings of the authority.

The MCA does not have any material to educate the general public on whose behalf it acts. Apart from a small survey, it does not have any data on prices.

Advocacy is an important function of the competition authorities around the globe. Through advocacy, competition authorities provide advice and influence, and participate in the formation of the government's economic and regulatory policies to promote competitive industry structures, firm behaviour and market performance. Advocacy campaigns of the Authority should spell out the implications of public policies regarding competition, and should influence decision making at governmental level. The MCA lags behind in this regard also. It does not have any material to educate the general public on whose behalf it acts. Apart from a small survey, it does not have any data on prices. Our survey shows that the Authority publishes only fifty copies of its annual report and it is not clear who its target audience is. Moreover, it neither issues periodic press releases nor holds any press conferences to keep people abreast of the efforts it is making to protect the public interest. It has very weak media links.

The competition authorities of developed countries and of some developing countries utilise information technology to build partnerships with the public and the media and have their own websites. The MCA still has no website.

Although the MCA has acted in the interests of the public on several occasions, it has not been able to communicate its efforts to consumers. There are no mechanisms for involving civil society groups and representatives of the citizenry in its advocacy and outreach programmes. Though the consumer movement is at a nascent stage, as mentioned earlier, there are some groups actively pursuing public interest issues. Partnerships with such groups and members of academia could be a useful vehicle for the MCA to reach its constituency and to help it to comment on the policies in the purview of competition.

Though the consumer movement is at a nascent stage, there are some groups actively pursuing public interest issues. Partnerships with such groups and members of academia could be a useful vehicle for the MCA to reach its constituency

Finally, it requires a lot of patience to solicit information from the Authority. Data is not tabulated in a systematic fashion and although on paper it seems that all the wings are working in close co-operation, it is very difficult to get consolidated data from the Authority. Various wings of the Authority are responsible for handling data, and no effort has been made to consolidate the database. For example, we could find no information on how much time it takes for a complaint to go from investigation to a final decision. Similarly, records about the status of cases that are pending with the authority is also not available. In some cases, the Authority takes too much time to rule against an undertaking, allowing the company or individual to reap non-competitive benefits at the expense of consumers.

CHAPTER-VII

Conclusion

Competition legislation is necessary to regulate business, ensure consumer and producer welfare, and promote the healthy growth of the economy and social justice. Pakistan enacted competition legislation (MRTPO) as early as 1971, but the law needs more frequent amendments. For example, only private monopolies come under the purview of the law, and state monopolies do not. It is also necessary to extend the coverage of MRTPO to public sector enterprises. This would provide a level playing field to both private and public sector organisations.

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The section of the MRTPO dealing with circumstances constituting undue concentration of economic power contradicts the investment policy of the government. This provision of the law discriminates against foreign investors, as it puts a limit of Rs. 300 million on the assets of private companies, and is a major hindrance to capital inflow to the country.

Although the MCA has suspended this section and no action has been initiated under it for the last four years, it is still a part of the law and needs to be amended. Similarly, single firm monopolies are not covered in the substantive provisions of the law. Moreover, some provisions of the law amount to over-regulation of the corporate sector. The levels of the penalties are very low as compared to other countries and this encourages businesses to pay the penalties and then continue their abusive practices.

Since its inception, the MCA has assessed various companies and undertakings on the basis of their assets, and a large number of companies with total assets over the prescribed limit have been converted into public limited companies. This asset-based investigation to diversify capital resources needs to be replaced with market-based investigation.

The asset-based investigation to diversify capital resources needs to be replaced with market-based investigation.

A new law has been drafted in view of the changed circumstances in domestic as well as international economic environment. The Bill is currently with the Ministry for vetting. Hopefully the law makers of Pakistan will take note of the above discussed points before giving it a final shape.

The MCA was established to implement the legislation that was ignored by respective governments. After 25 years, in the mid-1990s, it started asserting itself, and since then has dealt with numerous cases. There is a need to revitalise this important institution and strengthen it to give relief to the public. It should take a lead in creating consumer awareness about their rights and help to promote a culture of competition. The MCA should also make use of the opportunities for technical assistance provided by UNCTAD.

A new law has been drafted A new law has been drafted and the Bill is currently with the Ministry for vetting.

Although consumer protection legislation exists at the Federal level, there is a need to expand its jurisdiction to the rest of the country to help the general public to get relief from any damages in this regard. As the famous saying goes, 'better late than never'. The need of the hour is to constitute a CPC so that consumers get the relief that they deserve.

As compared to the corporate world, against which the Authority is competing for employees, there are no funds allocated for human resource development.

It is recommended that the authority should revise its recruitment and human resource policy, and offer attractive terms and conditions, providing some level of autonomy to highly qualified young mid-career professionals. As compared to the corporate world, against which the Authority is competing for employees, there are no funds allocated for human resource development. Without aggressive investment in HRD, it will be difficult for the Authority to meet the challenges of the requirements of changed circumstances. The corporate world invests heavily in HRD and reaps the benefits of this strategy. It is hard for the poorly endowed staff of the Authority to engage with them.

There is a strong need to build partnerships with civil society groups, citizen representatives and members of academia to create awareness and promote the competition culture.

There is a strong need to build partnerships with civil society groups, citizen representatives and members of academia to create awareness and promote the competition culture. Lessons could be learnt from the experiences of other countries' competition bodies. A well thought out advocacy campaign is also recommended to the Authority, to cater to both the public and businesses.

NRG Meeting Summary

The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture.

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. The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base 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 a demonstrated interest in economic issues
- Experts/interested persons from academia and the media
- Business and chambers of commerce
- Competition & regulatory authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or parliamentarians
- Trade union leaders

In Pakistan, two NRG meetings were organised during the first phase of the project. The meeting provided a good platform to bring together several experts and to deliberate on various aspects of competition law besides discussing some project specific issues. The Phase-I country report and case studies to be taken up during Phase-II of the project were discussed in detail and finalised after a general consensus.

The highlights of the discussions can be summarised as follows:

It was observed that there is a need to understand competition law since it is important for controlling anti-competitive behaviour in the market.

The meeting stressed the need for competition policy to foster fair trade practices and curtail monopolies in the economy. It was observed that there is a need to understand competition law since it is important for controlling anti-competitive behaviour in the market. Restrictive trade practices like tied selling, exclusive dealing, resale price maintenance, price fixing, undue concentration of individual economic power and monopoly powers destroy healthy market forces.

It was felt that mega-mergers and market failures that eventually affect the consumers should be regulated through state intervention in the form of competition legislation, which is invariably as important as the trade policy, investment policy and industrial policy of a country.

The Monopoly Control Authority needs more functional autonomy and better financial support /autonomy so that it is strengthened and is better able to face challenges.

The inadequacies in the existing competition law in terms of its implementation and penalties were discussed and it was felt that the law should be reviewed in the light of the changing global economic trade environment.

The inadequacies in the existing competition law in terms of its implementation and penalties were discussed and it was felt that the law should be reviewed in the light of the changing global economic trade environment. It was suggested that areas such as jurisdiction, enforcement and penalties should be incorporated in the law if it is to be an effective tool for the public interest. It is important to elaborate the term "public interest". There is a need to conceptualise the competition protection legislation according to social norms and economic realities.

The need for a comprehensive competition policy further increases when the country on the one hand is going through a structural adjustment process and on the other hand is compelled to follow multilateral trade agreements. In an effort to ensure accountability and consumer protection, there is a need for social audit of state regulatory functions.

It was also recommended that a permanent body comprising all the relevant stakeholders should be created that would lobby with the government on competition and consumer protection issues.

There was a general consensus that strong and effective competition policy and legislation can improve the current situation where consumers are suffering from unfair trade practices. The competition authority is a toothless tiger and without having a proper enforcement mechanism it cannot meet the challenges posed by mega-mergers and other anti-competitive practices.

It was also recommended that a permanent body comprising all the relevant stakeholders should be created that would lobby with the government on competition and consumer protection issues.

It was also recommended that reforms in the judicial system were essential if civil society organisations were to participate effectively. Also a need was felt to evolve a proper system, appropriate procedures and efficient institutions.

Synopsis of the Synthesis Report

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

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

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

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

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

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

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7-UP COUNTRY PROFILES

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

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.
2 Latest available year.
3 Budget and exchange rate figures for India are for 1999 (2000 not available).
4 Pattern of expenditure for Pakistan is for 1999.

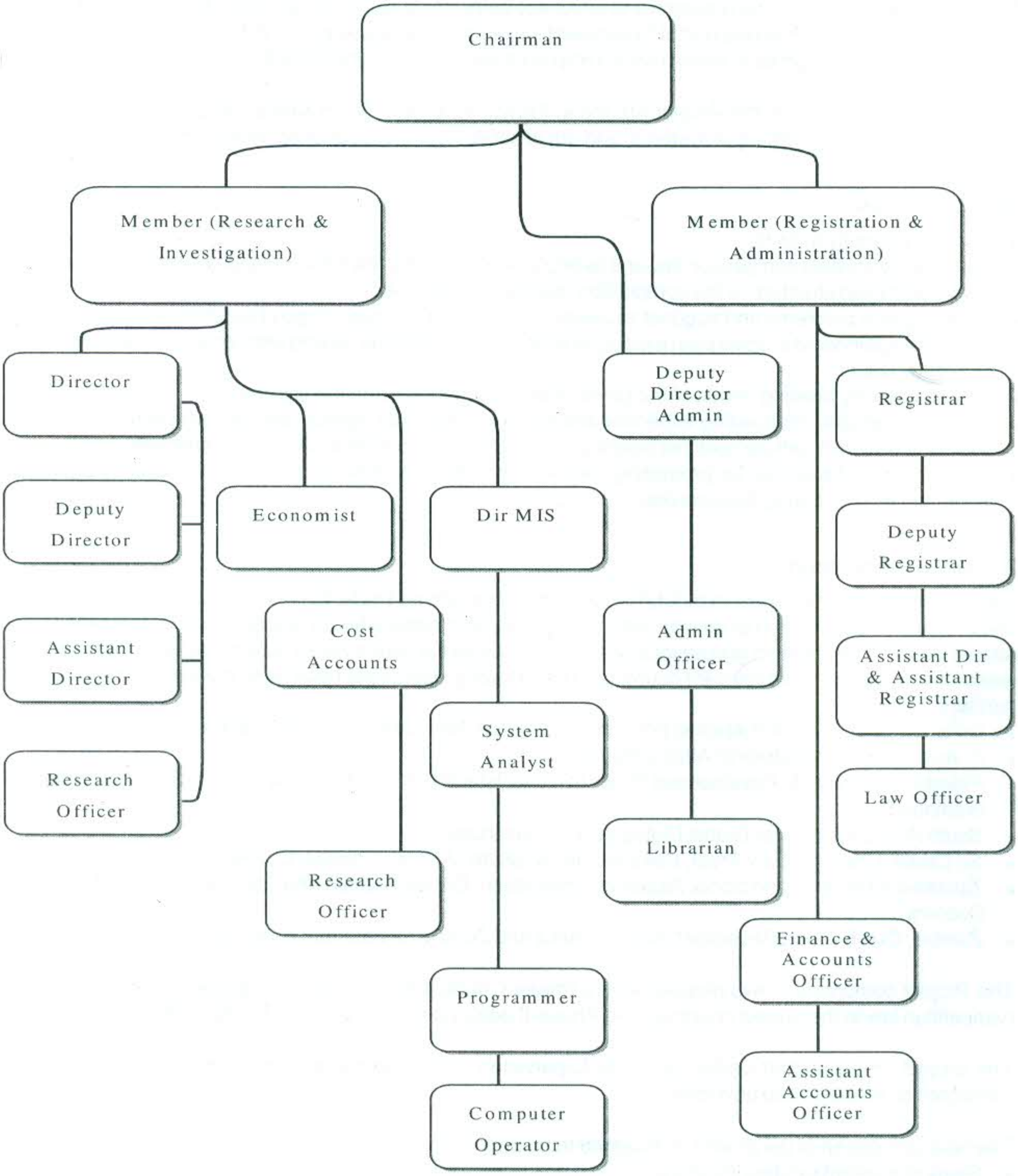
ANNEXURE-1

Exchange Rates

	1980	1990	1999	2000
Rs/US$	9.9	21.4	50.1	51.7
Source: World Bank, (2001).				

ANNEXURE-2

Organisational Chart of the Monopoly Control Authority



ANNEXURE-3

ABOUT 7-Up

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

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

Main Objectives

The project primarily aims to:

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

Project Implementation

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

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

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

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

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

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

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

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

Endnotes

1 Government of Pakistan, (2001), Statistical Appendix, p133.
2 UNDP, (2001).
3 Government of Pakistan, (2000), Statistical Appendix, p133 and Chapter 13, p182.
4 World Bank, (2001).
5 State Bank of Pakistan (2001).
6 Ibid.
7 Government of Pakistan, (2000), Chapter 1, p7.
8 Pakistan Automobile Corporation (PACO), National Fertiliser Corporation (NFC), State Engineering Corporation of Pakistan (SECP), State Cement Corporation of Pakistan (SCCP), Federal Chemical and Ceramic Corporation Limited (FCCCL), Pakistan International Airlines Corporation (PIAC), Pakistan National Shipping Corporation (PNSC), Ghee Corporation of Pakistan (GCP) and Pakistan Telecommunication Corporation Limited (PTCL) are the nine holding corporations controlled by the ministry.
9 Government of Pakistan, (2000), Statistical Appendix, p41.
10 The IPP's have been involved in disputes and litigation with the government over the rates set in their Power Purchase Agreements (PPA's) with the national WAPDA grid. The then government charged that the IPP's had engaged in price fixing and paid bribes to officials of the previous government. The PML government's main demand was for a reduction in rates to 4.5 cents per kilowatt-hour (kwh), from 6.5 cents per kwh, which most of the IPPs had in their original contracts. A formula has recently been negotiated to solve the issue.
11 Government of Pakistan, (2000), Chapter 9, p119-126.
12 Once in 1950-52 due to the Korean Boom and a second time in 1972-73 due to a high devaluation of the Pakistani rupee.
13 Overvaluation of currency, the bonus voucher scheme, import licensing, quantitative controls and protection are examples.
14 Government of Pakistan, (2000), Chapter 9, p123.
15 UNIDO, (1990), p20.
16 It provides 80 percent industrial employment and generates one quarter of the sector's export earnings.
17 Government of Pakistan, (2000) Chapter 3, p42.
18 These include arms & ammunition, high explosives, radioactive substances and security printing, currency or mint.
19 Category A is value added or exports industry and category B is hi-tech industry. Other categories are C and D and those are priority industries and agro-based industries respectively.
20 This does not include portfolio investment.
21 In the initial draft the amount was Rs. 10 million (one crore). According to the first amendment made, this amount was increased to Rs. 50 million. Due to inflation, the law constantly needs to be amended.
22 An explanatory memorandum on the Law on Regulation and Prevention of Monopolies and Cartels.
23 A Hindu undivided family has also been included in the definition of an individual.
24 Since this information is based on the latest available annual report of the MCA, the information is dated.
25 This section is based on the material published in the 26th annual report of the MCA.
26 *Baitul Mal* was established in Feb. 1992 under the provisions of Pakistan Baitul Mal Act 1991 to provide assistance to those in need especially minorities who are not covered by *Zakat,* a religiously mandated charity in Islam.
27 Provincial governments of Punjab and Balochistan have also drafted their respective consumer protection Acts.
28 MRTPO, (1970).
29 The same number of seats were vacant during 1997-98.
30 UNCTAD, (2000), p33.
31 Ibid. p33.
32 The proceedings before the authority are deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Pakistan Penal Code. The authority is deemed to be a civil court for the purpose of Section 195 and Chapter XXXV of the Code of Criminal Procedure 1898.
33 It would have been appropriate if the penalties were indexed to inflation. Moreover, it would have been wise to take into account the gravity of the offence and the ability to pay of the enterprise.
34 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.
35 Latest available year.
36 Budget and exchange rate figures for India are for 1999 (2000 not available).
37 Pattern of expenditure for Pakistan is for 1999.

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The Institute provides the global sustainable development community with representation from Pakistan as well as South Asia as a whole.

SDPI was founded in August 1992 on the recommendation of the Pakistan National Conservation Strategy (NCS), also called *Pakistan's Agenda 21*. The NCS placed Pakistan's socio-economic development within the context of a national environmental plan. This highly acclaimed document, approved by the Federal Cabinet in March 1992, outlined the need for an independent non-profit organisation to serve as a source of expertise for policy analysis and development, policy intervention, and policy and programme advisory services in support of NCS implementation. SDPI is registered under the Cooperative Societies Act, 1860.

THE NETWORK FOR CONSUMER PROTECTION

The Network for Consumer Protection, commonly known as "TheNetwork", is a national, public interest, non-profit organization.

The organization came into being in 1992 as "Association for Rational Use of Medication in Pakistan" in the wake of a drug tragedy. Building on this experience, TheNetwork developed a vision to become a national consumer protection organization with a broad mandate and multi-pronged strategy.

The mission of The Network is to protect and promote the interest of all Pakistani consumers: by educating them about their rights; by providing them independent information about goods and services; and by informing them about government's performance as the protector of their rights, especially the poor consumers. The organization also promotes responsible and sustainable consumption practices in society, as well as the development of alternative systems.

TheNetwork is registered with Securities Exchange Commission of Pakistan under Section 42 of the Companies Ordinance 1984 and is a company limited with guarantee not having a share capital.

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