

10. India

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1. INTRODUCTION

The importance of competition regimes in promoting inclusive growth, good governance and economic democracy – and hence assisting poverty alleviation initiatives of government – has been appreciated and endorsed across many jurisdictions. India is one of those nations that has endorsed competition through various initiatives that have been undertaken over a number of years. However, the nature of competition prevailing in any economy is an outcome of the interplay of various forces. The level of competition prevailing in the economy is shaped by the economic policies that have been put in place, which in turn are shaped in line with the political ideologies governing the country. In addition to policies on competition, there are also various other policies whose implementation can either positively or negatively influence the level of competition prevailing in the economy. Hence, political economy issues have a key role to play in influencing competition outcomes.

The nature of the competition regime prevailing in any country can best be understood after a full appreciation of its general economic governance regime. The major reason for the introduction of regulatory regimes was the prohibition of firm behavior considered detrimental to the general welfare by independent institutions. The creation of the necessary structural conditions to enable market conditions must exist to satisfy the economic needs of the population. This intention resulted in the creation of several regulatory tools to monitor particular aspects of the economy. These included sector regulatory laws and a competition authority. The effectiveness of competition law's ability to evolve effectively in a country in concert with corresponding socio-economic and historical trends is challenging as many institutions have a role to play in the enhancement of the market process, including, but not limited to, institutions provided for under competition policy and law.

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It is in this context that the political economy issues concerning the competition regime in India will be discussed. This chapter explores the various economic issues governing competition law in India. The competition environment is expected to play a role in shaping the general economic governance system in the country. In addition, the Indian economic system will also be analyzed to provide a brief sketch of the economic background. This chapter also makes an attempt to explore the regulatory system governing various sectors of the economy, which also interacts with promotion of competition.

The rest of the chapter is organized as follows. Section 2 describes the political system, while Section 3 discusses the economic system in India, including the key economic indicators as well as giving an overview of the most significant economic sectors. Section 4 discusses the characteristics of the competition regulatory regime in India, and Section 5 offers some concluding remarks.

2. POLITICAL SYSTEM

2.1 Constitution

The Constitution of India entered into force on 26 January 1950 and established India as a republic and a union of states. The Constitution is explicit about the fundamental rights and duties of citizens, and the distribution of powers and responsibilities between the legislature, executive and judiciary at union as well as state level. With the increase in application of the constitutional provisions in the Indian governance and changes in the socio-political realities of the country, amendment of the original Constitution has been required. Thus, the first Constitutional Amendment Act was passed within 16 months of the coming into force of the Constitution. Over the last six decades, 115 constitutional amendments have been proposed.¹

The Constitution also formed the basis for the call for competition reform, given that Article 39 of the Constitution of India provides for competition-related action under the directive principles to be followed by the state to ensure the all-round welfare of the citizens of the country. Under Article 39 (b) and (c), the ownership and control of the material resources of the community should be so distributed as best to serve the

¹ <http://www.prsindia.org/billtrack/constitutional-amendments> (last accessed 26 June 2011).

common good, while the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment.²

2.2 The Legislative Institutions

India is a Westminster-style parliamentary democracy with union as well as state legislatures. At the union level, the President, the Council of States or the *Rajya Sabha* (the upper house),³ and the House of the People or the *Lok Sabha* (the lower house)⁴ constitute the Parliament, which is the supreme legislative body for the country. The President is elected indirectly for a term of five years by the members of an electoral college, consisting of the elected members of both Houses of Parliament and the elected members of the legislative assemblies of the states.

Most of the members of the Council of States are elected by the members of the state legislative assemblies and a few are nominated by the President. These members serve a term of six years along with the Vice President, who is the ex officio Chairman of the House and heads the Council. The members of *Lok Sabha* are elected directly from the territorial constituencies of the states and the union territories. The normal tenure for the *Lok Sabha* is five years, at the end of which it is dissolved and fresh elections are held. If the ruling party or parties lose their majority, early or mid-term elections are held. The *Lok Sabha* is chaired by the speaker. At the state level, legislative assemblies of the state and, in some states, the legislative councils serve as the legislative bodies. Whereas the tenure of the legislative assemblies is five years, the legislative councils work on a permanent basis, with one-third of their membership being replaced every two years, and with members serving for a maximum duration of six years.⁵

2.3 The Executive

The executive comprises elected representatives, who are part of the majority party, or parties in a coalition government, in Parliament, as well as

² Constitution of India. Retrieved from http://india.gov.in/govt/constitutions_india.php (last accessed 26 June 2011).

³ Official website of the Council of States of India. Retrieved from <http://www.rajyasabha.nic.in> (last accessed 22 June 2011).

⁴ Official website of the House of the People of India. Retrieved from <http://www.loksabha.nic.in/> (last accessed 22 June 2011).

⁵ N 3.

appointed officers, commonly referred to as the bureaucracy. At the union level, the President is the executive head of the government, with a Council of Ministers headed by the Prime Minister to aid and advise the President. The President is head of state and formally head of the government, but it is the Prime Minister who exercises political leadership of the government. His advice to the President, with a mandate from the Council of Ministers, is binding. At the state level, a governor, appointed by the President for a term of five years, is vested with executive power, with the Council of Ministers, headed by the chief minister of the state, advising him. Like the President, the Governor formally leads the government but real political leadership of the state government rests with the Chief Minister.⁶

2.3.1 Political parties and elections

India has a multi-party system, with a large number of political parties in existence. There are two kinds of political parties in India – national level and state level parties. According to a notification issued by the Election Commission of India 2010, there are six national parties and 52 state parties in India. Apart from these major parties, there are 1,112 registered but unrecognized Parties in India (ECI 2010).

In the first two decades of Indian independence, the Indian National Congress, a political party, enjoyed national as well as regional dominance on account of the role it played during the struggle for independence from Great Britain. However, Congress was later challenged by other parties at both the national and state level. At the national level, the first party to challenge the long rule of Congress in 1977 was the Janata Party, a coalition of various non-Congress parties, which came together to form an alternative government. In view of the fragmented nature of the Janata Party due to the varying ideologies of its constituents, it fell apart within three years of its formation. The Bharatiya Janata Party emerged out of the Janata Party and was comprised mainly of leaders belonging to the former right-wing Bharatiya Jan Sangh party.

Subsequently, the tradition of single-party domination was challenged and other parties started assuming a greater role in national politics. The phenomenon of political alliance building started to gain momentum. Since then, over the last two decades, coalition politics has been guiding government formation at both Union and state levels.

Elections are a costly exercise and therefore parties need substantial funding to contest them. Since 2000, both the aforementioned parties have led coalitions of other national and regional parties to form the Union

⁶ Ibid.

government, since neither of them could achieve a majority on their own. This has had great implications for the political economy of the country as the government has had to bargain and offer concessions to interest groups.

2.4 Legal System and Judiciary

India's legal system has a long and complex history. In addition to the Constitution and laws made by the legislature, there is also a body of subordinate legislation in the form of rules, regulations and by-laws made by union, state and local governments. India has a single integrated system of courts to administer both union and state laws. The Supreme Court is at the apex of the judicial system. Below it are the high courts for each state or group of states. Below the high courts lies a hierarchy of subordinate courts. Each state is divided into judicial districts presided over by a district and sessions judge, which is the principal civil court of original jurisdiction and can try all offenses, including those which may result in the death penalty. The district and sessions judge is the highest judicial authority in a district. Below him, there are courts of civil jurisdiction, known in different states as munsifs, sub-judges, civil judges and the like. Similarly, the criminal judiciary comprises the chief judicial magistrates and judicial magistrates of the first and second class.⁷ A recent statute passed by the Parliament of India has created a provision for constituting *Gram Nyayalayas* or village courts at the sub-district level.⁸ Other than a general judicial system, India also has an elaborate system of special courts, tribunals and quasi judicial bodies to resolve disputes of various kinds, such as marital discord, labor disputes, consumer disputes, environmental violations, competition abuses etc.

As of 30 September 2010, there were over 32 million court cases pending in the judicial system in India. There were approximately 55,000 cases awaiting trial in the Supreme Court (the equivalent figure for the high courts was around 4.2 million) and there were around 28 million cases pending in the subordinate courts.⁹ To address the issue, successive governments have taken various steps such as prescribing timelines, ensuring

⁷ <http://www.supremecourtindia.nic.in/constitution.htm> (last accessed 24 June 2011).

⁸ The Gram Nyayalayas Act, 2008, Act 4 of 2009. Retrieved from <http://lawmin.nic.in/doj/justice/gramnyayalayas.pdf> (last accessed 24 June 2011).

⁹ Text of speech of union Law Minister on union government initiatives to reduce pendency in Indian Courts. Retrieved from <http://pib.nic.in/newsite/erelease.aspx?relid=72970> (last accessed 12 August 2011).

accountability, leveraging upon technology, establishing missions, launching campaigns, extending legal aid, encouraging out-of-court settlements through alternative disputes resolution, and other proposed remedies, but these efforts have had limited effect on improving the effectiveness of the system.

2.4.1 Politico-business nexus

The relationship between business and politics in India is dynamic and multifaceted. The government plays an active role in undertaking commercial activities often left to private providers in other countries. Businesses often build relationships with politicians and bureaucrats in exchange for rents, bribes and allurements. Corruption is endemic and seen as the recognized way of making connections and succeeding in business. Such corrupt practices include influencing the policy and decision-making processes of government as well as manipulating sales of public assets and government procurement.

Many scams and cases of gross financial turpitude are a result of these nexuses. For example, the current 2G spectrum scam is estimated by the Comptroller & Auditor General of India (CAG), the government financial watchdog, to have lost government revenue an estimated US\$32.5 billion, an amount surpassing the annual defense budget.¹⁰ A bigger scandal followed on the heels of the 2G spectrum scam when coal mines were allocated to private parties without competitive bidding.¹¹ The CAG estimated a presumptive loss of US\$33.8 billion. In addition, there has been the Adarsh Housing Society Scam, the Commonwealth Games scandal, and the Bofors defense equipment deal. The list is endless, and does not include the vast incidence of petty corruption at local level due to red tape, which is also endemic. This burden of corrupt dealings between government at all levels and business has serious implications for competition, as the economic distortions make open competition in the market difficult if not impossible. Corruption also leads to the inefficient allocation of resources and discrepancies in the whole market system. India ranks 95 out of 182 in the Transparency International Corruption Perceptions Index.¹²

¹⁰ Inderfurth, Karl F. and Uttara Dukkupati (2011), '2G or Not 2G: Confronting Corruption in India', *US-India Insight*, 1(2). Retrieved from <http://csis.org/publication/2g-or-not-2g-confronting-corruption-india> (last accessed 2 February 2013).

¹¹ <http://www.globalpost.com/dispatches/globalpost-blogs/india/india-coal-gate-corruption> (last accessed 2 February 2013).

¹² 'Transparency International's Corruption Perceptions Index 2011'.

3. THE ECONOMIC SYSTEM

3.1 Key Economic Indicators

3.1.1 Gross domestic relatives

India has a relatively open economy which is becoming increasingly more liberal. India's recent economic development has been underpinned by advanced information and telecommunication technology.

The growth of gross domestic product (GDP), measured at market prices, has been very consistent.¹³ In the fourth quarter of 2010, India's GDP increased by 8.20 percent in comparison to the same quarter during the previous year. Between 2004 and 2010, India's average quarterly GDP growth was 8.40 percent,¹⁴ including during the period of the recent global economic crisis in 2008–09. Although there was a reduction in the growth rate from over 15 percent during the period 2007–08 to just over 12 percent in 2008–09, the reduction was lower than the record reduction during 2004–05, when it fell to just over 4 percent.

The economy is driven by traditional farming, a more modern agriculture sector, handicrafts, heavy industries and a booming services sector. The share of agriculture in the economy is around 14.6 percent, while the industrial share is around 28.6 percent, with the largest share of 57.2 percent provided by the services sector.¹⁵ In 2010, India's GDP was estimated to be about US\$1,315.66 billion,¹⁶ while India's GDP per capita, when adjusted for purchasing power parity, stood at US\$2,946 in 2008. The average GDP per capita for the period 1980 until 2008 was US\$ 1,254.03.¹⁷

3.1.2 International trade

India is an active member of the World Trade Organization (WTO), having joined the organization as a founder member on 1 January 1995. India has benefited from WTO membership. The adoption of liberally

Retrieved from http://cpi.transparency.org/cpi2011/in_detail (last accessed 2 February 2013).

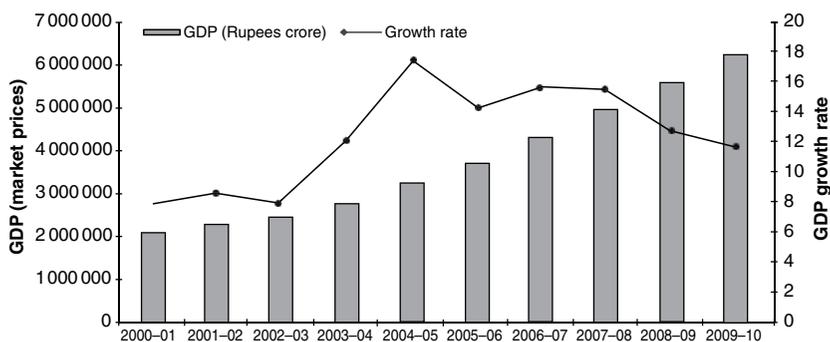
¹³ See Figure 10.1.

¹⁴ 'India GDP Growth Rate'. Retrieved from <http://www.tradingeconomics.com/india/gdp-growth.10percent> (last accessed 31 May 2011).

¹⁵ http://en.wikipedia.org/wiki/Economy_of_India (last accessed 2 February 2013).

¹⁶ 'Economy of the Federal States for Year 2011 & Population for Year 2011'. Retrieved from http://unidow.com/india%20home%20eng/statewise_gdp.html (last accessed 31 May 2011).

¹⁷ Ibid.



Source: Reserve Bank of India, 'Handbook of Statistics on the Indian Economy (HBS) 2010-11'. Retrieved from <http://rbi.org.in/scripts/AnnualPublications.aspx?head=Handbook of Statistics on Indian Economy>.

Figure 10.1 GDP and GDP growth rates, India, 2000–2010

oriented policy initiatives since 1991 has seen India emerge as a player in the global economy. India's economy is now open to external trade, through both exports and direct participation of foreigners in the domestic economy, though restrictions remain.

Trade openness is reflected by the increased levels of imports and exports. Table 10.1 shows the volumes of imports and exports over the years since 2000.¹⁸

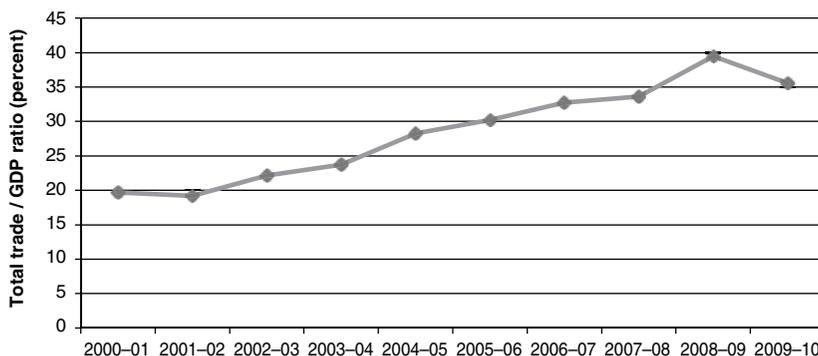
One crude measure of trade openness is the ratio of total trade (imports plus exports) to total GDP. Converting the GDP figures to US dollars as shown in Table 10.1 before calculating the total trade/GDP ratio and then plotting it over time reflects how trade has been improving. This trend toward greater trade openness is shown in Figure 10.2. Generally there has been an upward trend during the period from 2000 to 2010.

Trade openness has helped the competitiveness of Indian industries by introducing more competition in the Indian domestic market. India's trade openness has also resulted from several free trade agreements that the country has signed. These include regional trading arrangements as

¹⁸ Reserve Bank of India, 'Handbook of Statistics on the Indian Economy (HBS) 2010-11'. Retrieved from <http://rbi.org.in/scripts/AnnualPublications.aspx?head=Handbook of Statistics on Indian Economy> (last accessed 2 February 2013).

Table 10.1 India's foreign trade (US dollars)

Year	Exports (US\$ million)		Total	Imports (US\$ million)		Total
	Oil	Non-oil		Oil	Non-oil	
2000-01	1869.7	42690.6	44560.3	15650.1	34886.4	50536.5
2001-02	2119.1	41707.6	43826.7	14000.3	37413.0	51413.3
2002-03	2576.5	50142.9	52719.4	17639.5	43772.6	61412.1
2003-04	3568.4	60274.1	63842.6	20569.5	57579.6	78149.1
2004-05	6989.3	76546.6	83535.9	29844.1	81673.3	111517.4
2005-06	11639.6	91450.9	103090.5	43963.1	105202.6	149165.7
2006-07	18634.6	107779.5	126414.1	56945.3	128790.0	185735.2
2007-08	28363.1	134541.1	162904.2	79644.5	171794.7	251439.2
2008-09	27547.0	157748.0	185295.0	93671.7	210024.6	303696.3
2009-10	28192.0	150559.4	178751.4	87135.9	201237.0	288372.9
2010-11	41480.0	209656.2	251136.2	105964.4	263804.7	369769.1
2011-12	55603.5	249020.0	304623.5	154905.9	334511.5	489417.4



Source: Reserve Bank of India, HBS (2010–11).

Figure 10.2 India – trade openness, 2000–2010

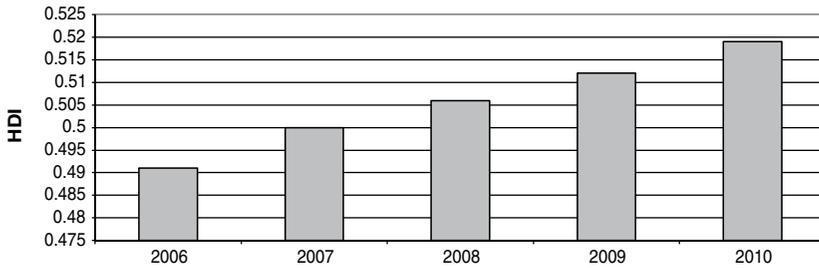
well as other bilateral agreements that the country has signed over the years.¹⁹

3.1.3 Human capital

India's performance has not been very impressive as far as development of its human capital is concerned. One common measure of human capital is the human development index (HDI), an index collated by the United Nations, measuring the average achievements of a country based on three criteria: a long and healthy life, access to knowledge and a decent standard of living. In the 2010 HDI, India ranked a lowly 119 out of 169 countries. A look at the historic trends, however, reveals that the index has been rising slowly from 0.320 in 1980 to 0.519 in 2010. The steady increase in HDI values over this period is shown in Figure 10.3, where there has been a consistent and improving upward trend over the last five years.

The improvement in the HDI is also consistent with the general improvement in the country's literacy rate. According to the 2011 National Census, India's literacy rate now stands at 74.04 percent, which is an increase of about 9.2 percent in comparison with the 2001 level. These positive developments in human capital can all be attributed to the various policies and

¹⁹ 'India – Foreign Trade Policy'. Retrieved from <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSARREGTOPI NTECOTRA/0,,contentMDK:20592520~menuPK:579454~pagePK:34004173~p IPK:34003707~theSitePK:579448,00.html> (last accessed 2 February 2013).



Source: UNDP HDI, 2006–2010.

Figure 10.3 India's HDI, 2006–2010

incentives that the government has adopted. India has an illiteracy rate of more than 25 percent, indicating the size of the challenge faced by the government. Apart from literacy, poor health care is another issue that contributes to a poor HDI.

3.1.4 Level of foreign direct investment (FDI)

The United Nations Conference on Trade and Development's (UNCTAD) 'World Investment Prospects Survey 2009–2012' ranked India as the second largest recipient of global foreign direct investment in 2010. The Japan Bank for International Cooperation's 2010 survey, conducted by Japanese investors, also ranked India as the second most promising country for overseas business opportunities. Furthermore, a report released by the Leeds University Business School in 2010 ranked India among the top three countries where British companies could do business during 2012–14.²⁰

The findings from these surveys confirm India as a major recipient of FDI. Although various liberalization initiatives have been undertaken in India, there are significant problems caused by infrastructure bottlenecks. Although the electricity industry has been reformed and opened up to private investment, the sector has remained unattractive to private investors due to the high cost of producing and transmitting electricity which exceeds the permitted selling price. The road network is very poor, with considerable traffic congestion on most highways (major roads). Even

²⁰ Azhar, Syed and K.N. Marimuthu (2012), 'An Overview of Foreign Direct Investment in India'. Retrieved from http://www.zenithresearch.org.in/images/stories/pdf/2012/Jan/ZIJBEMR/18_ZIB_VOL2_ISSUE_1.pdf (last accessed 2 February 2013).

though these only constitute about 2 percent of the network, they carry about 40 percent of the road traffic in India.²¹

Port infrastructure is also critical for the Indian economy since maritime transport accounts for about 95 percent of India's international trade by volume and 77 percent by value, with the major ports dominating in terms of business volume, accounting for 75 percent of all cargo handled.²² However, the performance of Indian ports is inefficient and below international norms. This results in higher container handling costs and slower ship turnaround times. Such inefficiency has resulted in operators charging a higher freight rate when compared to other ports in the region.²³

3.1.5 World Economic Forum (WEF) competitiveness ranking

Despite a fairly welcoming environment for domestic and foreign players as well as an economy favorable to trade, India's performance, as measured by economy-wide international competitiveness, is not satisfactory. According to the World Economic Forum's 'Global Competitiveness Report 2010–2011', India's competitiveness fell two places to 51st in the world rankings. Although the overall ranking is not good, there are some sectors which were ranked higher. These include financial markets, ranked 17th, business sophistication, ranked 44th, and innovation, ranked 39th. The report also noted some areas where India needs to improve its competitiveness, including the health and primary education sectors, each with a ranking of 104th. Infrastructure ranked 86th and labor market negotiation 92nd.

High rates of communicable diseases and high infant mortality affect India's competitiveness in maintaining a healthy population and although there have been improvements in primary education enrollment, the poor quality of schooling does not ensure a supply of high quality labor. Poor infrastructure in terms of roads, ports and electricity all contribute to India's relatively modest international competitiveness.

²¹ Henry, Laurence (2008), 'India's International Trade Policy', *Asie Visions 9*. Retrieved from www.ifri.org/downloads/AV9.pdf (last accessed 2 February 2013).

²² CUTS (2010), 'Competition and Regulation in the Indian Port Sector', Briefing Paper No. 7/2010. Retrieved from http://www.cuts-ccier.org/icrr09/pdf/Briefing_Paper-Competition_and_Regulation_in_the_Indian_Port_Sector.pdf (last accessed 2 February 2013).

²³ Ibid.

3.2 Structure and Nature of Key Sectors of the Economy

3.2.1 Agriculture sector

India's agricultural sector is large and diverse, with the country being one of the world's greatest producers of agriculture commodities.

Cereals (mostly rice and wheat) are the staple food in India, providing over half the calories consumed by the whole population. India is among the world's leading producers of paddy rice, wheat, buffalo milk, cow's milk and sugar cane, with most of the products being widely traded.

Due to high levels of local consumption of these products, quantities exported are minimal. It is estimated that trade in agricultural and food products as a proportion of total trade is very low; agricultural exports represent only 9 percent of the value of total exports, while the share of agriculture in total imports is just 5 percent.²⁴

India's performance in agricultural productivity is low in comparison with its neighboring countries. This low productivity could explain the inability to export significant amounts of food; production struggles to exceed domestic consumption. There are several reasons for this poor productivity. First, the supporting infrastructure for sustainable irrigation is underdeveloped. Secondly, farm sizes remain small, thus preventing economies of scale that come with large-scale investment. Thirdly, the rural population, which is where the bulk of farming activity lies, has little access to the credit needed to produce on a larger scale.

Given the importance of the agriculture sector to the economy and to people's livelihoods, the government has also introduced various policy measures to regulate the sector. Minimum support prices for the major agricultural crops, farm input subsidies and preferential credit schemes are all offered to support production. These support prices for basic staples are intended to cushion producers from any unexpectedly sharp price falls, as well as to ensure that the public sector becomes an attractive buyer for farmers in case of overproduction. Adequate food stocks are thus ensured for distribution in time of need.

However, there are times when these policies cause distortions in the market. Guaranteed prices have been found to be below prevailing market prices, with subsidies on farm inputs, including fertilizers, electrical power and irrigation water, leading to inefficient use of inputs, implying that

²⁴ Monitoring Agri-trade Policy (MAP) (2007), 'India's Role in World Agriculture', December. Retrieved from http://ec.europa.eu/agriculture/publi/map/03_07.pdf (last accessed 2 February 2013).

the instruments of support are inefficient and constitute the most trade-distortive forms of support.²⁵

Prior to the reforms in 2000, Indian agriculture policy was restrictive, with regulations governing entry and investment into the private sector. In 2000, the enactment of the National Policy on Agriculture saw the Agriculture Produce Marketing Committee (Regulation) Act (APMC) amended so as to allow easier entry to the industry. Consequently, several domestic and multinational firms entered into the marketing and processing of agricultural products,²⁶ so improving efficiency and competition in its sector. However, agriculture being under State control, the reforms have not been universal. Amendments in the APMC Act are in the sovereign domain of States. Traders who benefit from the existence of the APMC Act are beneficiaries of political patronage, hence reform is difficult.

The Food Corporation of India (FCI) implements the food grains sectors of supply policy, mainly rice and wheat. FCI, directly or through an agency of a state government, buys paddy and wheat from farmers at a designated minimum support price as well as through a levy system from rice mills. The rice mills are required to sell to the FCI between 10 and 75 percent (depending on the area of production, as state regulations differ) of their milled rice at the prescribed levy price.

There are also several other policy instruments that are used to regulate various aspects of agriculture activities besides the APMC Acts, at both central and state government level. Among these is the Essential Commodities Act (ECA) of 1955, which also causes distortions in the market, as it restricts movement, storage, processing, and imposes stock limits on agricultural products. For example, ECA is believed to have prevented the flow of commodities from surplus to deficit regions and has been accused of having widened the price difference between different parts of the country and to have prevented large-scale participation by private traders in various marketing activities.²⁷

The Forward Markets (Regulation) Act 1952 regulates commodity futures markets in India. The Forward Markets Commission (FMC) acts as the regulatory authority for futures and forward trading. Private associations, registered under the Act, own the commodity exchange institutions in which futures trading is conducted in. Futures trading is also

²⁵ *Ibid.*

²⁶ Chadha, R., S. Davenport and K. Elumalai (2008), 'Competition and Regulation Issues in Indian Agricultural Markets', Paper prepared for International Workshop Agricultural Trade Liberalisation and Domestic Market Reforms in Indian Agriculture, 5 June 2008, The Claridges Hotel, New Delhi, India.

²⁷ *Ibid.*

an avenue used by the government as an instrument to contain the rise in prices of agricultural commodities. Some products are, however, banned from being traded in the futures market, and these commodities include rice, wheat, potato, gram (chana), soya oil, and rubber.

The government also intervenes in the input market through the provision of subsidies, particularly through grants for fertilizer, power and irrigation water. This allows inputs to be supplied at below their actual cost to farmers, with the result that these subsidies impose a huge strain on central and state budgets.

There are a large number of buyers (farmers) and a relatively small number of suppliers in the seed market, which consists of both private and public sector businesses. Players from the public sector include the National Seeds Corporation, the State Farms Corporation of India and 13 state seed corporations, while the private sector, which encompasses domestic and multinational firms, has about 200 private seed companies, accounting for 70 percent of the market. There are about 13 major tractor manufacturers in India, which produce about 250,000 tractors annually, though their use is highly concentrated in Punjab, Haryana, and Western Uttar Pradesh (UP), which account for about 55 percent of the total sales in India.²⁸ Production of pesticides, including by multinational companies (MNCs), is also a relatively concentrated market.

The Indian agricultural system has given rise to competition concerns. It is possible for a few traders in the grain market, for example, to depress the price they pay by forming a buyers' cartel. The fact that the agrochemical and other input markets are highly concentrated implies that their producers might not have an incentive to improve their inefficiency to allow farmers to increase productivity. Consequently, farmers may be subject to market abuse.

Government policies may contradict the objectives of competition policy due to restrictions on investment. There has been a dearth of investment in rural road infrastructure, resulting in middlemen taking advantage of small farmers; they buy from farmers at comparatively low prices and sell at inflated prices to make large profits for themselves. Thus, weak road infrastructure restricts farmers to selling to the middleman, thereby exacerbating rural poverty.

3.2.2 Extractive sector

India has a thriving mining industry which plays an important role in the economy. In addition to contributing to export earnings, the sector also

²⁸ Ibid.

provides raw materials to domestic industries. It is believed that, due to the multiplier effect, every penny generated from the mining industry would in turn generate about 2.4 times the direct and indirect output in the economy, although the industry also contributes around 2 percent to overall GDP.²⁹ There are some states whose economic development heavily depends on mining, and these include Jharkhand, Orissa and Chhattisgarh.

India mines about 86 minerals, which include four fuel minerals, ten metallic, 46 non-metallic, three atomic, and 23 minor minerals. The minerals are mined by large mining giants together with a large number of small mines; in 2008–09, about 2,954 mines reported that they had been engaged in mineral production (excluding minor minerals, petroleum, natural gas, and atomic minerals), which was an improvement on 2,854 the previous year. In terms of geographical spread, about 433 were located in Gujarat, 406 in Andhra Pradesh, 298 in Madhya Pradesh and Jharkhand, with others in Rajasthan (252), Orissa (236), Karnataka (230), Tamil Nadu (159), Maharashtra (154), Chhattisgarh (150) and West Bengal (113). The public sector is also significant, as there are roughly 755 publicly owned mines.³⁰

The National Mineral Policy of 2008 is the policy document guiding the operations of mining companies in India. There are also specific regulations, such as the Mines and Minerals (Development & Regulation) Act of 1957 (amended in 2009³¹) and the Mines Act of 1952, in addition to other rules and regulations framed under these laws. The Offshore Areas Mineral (Development and Regulation) Act of 2002 was enacted to regulate drilling in territorial waters, continental shelves, exclusive economic zones, and other maritime zones of India. The regulations under these laws include the Mineral Concession Rules of 1960, and the Mineral Conservation and Development Rules of 1988.

The National Mineral Policy opens the mining sector to private investment, including foreign investors, for the exploration and exploitation of all non-fuel/non-atomic minerals. The policy also envisages the establishment of a level playing field between government-owned companies and private players. Foreign ownership of up to 100 percent is allowed with prior approval from the Foreign Investment Promotion Board (FIPB) as

²⁹ Federation of Mineral Industries (2010), 'A Guide to Investment in India's Mineral Industry', January. Retrieved from www.fedmin.com/html/guidetoinvest.pdf (last accessed 26 May 2011).

³⁰ Ibid.

³¹ Another amendment bill is pending before the Parliament (November 2012).

well as under the Automatic Route under powers delegated to the Reserve Bank of India.

3.2.3 Manufacturing sector

The Indian manufacturing is dualized, given the prevalence of the largely unorganized and informal sector coexisting with the formal sector. The informal sector can be classified into three categories: (i) own-account manufacturing enterprises, which are household enterprises making use only of family labor, (ii) non-directory manufacturing establishments that employ at least one wage (hired) worker and have between two to five workers in total, and (iii) directory manufacturing establishments employing between six to nine workers in total, of which at least one is a hired worker. The formal or organized sector is defined under the Factories Act to be establishments employing ten or more workers.³²

3.3 Core Manufacturing Sub-sectors in India Include the Following

3.3.1 Auto industry

The industry has grown significantly during 2009–11, given that in the first half of 2010, the industry witnessed a steep 32 percent average annual sales growth, which came down to 25 percent in the latter half of the year.³³ Two-wheelers dominate the automobile industry exports, and it is estimated that about 65 percent of total automobile exports from India are two-wheelers. They also lead in terms of production volumes, for example, during the 2004–05 period, about 8.6 million vehicles were produced, of which 6.6 million were two-wheelers, with the rest composed of passenger cars, three-wheelers, and commercial vehicles.³⁴

It is estimated that the Indian auto industry is a US\$44 billion industry, and represents about 5 percent of GDP on average.³⁵ The industry is

³² Mazumdar, D. (2010), 'India's Peculiar Pattern of Growth: The Impact of Labour Regulations on its Origin and Persistence', paper prepared for the International Conference on Enforcement, Evasion with Informality: Theory and Practice, Ann Arbor, Michigan, 4–6 June 2010.

³³ 'Indian Automobile Industry in 2011'. Retrieved from <http://www.carazoo.com/article/1001201101/Indian-Automobile-Industry-in-2011> (last accessed 26 May 2011).

³⁴ IE Singapore (2009), 'Opportunities in India's Manufacturing Sector' Retrieved from <http://www.smafederation.org.sg/Portals/0/Events/2009%20Apr%20-%20Jun/Opportunities%20in%20India%27s%20Manufacturing%20Sector%20-%20EPC%20Buyer%20Seller%20Meet%20030409.pdf> (last accessed 31 May 2011).

³⁵ Ibid.

open to foreign investment, given that up to 100 percent FDI is permitted through automatic eligibility. As a result, the market is relatively competitive, with many domestic and international players. However, due to high tariffs, imports of assembled cars are discouraged.

3.3.2 Pharmaceuticals

Among developing countries, India ranks at the top in terms of the manufacture of pharmaceutical products. The industry has expanded during the last decade, and recently there has been a spate of mergers and acquisitions, which saw the entrance of several multinational companies into the sector.³⁶ Although the industry is highly fragmented, with more than 20,000 registered units, it is estimated that the leading 250 pharmaceutical companies may actually control about 70 percent of the market.³⁷

Multinational companies, which recently entered the Indian market through strategic acquisitions, include Abbot Labs (by purchasing Piramal Healthcare), Sanofi-Aventis (which purchased Shantha Biotech), Fresenius Kabi (through Dabur Pharma) and Daiichi Sankyo (which bought Ranbaxy). They joined other multinational companies such as GlaxoSmithKline (GSK) and Novartis, which were already in the market. These companies were attracted by the potential of a fast-growing India generic drug market. Although the companies in the sector have low market shares, data released in various newspaper articles shows that the hold of multinational companies on India pharmaceutical market is increasing; the top four firms in terms of market share now include only one local company (Cipla), a complete contrast to the situation in 2008 when GSK (now ranked fourth in terms of market share) was the only MNC in the top ten. Collectively, multinational companies now command about a 25 percent market share. However, the market is still far from being highly concentrated, with the top firm having below 7 percent market share.

The other problem is that many of the acquired companies were manufacturing generic medicines and it is feared that their new foreign owners will not continue to manufacture product lines and will instead focus on

³⁶ Mehta, Pradeep S. (2010), 'Overseeing Pharma Mergers through Competition Lens', *The Financial Express*, June 20. Retrieved from <http://www.financialexpress.com/news/overseeing-pharma-mergers-through-competition-lens/635975> (last accessed 2 February 2013).

³⁷ UNIDO (2005), 'Indian Manufacturing Industry: Technology Status and Prospects'. Retrieved from http://www.unido.org/fileadmin/user_media/Publications/Pub_free/Indian_manufacturing_industry_technology_status_and_prospects.pdf (last accessed 2 February 2013).

their patented medicines, which have a higher profit margin, impacting the poor adversely.

3.3.3 Textiles

The textile industry now accounts for about one-fifth of total export earnings.³⁸ Traditionally, the government has deliberately discriminated against integrated textile mills in a bid to help cottage handlooms, as a way of fighting poverty; hence many mills have closed in recent decades, with the remaining producing only about 4 percent of textiles output.³⁹ Handlooms have also not fared as expected, given that they constitute only 18 percent of the industry, since the mills have found a way of escaping restrictions by having power looms located in sheds outside the mills, which produce the bulk of output.⁴⁰

The textile industry is, however, very competitive, taking advantage of abundant cheap skilled labor across the entire value chain of production (ranging from spinning and weaving to the final manufacture of garments). The importance of the textiles and clothing industry should also be understood from the point of view of generating more employment opportunities, as this is where the semi-skilled labor force is mainly to be found.

The manufacturing sector is also governed by various onerous regulations. Some of the regulations have affected the growth of the sector and competition; for example, the protection of small-scale units has been an important aspect of Indian industrial policy since independence. This took the form of reserving a large number of items for production in exclusively small units and the provision of fiscal, financial and legislative incentives to encourage them to stay below a certain size. This was later dismantled in the reform process, but it had helped in setting up the dual structure which still exists.⁴¹

The manufacturing sector is thus restricted by several challenges which also affect competition, among them the poor quality of infrastructure. The presence of state-owned companies, which have accounted for the bulk of activity in steel, non-ferrous metals (virtually 100 percent for copper, lead and zinc, and about 50 percent for aluminum), shipbuilding, engineering, chemicals and paper,⁴² also gives rise to concerns about competition as these state-owned enterprises sometimes get favorable treatment at the expense of their private counterparts.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Mazumdar (n 32).

⁴² UNIDO (n 37).

There are many challenges to doing business in India, which negatively affect the manufacturing sector. There are still too many bureaucratic restrictions amounting to a substantial burden on prospective manufacturers. By way of example it has been estimated that permission to construct a warehouse in Bangalore requires 20 procedures and costs 700 percent of per capita income.⁴³ The World Bank's Doing Business in India report for 2012 shows India at 132 out of 185 countries that it surveys annually.⁴⁴

3.4 Services Sector

India has a thriving services sector, which is regarded as one the fastest-growing sectors over the past decade. The service sector contributes more than 55 percent of the country's GDP,⁴⁵ and is growing at a higher rate than agriculture or manufacturing, which were traditionally regarded as economic growth drivers. The sector is broad, and includes transportation and communication, information technology, finance, real estate, business services and retail and distribution.

One of the most critical service sub-sectors is IT, which continues to play the leading role in the overall growth of industry. This growth is spurred by a number of local and multinational computer software and related accessory businesses operating in India. The total number of internet connections, including dial-ups, is around 9.22 million with about 17.8 percent of the population believed to be using the internet.⁴⁶ The television services industry has also been growing substantially in India; there were about 150 pay TV channels in existence as at end of June 2010. There are also six private direct-to-home licensees, offering services to a subscriber base of around 23.77 million.⁴⁷ The regulation of the IT industry, as well as the formulation of policies related to communications,

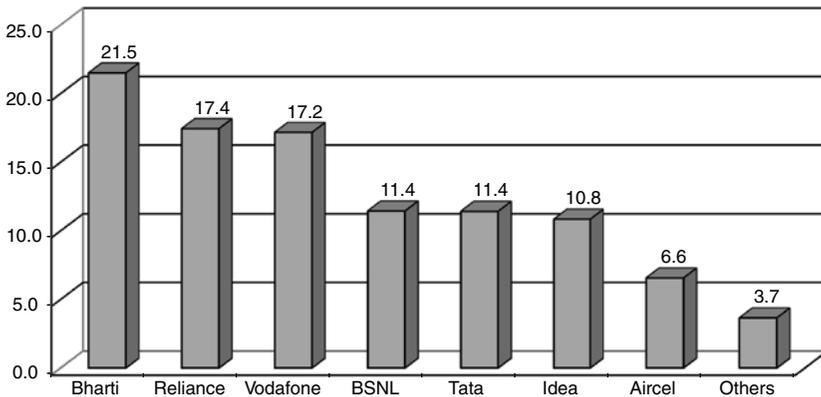
⁴³ Mazumdar (n 32).

⁴⁴ <http://www.doingbusiness.org/data/exploreconomies/india> (last accessed 2 February 2013).

⁴⁵ Gupta, V. (2011), 'Indian Economy Shifting towards Service Sector'. Retrieved from <http://www.goindocal.com/opinion-%C2%BB-editorial-indian-economy-shifting-towards-service-sector--go-335.htm> (last accessed 31 May 2011).

⁴⁶ CUTS (2009), 'The Competition Regime as a Determinant of Consumer Welfare: Focus on Indian Telecom'. Retrieved from http://www.cuts-ccier.org/pdf/Comp_Regime_Determinant_of_Consumer_Welfare.pdf (last accessed 2 February 2013).

⁴⁷ Telecom Regulatory Authority of India (TRAI) (2010), 'The Indian Telecom Services Performance Indicators, April – June 2010', TRAI. Retrieved from <http://www.trai.gov.in/WriteReadData/trai/upload/Reports/52/5octoblerindicatorreporton13oct.pdf> (last accessed 2 February 2013).



Source: Calculated from TRAI, 2010.

Figure 10.4 Market shares for the leading wireless providers

rests with the Ministry of Information and Broadcasting, aided by the Telecommunications Authority of India.

The telecommunications industry is also one of the fastest growing industries in India, with the mobile sector gaining around 5-6 million new customers every month.⁴⁸ The technological developments in the sector, however, have had a negative impact on the growth of fixed line industry, whose growth has been slower, with the number of fixed line phones actually declining from 41.3 million in May 2006 to 40.3 million in May 2007.⁴⁹

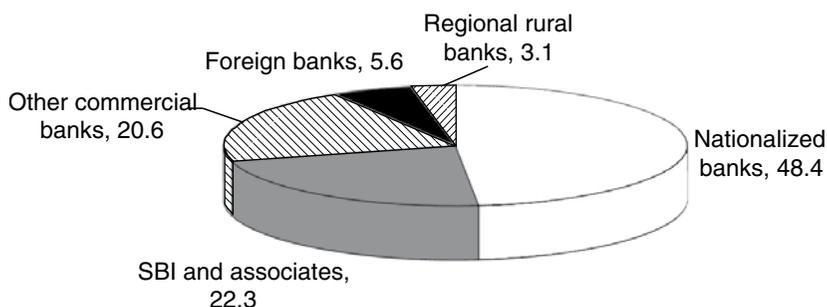
The overall number of telephone subscribers in India increased by 8.1 percent from the March 2010 figure to 671.69 million at the end of June 2010, resulting in an overall tele-density of 56.83 as of 30 June 2010.⁵⁰ Figure 10.4 shows the total number of subscribers (for both GSM and CDMA) in the mobile wireless sector. The sector is fairly competitive, with none of the players being in a dominant position. There are about 15 registered suppliers, the first seven having significant shares of the market at national level (some of the suppliers only operate in a single state, and the national picture does not accurately reflect the true state of competition in the market).

The services sector also contains a thriving banking sector, which has undergone a transformation over the years as banks have adopted

⁴⁸ CUTS (n 46).

⁴⁹ Ibid.

⁵⁰ TRAI (n 47).



Source: Calculated from Thakur, 2010.

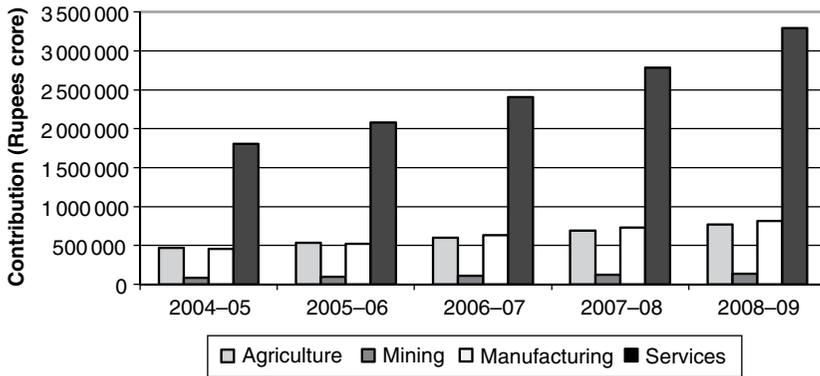
Figure 10.5 Share of aggregate deposits among banks

strategies to survive intense competition. Such strategies have included organic growth, acquisitions and alliances. In India, there are 84 commercial banks, over 3,000 cooperative banks, and 133 regional rural banks.⁵¹ Players include both public and private sector players, which include Citibank, Deutsche Bank, Standard Chartered, HDFC Bank, HSBC, IDBI, ICICI Bank, State Bank of India (SBI) and others. Although private banks also have a significant foothold in the industry, nationalized banks continue to play a significant role, capturing almost half of the market.

ICICI Bank and HDFC Bank are among the leading private sector banks, while Citibank, Standard Chartered, Deutsche Bank and HSBC are among the leading foreign-owned banks. The nationalized banks dominate the market in terms of deposit base; SBI (together with its associated affiliates) enjoy about 22.3 percent of the market, while the rest of the nationalized banks comprise about 48.4 percent of the market (Figure 10.5). Although foreign banks have also entered the market, they still face competition from local players, having captured only about 5.6 percent of the market.

Bank regulation is largely conducted by the Reserve Bank of India (RBI) and the Ministry of Finance. However, some calls have been made for policy prescriptions to be improved upon. For example, it is felt that the cost of intermediation remains too high, at a time when bank penetration is limited to only a few customer segments. It is also felt that there are some restrictions on capital availability and deployment, together

⁵¹ Thakur, Rajeshwari Adappa (2007), 'Banking on Growth', in *India Now – A Perspective*, 4(3), Haryana: IBEF.



Source: Reserve Bank of India Handbook of Statistics.

Figure 10.6 Sector contribution to GDP, India, 2004–2009

with a lack of institutional support infrastructure to ensure that the sector thrives.⁵²

The service sector continues to thrive in the Indian economy. From 2004–05 to 2008–09 the sector doubled in terms of nominal output and this trend is likely to continue.

Figure 10.6 shows that services are by far the biggest driver of the Indian economy. Although agriculture and manufacturing are also significant contributors to GDP, the gap between services and these other sectors continues to widen. This implies that the future of the Indian economy can be influenced through policies aimed at supporting the growth of the services sector.

4. COMPETITION POLICY AND LAW

4.1 Nature of Competition Policy

India's competition regime has over the years also been reflective of the general economic system prevailing in the country. Although India has a long history of competition law enforcement, the country has yet to

⁵² McKinsey & Company (2010), 'India Banking 2010: Towards a High-performing Sector'. Retrieved from http://www.mckinsey.com/locations/india/mckinseyonindia/pdf/india_banking_2010.pdf (last accessed 3 June 2011).

adopt a comprehensive competition policy to ensure that competition is made central to government policies by avoiding any conflicting provisions in legislation and existing sectoral policies. Before the liberalization initiatives of 1991, India adopted a policy of 'command-and-control' laws, rules, regulations, and executive orders – a system that had been followed since independence in 1947. As a result, the first competition law, the Monopolies and Restrictive Trade Practices Act (MRTPA) of 1969 was enacted in such an environment.

This MRTPA was based upon Article 39 of the Constitution of India, which calls upon the state to ensure that wealth is not concentrated in the hands of a few and that resources are available for the common good of the whole population. However, the MRTPA was in fact more of a licensing law, rather than a competition law.

After 1991, the MRTPA was found to possess many weaknesses as far as post-liberalization anti-competitive behavior was concerned. These weaknesses were exposed in a number of rulings by the Supreme Court of India which showed gaps in the interpretation of the various provisions of the MRTPA. Although centered on the two major pillars of competition enforcement (after the removal of the merger and acquisitions provisions from the MRTPA) – namely the abuse of dominance and cartelization – the wording of the MRTPA was considered inadequate by judicial pronouncements, ultimately resulting in the drafting of a modern comprehensive competition law. The Competition Act of 2002 (the Act), which was amended in 2007 to take into account various issues, now embodies India's commitment to a modern competition law. The major change in the new law was that behavior rather than size were important. Dominance *per se* was not bad, but its abuse was.

Although India had a long history of competition law enforcement under the MRTPA, what is still surprising, especially after repeated calls from numerous stakeholders, is the absence of a comprehensive pro-competition policy. The shortcomings from this vacuum are felt as a result of existing competition distortions emanating from various government policies and (in)action which tends to clash with the spirit of a pro-competition environment. Through government action, there are glaring examples of the absence of competitive neutrality, where policies favor the public sector at the expense of the private sector, particularly in the aviation, fuel, retailing, health, and the coal sectors.⁵³ There are also instances

⁵³ In both 2010 and 2011, Coal India had been investigated by the CCI (Competition Commission of India) following two complaints concerning their restrictive practices and alleged abuse of their 80 percent share of the market. It

where trade policies become distortive, when they are used to protect inefficient local firms while preventing more efficient foreign firms' entry into the market through the imposition of improperly constituted and poorly executed antidumping duties and safeguard measures. This disharmony between the main principle behind the enactment of the competition law and certain other policies is the basis upon which a comprehensive pro-competition policy statement is required.

4.2 Government Commitment to Pro-competition Policy

Although the government has demonstrated a willingness to enact competition laws, its commitment to pro-competition policies remains unstated. For example, although the Competition Law was enacted in 2002 to establish the Competition Commission of India (CCI), the enforcement agency and the Competition Appellate Tribunal (COMPAT), the CCI was only able to start meaningful operation more than six years after the enactment of the Act as a result of constitutional challenge to the makeup of the CCI. Although some of the delay was due to court applications, the government also complicated matters by delaying the notification of key provisions of the Act, resulting in the CCI being unable to enforce the law.

The extent to which the government attempts to accommodate dissent appears to point to a lack of commitment on the part of the government to a pro-competition agenda. The delay in activating merger notification was due to pressure exerted by interested parties who lobbied the government to ensure that anti-competitive mergers could be completed before the new rules came into effect.

Although the government has since indicated in principle that it now appreciates the need for a comprehensive competition policy to ensure that the economy enjoys the full benefits of pro-competition reforms, the continued absence of such a policy is likely due to a lack of political will. The government, through the Planning Commission, constituted a Working Group on Competition Policy more than five years ago⁵⁴ under the procedure for formulation of the Eleventh Five Year Plan. Included in the mandate of the Working Group were the following stipulations:

- To recommend a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition to

had been suggested that they had been supplying low-grade coal, forcing buyers to employ middlemen to further process the coal before it was usable. See Ray (2012). However, the CCI has not yet passed any order (November 2012).

⁵⁴ Order number I&M-(32)/2006 dated 5 June 2006.

enhance competition in the domestic markets, with the involvement of all stakeholders;

- To recommend ways of enhancing the role of competition and competitive markets in Government policymaking at the Central and State levels.
- To advise on the most effective and workable institutional mechanism for synergized relationship between sectorial regulators and the CCI.⁵⁵

The good news is that the government of India, through the Department of Corporate Affairs, has established a committee to draft a National Competition Policy. This has now been done and is available on their website for comment.⁵⁶ It is hoped that the Policy will be adopted soon. Concurrently, the government has commissioned a slew of studies⁵⁷ to identify competition impediments against which they plan to launch an advocacy strategy to promote competition reform. The same committee has also reviewed the Competition Act of 2002 in order to suggest improvements. These have been approved by the Cabinet and are likely to be placed before Parliament for adoption.

4.3 Industrial Policy and Competition

Traditionally, there are some aspects of Indian industrial policy which have been in conflict with a pro-competition objective. For several decades, India encouraged and protected its small-scale industrial sector by reserving certain goods for manufacture by this sector. As already mentioned, the handloom sector was protected in this way. However, the country has in this way protected inefficient small-scale units. The objective of providing employment and poverty alleviation was a good one, but producing poor-quality goods and perpetuating poor skill formation and low capital investment were high costs to pay. Increasing competition should improve efficiency by attracting innovative firms that are better equipped to satisfy consumer demand. However, for many years, such entry has been prohibited by law, and hence inefficiency persists.

Following the removal of quantitative restrictions on imports, resulting in most of the items on the reservation list becoming importable, the reservation system was rendered obsolete. The former reservation system

⁵⁵ Ibid.

⁵⁶ 'Draft National Competition Policy for India'. Retrieved from <http://indiacurrentaffairs.org/draft-national-competition-policy-for-india> (last accessed 5 July 2011).

⁵⁷ http://circ.in/CIRC-IICA_Sector_Studies_Project.htm (last accessed 2 February 2013).

has resulted in consumers paying higher prices than they would have done with a more liberal external trade system, thus reducing consumer welfare.

FDI policy also has some elements in conflict with competition objectives. Many liberal improvements have been made to the FDI policy, for example the tight cap on the quantum of FDI permitted in certain sectors has been removed. However, there are still some sectors where restrictions persist. A good example is the retail sector. Investment in multi-brand retail is prohibited, while FDI is permitted for single-brand retailers. The same situation pertains in defense and insurance sectors, where up to 26 percent FDI ownership is permitted. However, the FDI policy is dynamic and evolving, with the government committed to continued reform.

Other sectors also exhibit restrictions in relation to FDI, among them betting and gambling, the chit fund business, plantations and agricultural activities, real estate, transferable development rights, lottery businesses, railway transport, and the mining of some minerals.

These sectors, which are still out of bounds as far as full control for foreign investors is concerned, pose potential challenges in promoting domestic competition. First, the number of potential players in the sector is restricted as many firms with new innovative techniques cannot enter the market to give customers more choice. Secondly, this also allows inefficient firms to remain in the market, passing on their inefficiency to customers through higher prices due to the absence of competition from more efficient foreign players.

4.4 Nature and Structure of Competition Agencies

The Competition Act of 2002 provides that two major agencies will enforce the law. These are the Competition Commission of India (CCI) and the Competition Appellate Tribunal (COMPAT).

4.4.1 Competition Commission of India

CCI has been vested with responsibility for eliminating practices that have an 'adverse effect on competition',⁵⁸ which involves the elimination of anti-competitive agreements, abuses of dominant positions and the prevention of anti-competitive mergers and acquisitions. The CCI also has a mandate to promote and sustain competition in general through various

⁵⁸ This test is different from what similar laws provide in other countries, which is often 'substantial lessening of competition'.

initiatives – centered on advocacy – in order to protect the interest of the consumers, and to ensure that freedom of trade exists in India.

The structure provided under the Act is that the CCI Board is established and consists of a chairperson, who is to be assisted by no fewer than two and no more than six other members to be appointed by a Selection Committee prescribed under the Act. This committee is headed by the Chief Justice of India or his nominee and also comprises of the Corporate Affairs Secretary, the Law Secretary and two other experts to be appointed by the government. The chairperson and members of the CCI are appointed for a five-year term of office, which can be extended as members are eligible for re-appointment, subject to an age limit of 65 years.

The office of Director General is also established to be appointed by the central government to assist the Commission in conducting inquiries into contraventions of the Act. The Act also provides for the appointment of additional Directors General if considered necessary. A secretary, together with other professionals, may be appointed by the Commission. Collectively, these positions form the Directorate.

4.4.2 Competition Appellate Tribunal (COMPAT)

The COMPAT has two mandates: first, to hear and dispose of appeals against any decision made by the CCI and, secondly, to adjudicate on claims for compensation that may arise from the findings of the CCI. In turn, its orders can be appealed in the Supreme Court of India. The COMPAT has powers similar to those of the Civil High Court and can also deal with cases of contempt of court for disobedience of its orders.

In terms of structure, the COMPAT comprises of a chairperson and not more than two members. The chairperson must be a person who is or has been a judge of the Supreme Court or chief justice of a high court. The other members should have 25 years of experience in competition law and policy, international trade or economics, and shall be appointed by a selection committee consisting of the Chief Justice of India, Secretary of the Ministry of Corporate Affairs and Secretary of the Ministry of Law and Justice. This committee is smaller than the one for selection of members of the CCI, i.e. there are no external experts on this committee.

4.4.3 Competition Fund

In addition to COMPAT and CCI, the Act also provides for another institution, which is termed the 'Competition Fund'. Under the Act, the Fund is credited with: (a) all government grants to be received by the CCI, (b) the fees by the CCI received under the Act, and (c) the interest accrued on such fees. The Fund is the source of finance for the operation of the two competition agencies.

4.5 Type and Structure of Competition Law and Sector Regulation

The economic reforms of the 1990s also saw several sector-specific regulators established in India, with a mandate to regulate structural and behavioral issues pertaining to their respective sectors. Sectors with specific regulators include telecommunications, electricity, securities and exchange, airports, ports, fuel and banking. The Telecommunications Regulatory Authority of India (TRAI) and its associated appellate tribunal form the regulatory authority for the telecom sector. In the electricity sector, the Central Electricity Regulatory Commission (CERC) regulates the sector at the federal level (with an independent appellate tribunal), while the State Electricity Regulatory Commissions (SERC) regulate the sector at state level in most regions, and their appeals lie before the central appellate tribunal for electricity. The Securities and Exchange Board of India (SEBI), along with an appellate tribunal, has oversight over the operation of the capital markets, while the banking and the financial sectors are regulated by the Reserve Bank of India, the central bank. The Insurance Regulatory & Development Authority (IRDA) was created to regulate the insurance sector. The major ports, particularly with respect to tariffs, are regulated by the Tariff Authority of Major Ports (TAMP), while major airports are regulated by the Airport Economic Regulatory Authority of India. The Petroleum and Natural Gas Regulatory Board oversees the named sectors.

Included in the mandate of each authority is the safeguarding of competitive outcomes in the sector by fostering greater efficiency in resource allocation and promoting consumer welfare. This structure creates overlaps between the mandates of the CCI and the sector regulators, which has led to some potential difficulties. The requirement for a framework for the coexistence of sector regulators and the competition authorities is an issue that has been widely recognized.

An attempt was made to ensure a proper framework for cooperation between CCI and sector regulators in the Act. By virtue of sections 21 and 21A of the Act, both the CCI and the sector regulators are obliged to cooperate when it comes to dealing with issues that appear to have an impact on the jurisdiction of the other, which in any case raises the possibility of a competition issue that may be referred to CCI for its opinion. On receipt of the reference, CCI is also obliged to give its opinion within 60 days, after which the sector regulator is further obliged to take account of the opinion of the CCI, and to give reasons for accepting or rejecting the opinion and advice in its decision.

This framework is the basis for cooperation envisaged under the Act. However, it appears that this will be insufficient to create a completely satisfactory framework to allow the expertise of both the regulators and the

CCI to be harnessed in dealing with competition cases. Recently, a ruling was made by the Delhi High Court, which prevented CCI from investigating alleged anti-competitive practices in the aviation fuel supply market.⁵⁹ In this case, a company called Reliance Industries Ltd, which had lost a bid to supply, filed a complaint with CCI alleging that its rivals, Indian Oil Corp Ltd, Bharat Petroleum Corp Ltd and Hindustan Petroleum Corp Ltd, had formed a cartel to supply aviation turbine fuel to Air India. The companies being investigated for cartel behavior issued proceedings in the Delhi High Court, challenging the jurisdiction of CCI to handle a competition case in a sector under the authority of another regulator, namely the Petroleum and Natural Gas Regulatory Board. Somewhat surprisingly, the High Court acceded to the companies' request, giving rise to questions as to whether the judges fully appreciate the concept and spirit of competition law since they appeared to be oblivious to the danger of protecting a possible cartel. However, the legal rationale could have been the fact that the Petroleum and Natural Gas Regulatory Board Act is also mandated 'to protect the interests of consumers by fostering fair trade and competition among the entities' operating in the sector, and the Board might have misinterpreted this provision to mean that cartelization is acceptable.

The implication of the ruling is not yet clear, though it might be used as a precedent in future cases, where companies in a sector that has a regulator in place may also try to avoid being investigated by CCI. If this occurs, it could thus frustrate the intention of the legislature as regards section 21 of the Act.

There is currently a proposal to amend sections 21 and 21A of the Competition Act, approved by the Cabinet, to make it mandatory for sector regulators to consult with the CCI and vice versa whenever there is an overlap or conflict.

4.6 Competition Assessment Strategies

The CCI started full-scale operations in 2010, and there are still challenges in assessing its enforcement strategy. In its first year, CCI published more than 70 case decisions. A closer look at the cases, however, reveals that almost all of them did not go beyond the preliminary stage. Most such cases were aimed at establishing whether there is a prima-facie case against

⁵⁹ Pradeep S. Mehta (2011). 'Effective Enforcement of Competition Law'. *The Financial Express*, June 29. Retrieved from http://www.cuts-ccier.org/Article-Effective_enforcement_of_competition_law.htm (last accessed 2 February 2013).

the respondents. Cases going beyond this stage are still under investigation. The expectant public is therefore yet to witness any notable action by CCI to prohibit anti-competitive practices, amid public concern that there are cartels operating in India in various sectors of the economy. The fact that CCI is a new institution also makes it difficult to assess whether the strategies it has adopted are in accordance with international standards.

Concern has been expressed in relation to some of CCI's decisions. On 23 June 2011, the CCI published an order in the *MCX Stock Exchange Ltd & Ors v National Stock Exchange of India Ltd & Ors*, in which CCI found that NSE was guilty of abuse of a dominant position in the exchange traded currency derivatives market.⁶⁰

The Commission clearly departed from established case law in the EU and US in some of its findings. CCI's definition of the relevant market, of what constitutes dominance, predatory pricing, unfairness and leveraging strength in an adjacent market were all controversial as regards the validity of the analysis adopted and the conclusions reached. However, despite the deficiencies observed, it is to be hoped that the Commission's decisions will improve in terms of the quality of reasoning adopted and the outcomes achieved as the agency gains in experience.

The media have been kind to the CCI in reporting all its cases well, except to say that they need to improve their economic analysis and develop guidelines for fining.⁶¹

4.7 Congruence with International Norms

The Competition Act of 2002 has benefited from international developments in competition law. In addition to having tight provisions dealing with anti-competitive practices such as abuse of dominance, anti-competitive agreements and mergers and acquisitions which are similar to international best practice, the Act also includes the following provisions:

4.7.1 Competition Appellate Tribunal

One of the biggest challenges as regards effective competition law enforcement is the speed at which competition cases should be addressed. In many

⁶⁰ Desai, Kiran S., David A. Carpenter, Paul C. de Bernier, and Manu Mohan (2011), 'India Competition Report', 19 August. Retrieved from <http://www.mondaq.com/x/143274/Price+Fixing/India+Competition+Report> (last accessed 2 February 2013).

⁶¹ Pradeep S. Mehta (2012). 'CCI needs to pull up its socks' *The Financial Express*, June 29. Retrieved from <http://www.financialexpress.com/news/ci-needs-to-pull-up-its-socks/1013403/0> (last accessed 2 February 2013).

developing countries, appeals from decisions by the competition authority are heard in general courts, where they join other criminal or civil cases waiting to be heard. In countries such as Zimbabwe and Zambia, for example (before Zambia had amended its competition law to form a Tribunal), it could take more than five years for an appeal such as this to be heard in the courts.

India also took note of this problem and established an exclusive Competition Appellate Tribunal, which will hopefully allow cases to be heard faster than in the general judicial system.

4.7.2 Leniency programme

The prosecution of cartels is not an easy task unless evidence is obtained from at least one of the cartel operators. Incentives have been provided in competition laws, where the firm(s) that cooperate with the competition authority gains immunity from prosecution, or benefits from a reduced fine. Leniency provisions are now common in many jurisdictions, including Brazil, South Africa, the EU, the US and the UK. Leniency provisions make a successful outcome more likely by encouraging violators to confess and provide first-hand, legally admissible evidence that would normally be concealed by implicating their co-conspirators in return for leniency. This system is made more effective and efficient. This provision has already proved very effective in many jurisdictions.

India has thus benefited from being a latecomer into the field by having a modern competition law which includes leniency provisions. Under section 46 of the Act, CCI has the discretion to impose a lesser penalty on cartel members for cooperation which leads to successful prosecution.

However, there remain some areas of concern in relation to the Act which limit its ability to appropriately address anti-competitive practices. Some of these are listed below:

- i. Although a consultation process is envisaged between the competition authority and the sector regulators, such consultations remain largely voluntary as section 21 does not require sector regulators to make references.⁶² This is unlike other jurisdictions which have made consultation mandatory. Many countries have seen competition authorities and sector regulators develop frameworks of cooperation under which the sharing of expertise and jurisdictions

⁶² As of November 2012, a proposal to amend the Competition Act 2002 to make mutual consultation mandatory has been approved by the Cabinet, but the amendment bill is yet to be adopted by Parliament.

is harnessed. The UK adopted a concurrent jurisdiction approach in the Competition Act 1998, which gives concurrent powers to the Office of Fair Trading (OFT) and sector regulators in enforcing provisions against anti-competitive agreements and abuse of dominance. As a way of avoiding confusion over which agency ought to take the lead, the Competition Act (Concurrency) Regulations 2000 were adopted, setting out a procedure to determine which authority is best positioned to deal with a case in each instance.

- ii. Although mergers and acquisitions are regulated in line with international best practices, the Act provides for a 210-day investigation period after mandatory notification.⁶³ This protracted period has already received widespread condemnation, on the basis that it is too long. Several developing countries' guidelines provide for a review period closer to 90 days, for example Tanzania, El Salvador and Pakistan. This extended examination period may result in firms taking a risk and proceeding to consummate a merger without the blessing of CCI as many business opportunities might be lost whilst waiting for such a long period for approval.
- iii. The banking sector succeeded in getting exemption from the competition law in relation to merger regulation through a proposed amendment in the Banking Regulation Act.⁶⁴ The amendment bill is still pending before the Parliament (November 2012). Such a carve-out is inimical to the best practices recommendation by the International Competition Network (ICN). The ICN, as provided in a report by the Antitrust Enforcement in Regulated Sectors Subgroup (2005) entitled 'An Increasing Role for Competition in the Regulation of Banks', called for the application of general competition rules to the banking sector by competition authorities in parallel with the prudential rules enforced by the banking regulator. This practice is also followed by almost all countries with competition laws. India should do the same.
- iv. Whilst India has a national competition authority, the country is very large and has a federal system of government. Thus, whilst the States (provinces) have some constitutional authority to enact their own competition laws, they have not ventured to do so. This

⁶³ However, the merger regulations provide a two-track approach, i.e. simple mergers are cleared within 30 days and only complex cases may have to undergo a total period of 210 days. As stated above in note 56, an amendment has been proposed to bring down the period to a maximum of 180 days.

⁶⁴ As above, according to the proposed amendment in the Banking Regulation amendment bill, the exclusive jurisdiction to the Reserve Bank of India would be corrected (n 56).

challenges the effectiveness of competition law at a regional level. This defect is exacerbated by the fact that CCI only has one office in New Delhi, and no regional offices. This may make the CCI too remote from many businesses and makes effective advocacy or the receipt of complaints or appropriate regional enforcement problematic. Competition agencies in countries like Spain, Turkey and Ukraine have offices in the provinces, while federal countries like the US and Australia also have provincial competition laws that are dealt with at state level.

4.8 Future Prospects

Despite the problems discussed above, the future of competition law enforcement appears to be promising. A great deal of interest has been generated in India by the enactment of a competition law in 2002, which was delayed until 2007 due to court challenges on appointments to the Commission. Stakeholders have high expectations of competition enforcement if the number of complaints made to CCI is a measure of that enthusiasm. However, it is too soon to say whether these high hopes will be justified, given the paucity of decisions as yet. CUTS carried out an internet survey on news stories related to CCI, which produced a positive media perception.⁶⁵

5. CONCLUSION

India has undertaken several positive steps toward ensuring that the general economic environment is conducive to the promotion of competition. This includes liberalization initiatives as well as the gradual removal of restrictive policies in relation to both FDI and the sectors that have been hampered by reservation policies. Regulatory policies in many sectors have also been liberalized to encourage private participation in many markets. The Competition Act of 2002 is now being enforced, and will hopefully continue to improve the competitive environment in many sectors of the economy. India seeks to establish a National Competition Policy with an oversight mechanism through a National Competition Policy Council which it is hoped will deal with competition distortions that cannot be addressed by enforcement of the competition law.

⁶⁵ http://www.cuts-ccier.org/CCI_Watch.htm (last accessed 2 February 2013).

However, there are also several significant matters which require substantial improvement. CCI and sector regulators must quickly establish a mandatory consultation framework to ensure that they harness their expertise in a positive manner. Although the economy is now substantially liberalized, challenges in investment still exist, including infrastructure bottlenecks in electricity and transport as well as some sectors that have not been fully opened for FDI, such as retail and distribution. All these matters can adversely impact on the level of competition.

Given the reliance of the economy and the greater part of the population on the agricultural sector, it is important that measures be put in place to improve agriculture productivity. Corrective measures are needed to improve the weak framework for a sustainable water management and irrigation system as well as providing access to credit for farmers. The pricing system needs a significant overhaul to ensure that state intervention in prices causes minimum distortion. A final issue of concern is the inaccessibility of agricultural production in the regions to effective marketing and distribution channels, so reducing farm incomes and directly affecting the food market. All these challenges have to be effectively addressed if India is to establish a more competitive domestic and international economy.

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