OLD OR NEW, THE ROAD AHEAD IS LONG*

Competition Policy and Law in South and Southeast Asia

Introduction

The last two decades have seen most developing economies in the world, including those once committed to central economic planning, taking great efforts in their progression towards a market economy. In this agenda for reform in most of these countries, comprehensive development of the legal and regulatory framework has been a focus, with competition law and policy as an integral part, especially now that the need for, and the role of, such a law and policy in the development process is broadly accepted in principle.

It is well-recognised, nonetheless, that in order to achieve targeted policy objectives and to make reforms succeed, competition laws and policies in developing countries must be well-adapted to their national development circumstances, taking into account all the local economic, social, and cultural dimensions, *etc*, and by no means a copy or derivative fashioned after the developed-country style. However, there is no clear articulation as to how this should be done. They are also to be supported and promoted by efficient institutions, which are well equipped with sufficient capacity and skills.

Towards such policies and concomitant institutions, it is necessary, at the first instance, for developing countries to foster public acceptance as well as widespread participation and contribution of various national stakeholders into the policy-making process; build up the capacities and skills of the (future) competition authority and complementary institutions. In the whole process, it is important for them to learn from their own experiences. Externally, sharing and comparing -the learnings with other developing countries' experience will also help them overcome the impediments to having an effective competition regime.

Strongly aware of the severe resource and capacity constraints that developing countries are facing in the path towards such a regime, CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER) has taken up an initiative codenamed "the 7Up2 Project", which endeavours to accelerate the process towards a well-suited competition law and policy in select developing countries in South and Southeast Asia, *viz*. Bangladesh, Cambodia, India, Lao PDR, Nepal, and Vietnam; and advance the environment in which the law and policy can be enforced for better results; through various research-based advocacy and capacity building activities. The current project is in the sequel to a similar project titled "The 7Up Project", a research and advocacy project on competition regimes in seven developing countries that concluded in 2003 has been very successful in raising awareness and stimulating debate on these issues and helping in reforms in the project countries and beyond. This created a felt-need to take up similar activities in other countries as well. The 7Up2 Project of CUTS is in response to this.

The initiative is jointly supported by the State Secretariat for Economic Affairs, Federal Department of Economic Affairs, Switzerland (SECO), the Swiss Competition Commission (COMCO) and the Department for International Development (DFID), UK.

All the project countries are pursuing market-oriented reforms, which entail an explicit need for an effective competition law and policy. Given the local capacity and resource constraints, technical assistance is needed. The need has been underscored by the integration and cooperation process of these countries into regional and multilateral economic systems.

Moreover, given the strong similarity and comparability between these countries as regards the level of economic development, the local socio-political contexts, etc., a comparative study and integrated advocacy-cum-capacity-building programme among them will be a practical approach to cross-fertilise and consolidate expertise and resources from the perspectives of developing countries, helping to achieve synergies and contribute to policy and performance developments in the competition area in all the six.

CUTS, as a developing country-based research-cum-advocacy group with rich experience as regards competition law and policy and a vast network of contacts in the developing world, can stand out as the optimal deliverer of the needed technical assistance to the project countries.

Taking up the mission of "Promoting effective markets through competition policy & law", the project envisions a long-term cause towards a competition culture for economic development. The main objective of this project is to bring about developments in competition law and policy and implementation performance in project countries *viz*. building up capacities of policymakers, law enforcers, civil society organisations, consumer movements, and other stakeholders concerned; advocating for the enactment of a competition legislation where absent and the effective implementation of any in place; towards the ends of better economic governance and development in the integration and cooperation process. To be specific, with the long-term goal of shaping the competition culture, the objectives of the project are:

- Establishment of structures/actors able to advocate efficiently for the enactment of an appropriate competition legislation;
- Developments/changes in competition law and policy;
- Establishment of enhanced training facilities in the country (e.g., university courses on competition);
- Development of a meaningful dialogue between consumer groups and government officials.

Implementation and management is structurally modelled after the 7Up1 Project, which has been recognised among relevant circles for its uniqueness as well as effectiveness in promoting similar objectives. This involves partnering with renowned research institutions in respective project countries, engaging a Project Advisory Committee of prominent experts on competition to provide guidance and consultations. CUTS, in addition to the pivotal role of coordinating and maintaining the sustainability of the project, is also providing the needed expertise to the beneficiaries for realising the targeted results.

Research and advocacy are the two pillars of the project. Research has been carried out in each country to identify the macroeconomic and institutional context of competition and particular concerns and issues that arise. Every country has different competition concerns that will determine the nature of laws/policies that are appropriate. For example, a big developing country like India with a strong manufacturing sector would have competition concerns which cannot be the same of that of a country like Bhutan, which has a small manufacturing base and depends on imports for most of its needs for manufactured goods. Thus, research is essential to formulate the advocacy agenda as well as the capacity building/training programmes.

These research activities of the project have been conducted by the country research partners, primarily based on secondary information, *empirical/case study* and some *field surveys*. Some *interviews and scanning of media reports*, etc. have also been carried out in this regard.

The objective of the research was to collect information on market players and sources of competition failures in several markets (e.g. rivalry and pricing policies, innovation, and structural and behavioural impediments to competition). Efforts were also made to identify indicators that are traditionally used in the literature from which one can infer on market power such as levels of market concentration, price mark-ups, etc. This output has been complemented by a review of the existing legal and institutional framework to foster competition, including regulatory measures, consumer protection measures, etc. For the countries where a competition law or a draft competition law has been formulated, it has been analysed against the wider current context, concerns and needs.

The most important concrete outputs are the country reports for the selected countries and the synthesis report. The country reports deal with various aspects of competition issues, specific to the countries and thus will become an important guide for designing and/or implementing competition policy and/or law in those countries. They will also be of help to the other groups of stakeholders who may not be involved in policy making and its implementation, but will facilitate the process.

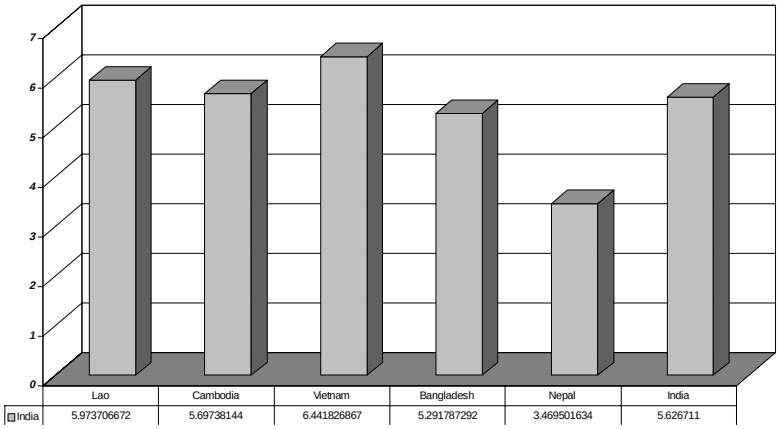
The synthesis report will take a broader approach where the focus will be more on issues rather than incidents, which of course will be used to understand the issues in perspective. It will also deal with the issues of regional policy making wherever appropriate, but will be helpful to national level policy makers not only in the project countries but in other developing countries as well. In addition, some occasional publications will also be made depending on the felt needs during the implementation of the project.

This book is a compilation of the synthesis report as well as all the country chapters. Starting with the synthesis as a comparative review and analysis of the information gathered and research done during the implementation of the project, it goes on to give a more detailed picture of the competition scenario in respective project countries. The main sources of information for all are the individual country research findings, and the deliberations in the National Reference Group (NRG) meetings and the review meetings. Among the six countries in the project, India has a long experience of implementing a competition law, and hence is in a much advanced stage in this regard. Naturally, the country chapter for India has been very different from those of other countries, in term of substance as well as structure. The synthesis chapter, therefore, also gives different treatment to

India. Wherever felt appropriate, references have been made to experiences of other countries as well.

The rest of this first chapter – the synthesis - is divided into seven sections. Section Two provides a socio-economic overview of the project countries and points out the differences and commonalities within the group. Section Three will focus on the similarities and differences among the project countries in terms of market structure and the nature of competition in the market. Section Four presents an overview of regulatory mechanisms of project countries and on that basis provides a comparative analysis across countries, focusing on critical issues like privatisation, power and autonomy of regulators etc. Section Five gives a comparative picture of consumer protection scenario in the project countries highlighting its complementary role with competition policy in promoting consumer welfare. Section Six provides a comparative view across project countries on the prevalence of most common anti-competitive practices and the way they have been dealt with. Section Seven gives a brief account of the perspectives and perceptions of project countries' national stakeholders on competition policy and law, the prevalence of anti-competitive practices, the desired content of the law and policy, as well as desired structure and power of the competition authority etc. Finally, Section Eight examines the current status of development as regards competition policy and law at national and regional levels and on that basis provides some recommendations to take care of existing and potential competition concerns.

Figure 1.2: GDP Growth Rate (2000-2004)

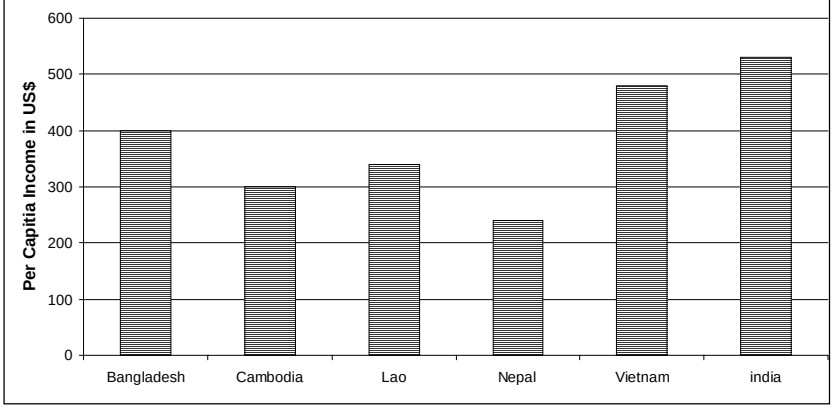


The Political Economy Context

Since competition law and policy (CLP) aim to create and protect a competitive environment in the market, they have to necessarily work in conjunction with the political, economic and social background of a particular country, because their combination constitutes the competitive structure of the market. Therefore, it is argued that harmonisation and linkages between competition law and other government policies are essential for meeting the objectives of CLP. The manner in which an optimal interface between competition law and other policies can be achieved remains a debatable issue.[1] Nevertheless, it would be useful to look into the political economy and public policy context of the 7Up2 countries.

The 7Up2 countries have a number of strikingly common features as well as dissimilarities. Among the six countries compared here, four are designated as least developed countries while two are developing. It includes the largest LDC, Bangladesh, as well as one of the smallest LDCs, Lao PDR, and one of the largest developing countries, India. Three of the countries have a history of command and control type one-party rule; two of them, Vietnam and Lao PDR are under one-party rule even today. Three of them, Bangladesh, Cambodia, and Nepal, have embraced multi-party democracy but it is yet to gain roots. In fact, in Nepal, democracy is under suspension now, with the monarch holding the absolute authority. India is considered to be one of the most vibrant democracies of the world.

Figure 1.1: Gross National Income Per Capita



Nepal and Lao PDR are landlocked and hilly with high forest coverage. Vietnam, though not landlocked, is also largely hilly and forested. Bangladesh and Cambodia are, however, largely plains with huge rivers and other water bodies. Vietnam is also endowed with huge rivers and water bodies. Area wise, all countries are small in size except India and possibly Vietnam, which is often termed as a medium size country. Population wise, however, there is large variation with Bangladesh having a population of more than 144 million; while Lao

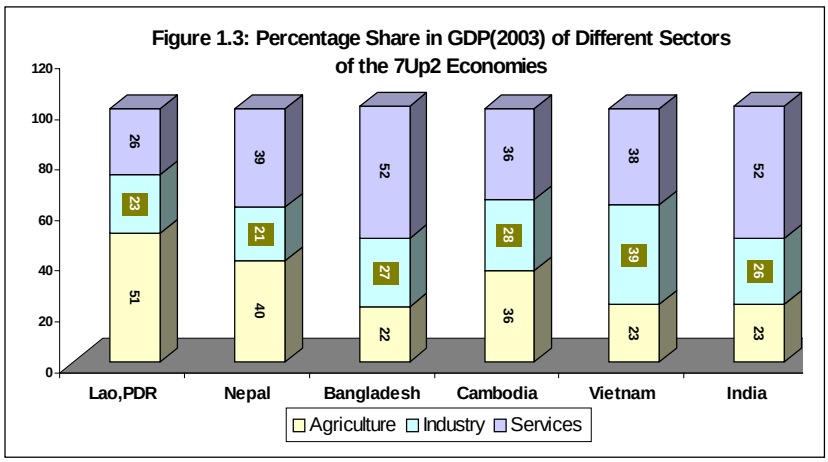
PDR has a population of just over six million. Bangladesh also has the highest population density in the world; while Lao PDR is one of the most sparsely populated countries. India is once again in a different league, being the second largest populated country in the world, next only to China, and with a population of more than a billion.

All of the countries come in the low-income category, though poverty is relatively more pronounced in Nepal, Cambodia, and Lao PDR. Nepal, the poorest of all, is also experiencing the lowest growth. All other countries have shown reasonably good growth performance in recent years. In particular, the performance of Vietnam has been quite impressive.

Economic Structure

As in other developing countries, agriculture plays an important role in the livelihood of people in all 7Up2 countries. However, the same is not consistently reflected in the income generated by different sectors. Share of agriculture in GDP is high in Lao PDR and Nepal and to some extent in Cambodia. As far as the share of manufacturing is concerned, Vietnam stands out as the only country where the sector makes a high contribution. The share of this sector has almost doubled since 1991.

In Bangladesh, the services sector makes the highest contribution of about 60 percent to the GDP. However, it is not clear if this high share is a reflection of high 'real value addition' by the sector or that of the sector's ability to extract higher rent, especially by the trading community. The economic structure in India is very similar to that of Bangladesh. In Cambodia also the share of service sector is relatively high, as it contributes 36 percent to GDP as does the agriculture sector, but higher than industry. In Vietnam, of course, the share of the service sector is quite high, at 38 percent, but lower than that of industry. The Vietnamese economy seems to have the best health among all these countries considering their stage of development.



All of these countries have a history of significant state participation and intervention in economic affairs. In Vietnam and Laos, and in Cambodia, for a brief period, the state had absolute control. The reflection of this past can be seen in the economic structure of these countries even today, though all of them have adopted a market-oriented economic policy regime. Thus, the share of state sector in the GDP of Vietnam was about 40 percent in 1999, which might have come down since then.

Industrial Policy

In terms of industrial policy, most of these countries have undergone drastic changes over the last couple of decades or so. The winds of change started blowing from the mid-eighties, though visible changes took place much later in some of these countries. The year 1986 was a landmark year in terms of economic policy changes in Bangladesh, Vietnam and Lao PDR, and even in Cambodia and Nepal to some extent. The Industrial Policy of Bangladesh, 1986, made substantial deregulation of industries and removed many of the restrictions imposed on the establishment and operation of industries. Substantial progress was made in this regard when the government abolished the system of prior clearance for setting up industries, except only in a few sectors.

In November 1986, the Fourth Congress of the Lao People's Revolutionary Party adopted a resolution to introduce economic reforms under the New Economic Mechanism built around the three pillars of macroeconomic stability and fiscal adjustment, private sector encouragement, and public sector reorganisation. This was followed by a new Constitution in 1991 that recognises and protects all forms of ownership, and the enactment of the Business Law 1994 that treats different types of business enterprises equally. Similarly, the economic policy of Vietnam saw a drastic shift when the much talked about *Doi Moi* (reforms) process was introduced to usher in a market oriented economy when the Sixth Congress of the Communist Party of Vietnam, held in December 1986, called for the transition. This was followed by lifting the monopoly of the state in foreign trade and allowing private parties in 1988 and reorganising the state-owned enterprises in 1994.

It may be noted in this context that the major reforms in the then Soviet Union which inspired many countries to change their course also started the same year, when the 27th Congress of the Communist Party of Soviet Union held in February 1986 adopted *Perestroika* (restructuring and socialist democracy) and

Table 1.1 :The Evolution of Economic Reforms in 7Up2 Countries		
Country	**Major Reforms**	**Comments**
Bangladesh	Industrial Policy 1986. Requirement of prior clearance for setting up industry abolished in 1991	However, clearance is required in some sectors including some manufacturing industries considered as saturated.
	Privatisation Law, 2000.	
India	New Economic Policy, 1991	Industrial licensing abolished for most sectors. Number of areas reserved for public sector was also reduced from 17 to six which had strategic and security concerns.
Cambodia	The 1993 constitution set forth a clear-cut market economy system for the government to pursue. Privatisation of SOEs except in rubber industry	Full freedom to engage in trade, obligation to sell products to the State does not exist, except for some special circumstances. Despite privatisation and other efforts industrial growth is heavily dependent on the garment sector
Lao PDR	Business Law, 1994.	Law classified four types of businesses - private enterprise, state owned enterprise, and union owned enterprise, joint venture. All are treated equally under law.
	High-level consultative process implemented by Ministry of Industry and Handicrafts in 2003.	Formulated a "Framework on Support for the Development of SMEs in Lao PDR"
Nepal	1990, shift towards liberalisation and privatisation. Industrial Enterprises Act, 1992.	Private sector was also allowed in power generation and telecom sector in 2003. Simplified the procedures for establishment, expansion and modernisation of industries.
Vietnam	*Doi Moi* process in 1986 and regrouping of SOEs in 1994.	*Doi Moi* made the shift towards market oriented economy and
	Socio-Economic Development Strategy 2001-2010 has set the target for Vietnam to become an industrialised and modern country by 2020.	Public sector will continue to be regarded as the leading sector of the economy. The state enterprises are to be renewed and developed, ensuring production and business efficiency.

Glasnost (openness and flexible system of economic management).[2]

Cambodia pursued a centrally planned economic system even after the fall of the Khmer Rouge regime in 1979 that introduced the system in a brutal way when it captured the power in 1975. The protracted civil war that followed the fall of the Khmer Rouge probably made it difficult to make any shift in the economic policy of the country. However, the year 1986 was a landmark year even in Cambodia, as Hun Sen became the Prime Minister and the First Five-Year Programme of Socio-economic Restoration and Development (1986-90) started, though it was adopted at the Fifth Party Congress of the Kampuchean (or Khmer) People's Revolutionary Party held in Phnom Penh in October 1985.

The year 1986 was not insignificant for Nepal too. In a significant development, the assembly elections held that year returned a majority opposed to the *panchayat* system of partyless government, despite the fact the main political party boycotted the elections. Nepal also signed a bilateral textile agreement with the US the same year, and within a decade apparels assumed about 50 percent share of its total exports and about 90 percent of it reaching the US market. In return, of course, Nepal had to give significant liberalisation commitments.

Table 1.2: Landmark Changes in Investment Policy from 1985 Onwards		
Country	**Major Reforms**	**Comments**
Bangladesh	Non-discriminatory treatment between local and foreign investments, protection of foreign investments from expropriation.	Foreign investment is open and encouraged in all activities except four industrial sectors reserved for public sector and some sectors like garment industry, bank, insurance companies, and other financial institutions.
India	New Economic Policy, 1991	Liberalising FDI inflows. Automatic approval of FDI in 34 industries.
Cambodia	New Investment Law, 1994 (modified in 2003).	No restrictions on foreign investments except for certain sectors. No discrimination against foreign investors, guaranteed compensation in case of expropriation.
Lao PDR	Domestic Investment Law, 1995.	Provided the legal framework for promoting investment in the country.
	1994 Foreign Investment Law.	Allows foreign investments in most sectors, guarantees investors against confiscation and nationalisation, freedom to repatriate profits
Nepal	Foreign Investment and Technology Transfer Act, 1992.	Foreign investment open for every sector except a few, such as - cottage industries, arms and ammunitions, security printing, currencies and coins, retail business, travel and trekking agencies, etc.
Vietnam	Phased out dual pricing policy in areas such as air, rail transportation, seaport charges, electricity, water etc.	This system was regarded as discriminatory against foreigners; hence the government is gradually eliminating the system.
	Decree 27 and 24 of 2003 and 2000, Common Investment Law, 2004.	The government has committed to the elimination of investment licensing for most sectors.

In 1986, Nepal also went for a Structural Adjustment Facility (SAF) programme with the International Monetary Fund (IMF) for three years. During that period, Nepal initiated most of economic reforms under the aegis of SAF with the IMF and Structural Adjustment Loan (SAL) programme with the World Bank. The agreement with the IMF for an Enhanced Structural Adjustment Facility (ESAF) sets the frameworks under which reforms in economic policies were initiated in early 1990s. This was followed by the Industrial Enterprises Act, 1992, which simplified the procedures for the establishment, expansion, and modernisation of industries. Accordingly, various components of economic policy reforms were carried in Nepal during the last one and half decades.

India, however, did not make any major departure in its policy regime in the year 1986. Its tryst with liberalisation is quite distinct from others. It started gradual liberalisation since the early 1980s, which picked up momentum in the second half of the decade. Major changes however came only in 1991. India, therefore, can be termed the most cautious and gradual liberaliser among the 7Up2 countries.

Trade Policy

All of the countries have liberalised their trade policy regimes during the last few years. Among the six, only Bangladesh and India are founding members of the World Trade Organisation (WTO). Cambodia and Nepal joined in 2003 at the Cancun Ministerial Conference, with substantial commitment on trade liberalisation. Vietnam is in the process of joining the WTO. Lao PDR is also in the queue to join the WTO but it will take some time before it can join it. Though Vietnam and Lao PDR are yet to become a member of the WTO, they had to open up their markets substantially as they joined the Association of Southeast Asian Nations (ASEAN). They are also pursuing reforms in several areas in their preparation for joining the WTO.

For Bangladesh, the trade liberalisation commitment is guided by its WTO commitments. Though it is a member of two regional groupings, namely the South

Asian Association for Regional Cooperation (SAARC) and the Bay of Bengal Initiative for Multi-sectoral Technical and Economic Cooperation (BIMSTEC). Between these two regional groupings, BIMSTEC is in formative stage, while SAARC has launched a free trade area called South Asian Free Trade Area (SAFTA), from the beginning of 2006, though the trade liberalisation commitments are not very high. However, Bangladesh has gone for trade liberalisation much higher than its WTO commitments, due to its structural adjustment programme. Nepal is also a member of SAFTA and BIMSTEC. Moreover, Nepal has a bilateral trade agreement with India, which happens to be its principal source of imports. Since this agreement imposes higher trade liberalisation commitments, Nepal has also liberalised its trade regime beyond WTO commitments for a substantial part of its imports.

Though India made some trade liberalisation in the late 1980s and quite drastically in 1991; its commitment to trade liberalisation became much higher after it signed the WTO agreements in 1994. A major milestone towards trade liberalisation was

Table 1.3: Landmark Changes in Trade Policy from 1985 Onwards

Country	Major Reforms	Comments
Bangladesh	Imports licensing abolished. Customs tariff brought down drastically in 1992.	The number of tariff slabs and the rate of import tariffs reduced to promote competition in internal market.
	Government introduced the Customs Act in 1995.	The Act was introduced in order to protect local industry from dumped and subsidised imports. No rules have been put in place so far.
	Foreign exchange market has been liberalized.	Bangladesh *taka* has been made convertible, with respect to current international payments and transfers.
India	New Economic Policy, 1991	Lowering of trade barriers and devaluation of currency, finally making it fully convertible on current account.
	WTO membership	Signed WTO Agreements in 1994 and finally removed all quantitative restrictions in 2001 as a consequence.
	Free Trade Agreements	FTAs with Nepal, Sri Lanka, Thailand, MERCOSUR, and Singapore.
Cambodia	Import Liberalisation	In 1994, Cambodia eliminated all quantitative restrictions, except for certain commodities. Tariffs were drastically reduced in 2001; tariffs system was simplified by reducing number of trade bands.
	Admitted to WTO in 2003.	The deals involved concessions and commitments to reduce tariffs, opening its service sector, complying with the WTO Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPs), as well as reforming its legal system.
	Regional Integration: Became a member of ASEAN in 1999	Committed to gradually reduce most tariff rates by 2010 under the ASEAN Free Trade Agreement (AFTA)
Lao PDR	Liberalisation, restructuring of the tariff system and other reforms in 1993, 1995 and 2001-2002.	Tariff structure was rationalised to a great extent, import duties were drastically reduced, restrictive export licensing to protect domestic customers has now been abolished and import-licensing system has been simplified and relaxed.
	Applied for WTO accession in 2001.	Accession to the WTO is believed to be important for being protected by the rule-based WTO provisions.
	Acceded to ASEAN in 1997.	Committed to tariff reductions in accordance with the conditions under the Common External Preferential Tariff (CEPT) scheme under AFTA.

Contd..

Landmark Changes in Trade Policy from 1985 Onwards

Country	Major Reforms	Comments
Nepal	Trade liberalisation	Reduction and restructuring of import duties, elimination of most quantitative restrictions and import licensing requirements and introduction of full convertibility for current transactions.
	Admitted to WTO in 2003.	The deals involved concessions and commitments to reduce tariffs, opening its service sector, complying with TRIPs, as well as reforming its legal system.
Vietnam	Liberalisation of domestic prices, 1989.	Domestic prices were liberalised and linked to the world prices so that domestic prices could play a more significant role in resource mobilisation.
	Exchange rate distortions removed in 1989. Convertibility in current account	Exchange rate was unified and devalued, in real terms by about 70 percent.
	Joined ASEAN in 1995	Tariff reductions in accordance with the conditions under the Common External Preferential Tariff (CEPT) scheme under AFTA.
	Applied for WTO accession	WTO accession process is becoming a cornerstone of economic and structural reform
	Schedule to phase out quantitative restrictions given in 5-year Import-Export Programme (2004-2005).	Reduction in the use of non-tariff barriers (NTBs), including import and export restrictions, quotas and licensing requirements. Quantitative restrictions on exports eliminated with exception of textiles, garments, and a list of sensitive items.

achieved when it removed all quantitative restrictions on imports in 2001, due to WTO strictures. Like Bangladesh and Nepal, India is also a member of SAFTA. India has, however, signed a few bilateral trade agreements in recent years, with Nepal, Sri Lanka, MERCOSUR, Thailand, and Singapore, which have liberalisation commitments.

Lao PDR is a member of ASEAN and hence has commitment for deeper trade liberalisation with other member states. However, its share of trade with non-ASEAN countries is quite small and hence its trade regime is *de facto* in the process of being liberalised due to its AFTA commitments even if it is not a member of the WTO. Vietnam also has similar situation, though its share of trade with non-ASEAN countries is much higher. Its bilateral trade agreement with the US, however, put significant liberalisation obligations in trade regime as well as in other areas. Cambodia has a totally different story as it embarked on autonomous trade liberalisation measures, though it can be debated as to how far it was really autonomous or due to pressures from foreign powers and international institutions.

Competition Policy and Law

National Scenario

Though the importance of competition in the market is recognised by all the countries in the 7Up2 project, none of them has a structured competition policy. India is the only country in the group with a long history of a competition law, which is in the threshold of a major change. India is also considering adopting a competition policy. Among other countries, Vietnam and Lao PDR have recently adopted competition legislations. Cambodia and Nepal made a commitment to adopt a competition law at the time of their accession to the WTO in 2003. However, none of them has fulfilled the commitment so far. Bangladesh, as of now, does not seem to be considering a competition law in the near future. The following paragraphs provide further details about the status of competition law scenario in the selected countries.

Bangladesh: Presently, Bangladesh has no competition policy or law. When it separated from Pakistan in 1971, it did inherit all their laws, which were notified on a selective basis for domestic implementation. One law, which was not notified, was the Monopolies & Restrictive Trade Practices (MRTP) Ordinance, 1970, which is the current competition law in Pakistan. However, the law was not repealed either. Thus, technically, Bangladesh does have a competition law in its statute book. Nevertheless, fresh initiatives had been taken to adopt a competition law in Bangladesh, following discussions at the 1996 Ministerial Conference in Singapore, though abandoned after the Cancun Meeting.

***Cambodia*:** In realising the country's commitment to adopt a competition law in its accession to the WTO, a concept Sub-decree on Trade Competition has been

recommended in Cambodia (hereinafter referred to as 'the concept bill'). This concept bill was drafted with inputs from the Consumers International (CI) and the United Nations Conference on Trade and Development (UNCTAD). It has not yet been accepted by the Government for submission to the Parliament. Some other discussions are also going on in the direction of drafting a comprehensive competition law for Cambodia, instead of a subordinate legislation, as in this case.

India: The first competition law of India, the MRTP Act was enacted in December 1969. It came into force in June 1970 and the MRTP Commission was set up in August of the same year. However, with the passage of time, it was noticed that the MRTP Act was not in conformity with the prevailing economic policy environment, particularly after the new economic policy adopted in 1991, even after making significant amendments in the same year. Thus, a need for a new competition law was felt.

For this purpose, the Government appointed the High Level Committee on Competition Policy and Law (Raghavan Committee) in October 1999. After heated discussions on the Committee's report and the Competition Bill that it recommended, as well as parliamentary debates, the Competition Act 2002 was enacted in January 2003. Its main objectives are to:

- Ensure fair competition in India, by prohibiting trade practices that have an adverse effect on competition;
- Promote and sustain competition;
- Protect the interests of consumers; and
- Ensure freedom of trade for other participants in incidental and connected markets.

The Competition Act 2002 provides for the establishment of the Competition Commission of India (CCI), which, like its predecessor, the MRTPC, is a quasi-judicial body. The CCI, *inter alia*, has the power to:

- Issue cease and desist orders;
- Grant interim relief;
- Award compensation;
- Impose fines; and
- Order the division of dominant undertakings.

As per the new law, the CCI has been established. However, the functioning of the CCI has been affected by a writ petition filed in the Supreme Court, which challenged the appointment of a non-judicial person as its chairman, asserting the doctrine of the separation of the powers of the executive and the judiciary. In response, the Government of India has suggested that the Act will be modified and the CCI will be split into two bodies: one, a regulatory body to be headed by an expert, and the other, an appellate body to be headed by a judge. At the time this paper was written, the amendment bill was yet to be finalised and approved by the Parliament. In the interlude, the CCI is functioning in a limited manner with one Member and few staff, which are engaged in preparatory work and advocacy seminars.

Lao PDR: The initial cornerstones of an evolving competition policy have been set. The most recent landmark is the Prime Minister's Decree on Trade Competition adopted in February 2004, supposed to become effective from August 2004. The Decree was drafted and promulgated as a subordinate legislation to the Business Law 1994 of Lao PDR, which stipulated 'All types of operations conducted by enterprises in all economic sectors are inter-related and competing on an equal footing before the Law' (Art.5). This principle is further reflected by the Decree that 'Business activities of all sectors are equal under the Law; they co-operate and compete with each other in a fair manner in compliance with this Decree and concerned laws and regulations' (Art.3 – Fundamental Principle in Competition).

The objective of the Decree is to "define rules and measures to regulate monopolisation and unfair competition in trade of all forms, aiming to promote fair trade competition, protect the rights and legal interests of consumers and to encourage business activities in the Lao PDR to function efficiently in the market economy mechanism as determined by the Government of the Lao PDR" (Art. 1 – Objectives).

The Decree, amongst other things, defines the concept of market dominance, monopoly, M&As, and unfair trade practices; and provides for the establishment of a Trade Competition Commission, which will be responsible for the implementation and enforcement of the Decree. The Trade Competition Commission is to be chaired by the Minister of Commerce, consisting of relevant parties of the trade sector and a number of persons with relevant experience appointed by the Minister of Commerce. The Commission will have its office and its permanent Secretariat set up within the Ministry of Commerce (Art. 5 – The Trade Competition Commission). However, so far, no further progress has been made in this regard.

Nepal: During negotiations with members of the WTO on accession, Nepal made a voluntary commitment to enact a competition law by July 2004. Accordingly, the Ministry of Industries, Commerce and Supplies prepared a draft competition bill. The objective of the draft bill, as highlighted in its preamble, is to ensure healthy competition in the economy by restricting anti-competitive behaviour.

The draft bill prohibits price and market fixing, and puts restrictions on the production and sale of goods or services that have a negative impact on competition, collusive bidding, syndicates, cartels, predatory pricing, refusal to deal, tied selling, and misleading

advertising. The draft bill also has provisions to curtail the abusive power of monopolies, and proposes to bring mergers and acquisitions (M&As) under the scrutiny of the future competition authority.

However, the Government could not meet the deadline agreed at the WTO, and the draft bill has yet to see the light of the day. Going by press reports, the Ministry of Law has expressed serious concerns regarding the provision of an independent competition authority. The draft has been sent back to the Ministry of Industries, Commerce and Supplies, for reconsideration.

It may however be noted that the Consumer Protection Act, 1997 recognises the right of the consumer to choose goods and services at competitive prices[3]. The Act addresses anti-competitive practices by prohibiting creation of circumstances that would lead to any adverse impact on the market, or in the demand, supply or price of goods or services through collusion, quota fixing or by creating artificial scarcity of goods and services.[4] It further empowers the government to control monopolistic and unfair trade practices and calls upon the government to prepare a work plan to monitor, prevent, and control such activities.[5] However, enforcement of the Act has never been taken seriously.

Vietnam: Passed in December 2004 by the National Assembly of Vietnam, the Competition Law of Vietnam is a result of a four-year drafting process, with reference to the statutes of nine nation-states and territories; and the model laws promoted by international institutions like the United Nations Conference on Trade and Development (UNCTAD) and the World Bank; as well as enforcement practices and experiences of other countries. It was notified on July 1, 2005.

The Law prohibits five broad types of anticompetitive practices: (1) agreements that substantially restrict competition; (2) abuse of dominant or monopoly position; (3) 'concentrations of economic power' that substantially restrict competition; (4) acts of unhealthy competition; and (5) anti-competitive behaviour/ decisions by officials or State administrative agencies, taking advantage of their authority.

The establishment of two State authorities is provided for the law's implementation - the Competition Administration Department (with investigative powers), within the Ministry of Trade of Vietnam, and the Competition Council (with adjudicative powers). The Competition Administration Department has already been established which, as of now, is engaged in advocacy, capacity building and framing of rules and procedures.

Regional Initiatives

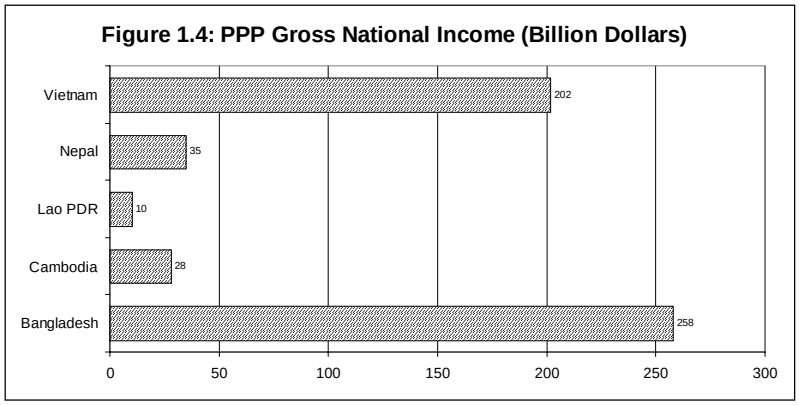
The countries in the 7Up2 are part of two major regional groupings. While Cambodia, Lao PDR, and Vietnam are members of ASEAN, Bangladesh, India, and Nepal are members of SAARC. Both the groups have adopted frameworks for establishing a free trade area with provisions for adopting regional competition rules.

The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme For The ASEAN Free Trade Area (AFTA), adopted on January 28, 1992 at Singapore, in its Article 5 (Other Provisions) mentions: "Member States shall explore further measures on border and non-border areas of co-operation to supplement and complement the liberalisation of trade. These may include, among others, the harmonisation of standards, reciprocal recognition of tests and certification of products, removal of barriers to foreign investments, macroeconomic consultations, rules for fair competition, and promotion of venture capital." The Agreement on South Asian Free Trade Area (SAFTA) adopted in 2004 has provisions for competition rules. Under Article 3 (Objectives and Principles), section (b), one of the objectives of SAFTA is: "promoting conditions of fair competition in the free trade area, and ensuring equitable benefits to all Contracting States, taking into account their respective levels and pattern of economic development".

Article 8 (Additional Measures) of the Agreement also mentions: "Contracting States agree to consider, in addition to the measures set out in Article 7 (Trade Liberalisation Programme), the adoption of trade facilitation and other measures to support and complement SAFTA for mutual benefit. These may include, among others: ... j) rules for fair competition and the promotion of venture capital".

Strictly speaking, in none of these Agreements, adoption of regional competition rules is binding. However, the provision in AFTA seems to be slightly stronger as it uses the term 'shall consider', while SAFTA uses the term 'may consider'. One may of course argue that SAFTA is more persuasive in this regard, as it includes the competition provisions in the very objectives of the Agreement. Fact of the matter is, however, ASEAN is still discussing the issue and has not made any progress even after 14 years have passed since the signing of the Agreement. SAARC is not even discussing the issue, though only two years have passed since the signing of the Agreement, which came into effect only in 2006.

In sum, all of the countries in the 7Up2 project have made major leaps forward in liberalising their economic regimes, brought down the role of the state, and provided commanding heights to the markets. However, such a transition is not an easy process,



especially in countries that followed a centrally planned economic management. Moreover, efficient markets are not automatically created they need to be nurtured and developed by appropriate legal and institutional framework. The task is particularly challenging for former centrally planned economies, as the institutional framework created there was to support a totally different kind of economic policy regime.

The task has been made even more complicated due to the fast changing global economic and legal environment in the era of rapid globalisation. The policy and institutional frameworks at the national level not only have to take consideration of the opportunities and challenges created by globalisation, but also have to take note of the commitments made by the nations in different global and regional forums as well as bilateral agreements as increasingly such agreements are touching upon the issues that had hitherto been left to the national governments only.

Market and Competition

Markets in five among the six countries are relatively small in size, particularly so in Cambodia, Lao PDR, and Nepal. On the other hand, the biggest among them is quite big, as India is the fourth largest economy of the world in terms of purchasing power parity (PPP) adjusted GDP. The second largest of them, Bangladesh, has a PPP adjusted GDP[6] of slightly more than 250 billion which is almost one-twelfth of India and about one-forty-second of the US, the largest economy of the world. The PPP-adjusted GDP of Lao PDR is merely 10 billion. This makes introducing and maintaining competition a difficult proposition, as the small size of the markets cannot sustain too many firms, particularly in industries where economies of scale is an important factor.[7]

Moreover, a large part of the GDP involving a large section of the population comes from the subsistence sector, even today. This is more so in smaller countries like Cambodia, Lao PDR, and Nepal where the share of agriculture in GDP is quite high compared to bigger countries like India and Bangladesh. This means the size of the markets in these countries are even smaller than their size of GDP or population would indicate. To make matter worse, the entire economy of these countries does not function as an integrated market due to poor transportation and communication infrastructure, especially in Cambodia, Lao PDR, and Nepal. In the later two, it is also due to hilly terrain. Even in Bangladesh, the transportation network is highly susceptible to the whims of nature and several parts of the country are cut-off during the rainy season.

In none of these countries, except India, one can get comprehensive data on market shares and market structures. Some information is available only about the number of firms in an industry and at an aggregated level in some cases. For some industries, however, data are available for market shares of individual firms. Based upon such information, one can get a broad idea about the prevalent market structures in these countries. Number of firms in an industry, however, can often be misleading, as in some industries, the prevailing market concentration is found to be very high, despite the fact that the number of firms is reasonably large with most of them being fringe players.

Arguably, in small economies, competition can be enhanced and maintained by allowing free imports. However, this may not always be possible or desirable due to several reasons. Moreover, in small economies, even high import duty can be competition-neutral, particularly in the industries where there is not enough domestic manufacturing capacity and the demand is met largely through imports. This is true

Table 1.4: Trade Openness of 7Up2 Countries US$bn

Countries	Exports	Imports	Trade Exp+Imp	GDP	Openness = (Trade/GDP) X 100
Bangladesh	7.478	10.03	17.508	56.8	25.75
India	69.18	89.33	158.51	599.0	26.46
Cambodia	2.311	3.129	5.44	4.597	118.35
Lao PDR	0.365	0.579	0.944	2.412	39.14
Nepal	0.737	1.8	2.537	6.7	37.87
Vietnam	23.72	26.31	50.03	44.0	113.70

* Source: *CIA Fact file* <*http://www.cia.gov/cia/publications/factbook/index.html*>
** UNDP

Table 1.5: Products with High Market Concentration*	
Country	**Products**
Bangladesh	Toiletries, tobacco, pharmaceuticals, cement
India	Cement, pharmaceuticals (some products), cosmetics and toiletries, cigarettes, motorcycles & scooters, bread, lifts & escalators.
Cambodia	Tobacco
Lao PDR	Cement, beer, tobacco, motorcycle
Nepal	Cement, sugar, iron & steel, paper, dairy products
Vietnam	Tobacco (cigarettes), beer, soft drinks, cement, petroleum products, steel, sugar, fertiliser, automobiles, motorcycles
**Based on available information for select products only. There can be several other products with high market concentration.*	

for three of these countries: Cambodia, Lao PDR, and Nepal. Thus it can be seen that the trade openness is pretty high in these countries compared to India and Bangladesh. A very high level of trade openness in Vietnam and Cambodia has also to be understood in the context of these countries substantially increasing its exports of manufactured goods with high import content and low value addition in recent years.

However, in some industries, where there is significant domestic capacity or industries where goods and services are not easily tradable, competition concerns may arise. Nepal and Lao PDR are particularly vulnerable in this regard as both are landlocked. It is often observed in bulky goods like cement where high transportation costs make import uncompetitive. This of course does not mean that in all products where domestic demand is met largely through import will have high degree of competition. As was observed in Bangladesh and Nepal, in several products, there are just one or two importers though private companies are supposedly free to import them.

As can be seen from Table 1.5, there are some products where market tends to be concentrated in almost all countries. Cement is an example, not only in these countries but also in several countries or regions of the world. The same is true for products like tobacco and beer. Markets for petroleum products in these as well as many other countries are also quite concentrated. But this, in many countries, is primarily due to the government reserving the sector for state owned enterprises. Often the state owns more than one enterprise in some sectors, yet they do not compete with each other either due to the fact that prices of all these enterprises are administratively set, or they have area restrictions imposed on them by the state. Such area restrictions can be seen particularly in former centrally planned economies like Vietnam and Lao PDR.

In products like soft drinks, market is globally concentrated. Hence, it is expected that they are likely to be concentrated in individual countries in the 7Up2 project as well though this has not come out explicitly in the country reports.

Barriers to Competition

It has often been argued that a market need not have a low concentration or a large number of players provided that there is high market contestability. This means that entering the market by a new player is quite easy and if the existing players earn more than normal profit then it will attract new players reducing the profitability. Because of this fear of new entry, the existing players would keep their prices at a lower level. Thus, it is important to assess if market contestability is high enough or if entry barrier is insignificant. Due to low level of awareness and reportage on competition issues in these countries, it is indeed difficult to get fair picture of the existing entry barriers, especially those erected by existing market players.

Nevertheless, several policy-induced barriers can be observed in these countries. As already mentioned, there are several industries that are reserved for the state-owned enterprises especially in the former centrally planned economies. Despite significant progress made in terms of liberalising the business

Table 1.6: Cost of Starting a Business				
Countries	**No of procedures**	**Duration (days)**	**Cost (US$)**	**Cost as a proportion of per capita income**
Bangladesh	8	35	352.86	0.896
Cambodia	11	94	1550.50	4.58
India	11	89	264.59	0.413
Lao PDR	9	198	61.82	0.159
Nepal	7	21	183.83	0.759
Vietnam	11	56	136.07	0.258
Hong Kong	*5*	*11*	*824.77*	*0.030*
USA	*5*	*5*	*210.00*	*0.00528*
Singapore	*7*	*8*	*261.65*	*0.011*
Source: *Doing Business in 2005: Removing Obstacles to Growth, World Bank*				

environment, several approvals are required to start a new business and they often take substantial time and cost, acting as a major obstacles for a new business operator to enter the market. In Cambodia, for example, the business registration itself costs more than four times the per capita income of the country, while in Lao PDR it takes 198 days to get a business registered. In some countries, the cost involved is more than that in the US or Singapore even in absolute dollar terms. There are some specific entry barriers as well. For example, in Bangladesh some industries have been designated as saturated and special permission is required to create or expand capacity in those industries. However, many in Bangladesh believe that the private business is in a much better position to assess if the industry is indeed saturated. The government interference in this regard is unwarranted and only helps the vested interests.

In a bizarre example of an entry barrier, private cement producers of Vietnam have to get the approval of the General Cement Corporation, a state-owned enterprise and their competitor, to import clinkers for producing their final products.

The policy induced entry barriers are not limited to those imposed by the national governments only, but often regulations at sub-national and local levels can have the same effects, though they are much less pronounced in smaller countries. For example, it was found in Preah Vihear, a province located at the northwest of Cambodia bordering Thailand, that the governor issued a regulation authorising only one person to conduct trading in eggs.

Another type of entry barrier is the extra-legal barrier caused due to the criminalisation of the business environment. For example, in Bangladesh and Nepal, it is not enough to get a government licence to provide transport services. One has to get entry into the association (or syndicate as they are often called) of the existing transport operators, which is a form of cartel. Such practices are believed to be prevalent in India as well. Starting a business by avoiding them can be very 'costly'.

Policy Considerations

Promoting and maintaining competition is not an easy task in developing countries, particularly those of smaller size. Market structure, though often capable of giving a reflection as to the degree of competition, may not be the best indicator while formulating or implementing competition policy in small developing countries. The Vietnamese automobile industry is probably a case in point. There are 11 car manufacturers in the country with a small market protected by high tariff barriers. However, though there is competition, the market is hardly enough to give them efficient scale. The industry will find it difficult to sustain unless they can export to foreign markets on a large scale. However, this would not be so easy, as the industry, protected by tariff barriers, is quite inefficient and would hardly be able to sell in the global market.

Smaller developing countries, thus, may rely more on the notion of contestability rather than competition within the market per se in the structural sense. Unfortunately, as can be seen above, the policy-induced entry barriers are quite high in the 7Up2 countries, which are hardly good to promote market contestability. This may also require bringing down the trade barriers as well. However, this, again, might not be always easy. Firstly, for many countries, custom duty is a major source of revenue. Secondly, developing countries might want to give protection to infant and emerging industries.

Sectoral Policies

Governments in the 7Up2 countries have been following market-oriented economic policies for quite some time. However, the normal operation of market forces left to themselves may not lead to increased economic efficiency and fair distribution of welfare, due to a multitude of reasons. Market failures may prevail instead, especially in certain sectors, where competitive markets may not be the optimal structure or yield desired results, such as: telecommunications, energy (electricity, oil and gas), transport (seaports, civil aviation, roads and highways, railways), water, and financial sector (banking, capital market, insurance), etc.

Because of market failures in these sectors, some forms of intervention are required. In fact, experience suggests that, during the early period of transition in particular, from a non-competitive (or minimally competitive) market to a competitive (or more competitive) one, the governments will have to oversee and manage changes. They may not need to direct the changes, but at least, a process will be needed that can resolve disputes, respond to market failures, and provide new entrants with a sense of stability and fairness. Moreover, sectors with natural monopoly or high tendency towards market failures have generally been served by state owned enterprises. But in the new economic regime, due to privatisation, they are getting into private hands. Without any regulation in place, the situation is likely to worsen for the consumers. An effective regulatory framework is, therefore, more essential than ever during this period of introducing initial competition into the markets, especially in the absence of a competition policy and law, which happens to be the case in most developing economies.

In developing countries, economic regulation at the sectoral level was transitionally the task of various line ministries, who exerted control over entry conditions and in some cases, prices. In the re-regulation process that took place following

Table 1.7: The Evolution of Regulatory Regimes in 7U2 Project Countries				
Country	**Electricity**	**Telecom**	**Banking/Finance**	**Other**
Bangladesh	✔ (2003) (Bangladesh Energy Regulatory Commission)	✔ (2002) (Bangladesh Tele-communication Regulatory Commission)	✔ (1991) (Bangladesh Bank)	Maritime Transport: ✔ (Department of Shipping, under the Ministry of Ports, Shipping and Inland Water Transport)
Cambodia	✔ (2001) (Electricity Authority of Cambodia)	✔ (Ministry of Posts and Tele-communication of Cambodia)	✔ (National Bank of Cambodia)	Forestry: ✔ (Ministry of Agriculture, Forestry and Fisheries)
India	✔ (1998) (Central Electricity Regulatory Commission; State Electricity Regulatory Commissions)	✔ (1997) (Telecom Regulatory Authority of India)	✔ (1934) (Reserve Bank of India)	Maritime Transport: ✔ (1997) (Tariff Authority for Major Ports) Pharmaceuticals: ✔ (1995) (National Pharmaceuticals Pricing Authority)
Lao PDR	✔ (Department of Electricity, under the Ministry of Industry and Handicrafts)	✔ (Ministry of Communication, Transport, Post and Construction)	✔ (1999) (Bank of Lao)	Pharmaceuticals: ✔ (Food and Drug Department, under the Ministry of Health)
Nepal	✔ (1985) (Nepal Electricity Authority)	✔ (1998) (Nepal Tele-communication Authority)	✔ (1955) (Nepal Rastra Bank)	Civil Aviation: ✔ (1998) (Civil Aviation Authority of Nepal)
Vietnam	✔ (2004) (Electricity Regulator)	✔ (Ministry of Posts and Telematics)	✔ (1997) (2004) (State Bank of Vietnam)	Pharmaceuticals: ✔ (Drug Administration Department, under the Ministry of Health)
(✔) *The establishment of a regulatory body for the sector is mentioned in the sector regulation provisions (policy/law).* (✖) *There is no autonomous regulatory body and the governments continue to its sectoral regulation activities through line ministries.*				

liberalisation, privatisation, and deregulation, a system of specialised agencies was supposed to be set up to perform the regulatory functions, separately from the line ministries, which function as policy makers, and the SOEs, which are the service providers / market operators. Due to a multitude of reasons, in many cases, the line ministries still perform all the three roles of a regulator, policy maker, and service provider / operator. Hence, in a country we may find the presence of both the forms of government interventions, as what happens in most 7Up2 project countries.

Deregulation, Privatisation and the Evolution of Regulatory Regimes

Regulatory reforms happened rather late in all 7Up2 project countries, owing to the slow pace of the general reforms, the small and backward industrial base of the economies, and in some cases due to political reasons. It is also because of the same set of reasons that the reforms undertaken are not of very far-reaching nature, and that even until present, the regulatory systems in these countries remain yet to be fully developed. In many cases, the line ministries are still exerting their traditional control over more than one public utility service sector, such as the case of the electricity, telecommunication and pharmaceutical sectors in Lao PDR, the telecommunication sectors in Cambodia and Vietnam, etc.

Bangladesh: Although the history of reform in Bangladesh dates back to late 1970s and many of the reforms came out as governments' own initiatives; major reforms in Bangladesh came out mainly as implementation of a package of structural adjustment

policies under the auspices of the World Bank and the IMF in 1980s and early 1990s. Privatisation and public enterprise reforms, in particular improvement of the operational performance of public utilities, constituted an integral part of the reform process, which was gaining momentum during the 1990s but has slowed down in recent years. The regulatory framework in the country, however, is yet to be developed. Only very recently, a regulatory commission has been set up for the telecommunication sector. Nevertheless, it is still in its infancy and yet to acquire any teeth. Bangladesh has also established a Securities and Exchange Commission to regulate the capital market, and is in the process of restructuring the electricity sector with an energy regulator in place only since last year.

India: Regulation is not a new issue in India, as several sectors have been under regulation since its planned economic development. However, autonomous regulatory authorities started coming up only in the 1990s. Thus, though price regulation for pharmaceuticals has been a long practice, it was exercised by the relevant government department. The autonomous regulatory body, National Pharmaceuticals Pricing Authority was established in 1995. Next to be established was the Telecom Regulatory Authority of India (TRAI) in 1997. The same year the Tariff Authority for Major Ports (TAMP) was also established. In 1998, the electricity sector also came under regulation, as the Central Electricity Regulatory Commission was established. The sector is regulated at the state (sub-national) level as well, and by now most states have State Electricity Regulatory Commissions (SERCs). Meanwhile, the Securities and Exchange Board of India (SEBI) to regulate the capital market and the Insurance Regulatory and Development Authority (IRDA) to regulate the insurance sector have also been established. The government is also considering some more regulators for some other sectors.

Cambodia*:* The Royal Government of Cambodia (RGC) has been working earnestly on a very ambitious reform programme and it recognises that markets cannot develop without the right regulatory and political environment, which includes the development and effective implementation of a suitable tariff policy, tax policies, trade policy, competition and regulatory policy, and corporate governance[8]. This vision, however, is yet to be achieved to date. The regulatory regime in Cambodia remains very sketchy, with only one regulator in place for the electricity sector. The state continues to play the triple roles of a policy-maker, regulator and market operator at the same time in several sectors.

Lao PDR*:* Under the New Economic Mechanism (NEM) adopted in 1986, privatisation started on a large scale, and market participation by the private sector was allowed. However, the State retains its control over the large SOEs or sectors deemed 'strategic'. Sectoral economic regulation continues to be the responsibility of several line ministries. The Department of Electricity under the Ministry of Industry and Handicrafts handles electric power development and regulation of the sector. The telecommunication sector is regulated by the Ministry of Communication, Transport, Post, and Construction. Banking is the only sector where some sort of a regulator exists – the Bank of Lao, though the Ministry of Finance continues to exercise a significant power over this sector.

Nepal*:* The economic stabilisation programme was put in place in 1985. Nepal also went for a Structural Adjustment Facility (SAF) programme with the IMF in 1986 for three years. Accordingly, various components of economic policy reforms were carried in Nepal during the last one and half decade. This is true in the case of regulated industries as well. Many public enterprises have been privatised and several others are in the pipeline. Sectoral regulations are being laid out and independent regulators have been set up for almost every sector.

Vietnam*:* Vietnam adopted a comprehensive reform programme in 1986 called *Doi Moi* towards building a market-oriented economic regime, in which the private sector's role was recognised and encouraged. Nevertheless, the respective roles of the State, the private sector and the non-State sectors still lack clarity and the government's intervention in the market remains intensive. Most regulated sectors in Vietnam are still under the control of line ministries, such as the Ministry of Post and Telematics' regulatory power over the telecommunication sector, etc, which have caused no small grief to the private sector players, who cannot compete on a level playing field with SOEs due to political favouritism, excessive intervention, and so on. Vietnam, however, is moving towards building up a more transparent and accountable regulatory framework, starting with the adoption of the Electricity Law 2004, which provides for the establishment of an independent Electricity Regulator.

Organisational Autonomy of Regulators

Such a laborious process as it may seem, the adoption of a sectoral regulation, as well as the establishment of sectoral regulatory agencies, is not an end on its own. More importantly it is the effectiveness of regulation, which entails the effectiveness of the operational performance of the regulators. This, however, is not a simple issue.

To do their job properly, regulators must have clear legal authority and the capacity to carry out their mandate. They should have competent, non-partisan and professional staff. They should operate within a

Table 1.8: Autonomy of Sectoral Regulators Across 7Up2 Project Countries
The Case of the Electricity Sector

Autonomy	Bangladesh Energy Regulatory Commission (BERC)	Electricity Authority of Cambodia (EAC)	India – Central and State Electricity Regulatory Commissions	Nepal Electricity Authority (NEA)	Vietnam Electricity Regulator (VER)
Mandate	The BERC has the authority to: • issue licences for power generation, energy transmission, distribution and marketing, energy supply and energy storage; • fix the prices of petroleum products and electricity tariff; • judge over consumer disputes and punish dishonest business practices or monopolies; and • frame compulsory codes and standards to ensure quality of service.	The EAC is empowered to: • issue, revise, suspend, revoke or deny any licence for supply of electricity services; • approve tariff rates and charges, terms and conditions of licensees; which should be fair to both consumers and licensees; • approve and enforce performance standards to ensure quality supply and better services; • prescribe fees applicable to licensees; • evaluate, resolve consumer complaints; and • approve or disapprove, or restrict the conduct of a business merger or reorganisation, or a major acquisition or sales of assets or security or expanding the licensee's business activities.	• The electricity Act 2003 provides a regulatory framework for the industry through setting up of Electricity Regulatory Commissions (ERCs) in the centre and in the states of India. • The State Electricity Regulatory Commissions (SERCs) are responsible to regulate generation, transmission, and distribution of electricity in a state, the Central Electricity Regulatory Commission (CERC) is to decide on the matters related to the utilities owned by the central government and inter-state issue as well. Regulatory agencies are empowered to issue licence, set tariffs and performance standards, promote competition and overall development of the sector.	• To frame bye-laws regarding personnel, administrative and finance with government approval; • To fix electricity tariff without government approval but decided by the Electricity Tariff Fixation Commission. • To sell, transfer or deal unto any amount of its property as it deems fit; • To claim compensation from His Majesty's Government of Nepal (HMG/N) for any loss suffered due to its action in accordance with HMG/N's instructions.	The establishment of a VER is provided for by the Electricity Law 2004 of Vietnam. This body, however, is yet to be established. As per the Law, the VER will assist the Ministry of Industry, *inter alia*, in: • preparing rules and guidance on the operation of competitive electricity markets and measures to maintain the balance between electricity supply and demand; • issuing, amending and revoking electricity licences; • issuing guidance on the conditions and procedures for interconnection; • providing for the tariffs for electricity generation, wholesale and retail, and the fees for transmission and distribution; • observing the compliance with the master plans for electricity sector development; • settling complaints and disputes in the electricity market.

Institutions	The purpose of the BERC Act 2003 is to make provisions for the establishment of an independent and impartial regulatory commission for the energy sector. • The BERC, therefore, is supposed to be an institutionally independent commission comprising five members, a chairman and the other four members of the commission. • The BERC is only accountable to the Chief Justice. The President of Bangladesh will appoint the Chairman and the other members on the recommendation of the Energy Ministry. - The BERC members cannot be replaced by the government before the completion of their 3 years tenure.	• The EAC is legal public entity, being granted the right from the RGC to be an autonomous agency to regulate the electric power services and to govern the relation between the delivery, receiving and use of electricity. • The EAC consists of three members, including the Chairman. • The Chairman and members are designated and proposed by the Prime Minister and are appointed by the Royal Decree. • Each member has a three years term except for the initial term. The term of each member shall be staggered. • The Chairman's position is equivalent to the rank of Secretary of State and the position of other members is equivalent to Under Secretary of State. • All members of the Authority shall retire from the office when they attain the age of sixty.	• The ERCs have conferred with quasi-judicial status. • Appeals against the orders of the ERCs can be filed before an Appellate Tribunal that has been constituted by the government of India recently. • Regulatory role of the CERC includes regulating tariff of generating companies owned and controlled by central government; regulate and determine tariff for interstate transmission of electricity; issuance of license for transmission and trading; adjudication in case a dispute arises; levy fees for purpose of the Act; specify grid code; set standards for services; etc. • The SERCs are given the mandate to carry out respective functions in the context of a state which include (i) issue licenses for distribution, trading, transmission in the state; (ii) regulate tariff for generation, transmission, wheeling, and distribution of electricity; (iii) regulate electricity purchase and procurement process of distribution licenses; (iv) promote renewable generation; (v) adjudicate on disputes; (vi) levy fee etc; (vii) specify state grid code, etc. • ERCs are given mandate to promote competition in the sector without recognising a possible role of economy-wide competition authority.	• The NEA, a hundred percent HMG/N-owned utility which was established in 1985 under the NEA Act 1984 by amalgamating the Electricity Department, some Electricity Development Boards and the Nepal Electricity Corporation (NEC) all wholly HMG/N owned entities. • The NEA has undergone various changes since its establishment both on the organisational structure and working culture, especially after the enactment of the Electricity Act 1992. • Management of the NEA is entrusted to a Board of Directors which comprises of: (1) the Minister/State Minister of Water Resources or a person appointed by HMG as Chairman; (2) Secretary, Ministry of Water Resources; (3) Secretary, Ministry of Finance; (4) One prominent person from commerce, industry, or financial sector; (5) One person from consumers group; (6) Two prominent persons with experience in power sector from outside the government; (7) Two NEA Managing Director who act as member secretaries as well as chief executive officers.	The Prime Minister will provide for the organisation, powers and tasks of the Electricity Regulator in further regulations; which are yet to be done.

Budget	The BERC has its operational budget allocated by the Energy Ministry.	• The EAC has an autonomous budget for its operation. This budget comes from the fees paid to the EAC by applicants and licensees. • The EAC shall establish a budget for each financial year and shall submit it to the RGC for review and approval.	• The Electricity Act 2003 provides for creation of a Fund that would be repository for all fees that might be charged by a regulatory commission, grant given by government, any other fund that may come, and budgetary provisions made by government. • Presently, government allocates budget for the commission on annual basis. Baring some cases, the requirements of the commissions are being met.	• The NEA is a State-owned corporation with its own balance sheet.	No information
Level of autonomy	The autonomy of BERC is hampered for example: • Through the process of accounting and audit, the BERC is subordinated to the Ministry of Power, Energy and Mineral Resources (MPEMR). • Dependence on the Ministry in terms of operational budget also works to reduce significantly the autonomy of the BERC.	• Going by reading, the EAC seems to be an independent regulator. However, the problems lie with the high level of corruption and political favouritism in Cambodia, which may nullify any such good-intentioned reforms.	• The government does not have powers to supersede the regulator. Though the government can issue 'policy directives' to the regulator. To appoint regulators, a selection committee is to be constituted to recommend to the government. Removal is subject to a proven guilty in a probe.	• The NEA is by no means a regulator by the virtual meaning of this concept. It is at the same time a regulator and a service provider (government monopoly).	Not yet applicable.

statutory framework with substantive and procedural requirements that ensure integrity, independence, transparency, and accountability.

Independent regulators have a long history in the US and are being adopted by several OECD countries, including Australia, Canada, and the UK. The trend towards privatisation and regulatory reform has seen this model emulated in a growing number of developing and emerging economies. Recent examples include Argentina, Bolivia, Hungary, Jamaica, Malaysia, Mexico, Peru, the Philippines, Russia, and Venezuela. Some attributes, which are essential for the independence of regulators, include:

- *Mandate* - An independent regulator will typically have its mandate clearly defined by law and will not be subject to ministerial control.

- *Institutions* - or the agency's status outside the executive and legislative branches of government. This is comprised of three critical elements. First, senior personnel should enjoy security of tenure: clear rules, ideally involving two government bodies, must govern their appointment and, especially, dismissal. Second, the agency's governance structure should consist of multimember commissions composed of experts. And, third, decision-making should be open and transparent to the extent consistent with commercial confidentiality, enabling both the public and the industry to scrutinise regulatory decisions.

- *Budget* - Regulators should be given access to independent sources of funds, such as user fees or levies on the regulated industry. In order to prevent levies from growing too burdensome, the law establishing the agency may set a cap on levies, usually defined by reference to industry turnover.

In many developing and transition economies, however, regulators are usually not independent. Many of these agencies report to line ministries and are mainly staffed by government officials on deputation. Governments are usually reluctant to consign important regulatory functions such as tariff setting to independent sectoral watchdogs. Besides, it is also because independent regulatory agencies often have potential problems of their own. As agencies tend to respond to the wishes of the best-organised interest groups, when regulators are free from political control, the risk of regulatory capture by other groups—in particular, the industry they regulate—grows. Agencies that suffer from such capture come to identify industry interests (or even the interests of individual firms) with public interest. And industry capture can undermine the effectiveness of regulation. Regulators may, for example, formulate rules so as to minimise industry costs rather than strike an appropriate balance between those costs and public benefits. They may also apply rules inconsistently and exempt individual firms from regulatory requirements. Other causes of the lack of autonomous powers by sectoral regulators in developing economies are, of course, the weakness of the overall administration system and the low sophistication level of policy-making skills. The situation in 7Up2 project countries shows significant similarities in all of the above-mentioned respects.

Of the few regulators that have been recently established in these countries, none of them possess any high degree of independence. Take the case of the electricity regulators. Out of the five countries under consideration in this project, Lao PDR is yet to set up a regulator, Vietnam is planning to set up one as provided by the country's Electricity Law 2004. Nepal, since 1985, has had something called the Nepal Electricity Authority (NEA), which, however, is more of an SOE with regulatory power rather than a regulator in the true sense of the term. Bangladesh and Cambodia are the two countries with an autonomous regulator for this sector. However, these agencies' independence is highly susceptible to the governments' persistence to retain control over the sector as well as the hostile policy environment. Besides, all these regulators are still very young, whose establishment is carved out of the traditional regulators in these countries – the line ministries. Their institutional capacities are still underdeveloped and the legacy of the old mechanisms is still very strong.

The Interface Problems

It is now well recognised that the regulated industries in developing and transition economies, in particular those in Asia, are often over-regulated. These industries are usually overseen by a multitude of institutions, which tends to increase regulatory complexity, confusion and risk. In addition to the strong legacy of the old administrative system, the low degree of autonomy of the regulators and the lack of delineation in power and authority are the main causes leading to this situation.

The most major interface in many cases is the interface between sector-specific regulators and a country's competition regulator (i.e. competition authority). The reform process mentioned earlier, in addition to bringing about the regulatory evolution in many countries, also raises important questions about the scope of regulation needed in sectors being opened up to greater competition, and on the other hand, the optimal level of competition and the behavioural aspects of firms operating in regulated industries. The issues of interface arises, in many developing economies, when a competition policy and law is adopted to respond to the emerging issues of market regulation, and firms and industries, which traditionally were subject to only sectoral regulation,

Box 1.1: Interfacing Competition Rules with Industry-Specific Regulatory Rules

The critical areas where competition rules interact with regulatory provisions are interconnection or access, monopoly-pricing, anticompetitive agreements and merger control:

- **Network Access and Interconnection** - In integrated monopoly enterprises, regulatory rules seek to establish barriers of entry to the markets of the incumbent firm. Under this traditional structure, there is no requirement of the monopolist to engage in anti-competitive conduct, as there are no competitors. However, in the network industries, where the monopoly segments have been separated from the potentially competitive elements, the question of access to the monopoly 'essential facility' requires regulation to ensure free and non-discriminatory entry. It is also important to restrict the incumbent operator of the essential facility from acting in a manner that would be disadvantageous to rivals in the newly developed competitive sectors. In some regimes, competition rules and judicial precedents on interconnection prohibit misuse of dominant market position and this may be sufficient to address the problem. Refusal to allow a competitor to a network on non-discriminatory terms could be ruled unlawful. This rule, however, has the potential to overlap or conflict with industry-specific rules dealing with network access and interconnection under sectoral regulation law.
- **Monopoly Pricing** - Some competition regimes include rules that restrict excessive or unjust prices. Such rules could also conflict with industry-specific pricing rules established under sectoral regulation. Alternatively, the industry regulator in fixing prices may find that the competition rules against price-fixing are so general that they give the competition regulator the authority to challenge the price-fixing decisions of the sectoral regulator.
- **Restrictive Business Practices** - In the case of the vertically integrated monopoly firm, there are no competitors. Hence, there is no one to enter into agreements with or to behave in a manner that would restrict or lessen competition in the market for relevant utility services. When the industry is unbundled or liberalised and opened up to competition, the potential for anti-competitive agreements or conduct that could restrict or lessen competition emerges. Again, competition rules could be used to challenge co-operative arrangements, which have been sanctioned under sectoral regulation. Alternatively, the sectoral anti-competitive rules may conflict with the anti-competitive rules of the competition authority.
- **Merger Control** - Restrictions on mergers between utilities and other firms or reintegration are often provided for under sectoral regulatory rules. For example, in the new unbundled environment common ownership of generation, transmission and distribution firms is normally restricted under sectoral regulatory rules. Again, there is potential for conflicts in respect of interpretation of the sectoral regulatory rules and the competition rules.

Source: *Adapted from Cezley Sampson and Faye Sampson (2003), Competition and Sectoral Regulation Interface, Consumer Unity & Trust Society (CUTS).*

now find that they have to face regulation from both the competition authority and the sectoral regulators at one and the same time. The problem is that historically, in most countries, these two types of regulatory institutions evolved as distinct agencies with relatively limited formal relationships. Therefore, when the interaction among sectoral regulators and competition authorities is ill defined, the opportunities for turf-disputes and legal wrangling are multiplied.

Amongst the six 7Up2 project countries under consideration in this report, only India, Vietnam and Lao PDR have got their respective competition legislations - Lao PDR adopted a Decree on Trade Competition in February 2004 and Vietnam adopted a Competition Law in December 2004, while India is the only country which has a long experience of a competition law. However, the Vietnam Law is only effective since July 2005 and the Trade Competition Commission in Lao PDR is yet to be set up, though the Lao Decree on Trade Competition is supposed to be enacted since August 2004. Certainly, no interface problem is expected to emerge in such a short time yet. Nonetheless, there are certain legally provided issues that need to be highlighted, for the benefits of other project countries, which are on the way to adopt their competition legislation.

The Lao Decree on Trade Competition can only be applied to the sale of goods and services in business activities (Art. 4). The Trade Competition Commission, which is to be set up as the executing agency of the Decree within the Ministry of Commerce of Lao, has the responsibility to liase with relevant government agencies to take measures against those who breach the provisions of the Decree (Art. 5). There is no specific mention of the relationship between the Commission and other sector ministries, which indeed creates no less ambiguity and confusion among businesses which operates in operated sectors, especially the incumbent SOEs.

The Competition Law 2004 of Vietnam, on the contrary, clearly stipulates that "The Law shall apply to business organisations and individuals (hereinafter referred collectively to as enterprises), including also enterprises producing, supplying products, providing public-utility services, enterprises operating in the State-monopolised sectors and domains, and foreign enterprises operating in Vietnam" (Art. 2), and that "Where there is any disparity between the provisions of this Law and those of other laws regarding competition-restricting acts or unfair competition acts, the provisions of this Law shall apply." (Art. 5) This, of course, gives a clear message on the overriding power of the competition

rules of Vietnam over other sector-specific provisions regarding the competitive behaviour of enterprises.

Sectoral regulations in Vietnam since the reform times, on the other hand, are also quite consistent with the competition rules. The Electricity Law 2004 of Vietnam, for instance, aims *inter alia* to develop a 'competitive electricity market'; however, leaves the door open regarding the market behaviours of entities involved in electricity-related activities. Presumably, the regulation of these behaviours will be under the jurisdiction of the competition authority. The Ordinance No. 43/2002 on Post and Telecommunication of Vietnam, adopted in 2002, also contains provisions, which are consistent with the competition rules of Vietnam. It provides for an open interconnection regime in which all telecom network operators are entitled to interconnect with all other telecom networks on 'fair and equitable' terms. Particular obligations are placed on parties who are in a dominant market position (possessing 30 percent market share in respect of one type of service in a licensed geographical area) in respect of provision of interconnection and who control 'essential facilities' (though this key term is left undefined). These obligations provide for good faith negotiations and prohibit refusal to interconnect. Overlapping jurisdiction, if any, is still a matter for the future to respond.

Another notable case is the case of the electricity sector regulation in Cambodia, which gives the Electricity Authority of Cambodia the authority to *inter alia* approve or disapprove, or restrict the conduct of a business merger or reorganisation, or a major acquisition or sales of assets or security or expanding the licensee's business activities. This authority is very much likely to interact with the jurisdiction of the competition legislation that Cambodia is drafting as part of the country's WTO accession package.

Other agencies that the sectoral regulators might frequently have interface of powers and responsibilities include the line ministries and the judicial bodies. In developing countries, a large part of such problems have arisen from the State's inability, or even unwillingness, to give up control of the sectors it has liberalised. Thus, while more and more independent regulators have been set up in the last few years, most regulators are independent only in name. The role of a regulator is to advise the line ministry concerned on policy, solve disputes among service providers and ensure that the rules and regulations governing business are followed. It is also the agency to intervene in case market failures take place and protect consumer interests.

Effectiveness of Regulatory Institutions

The crux of the problem has been that the legislation governing these new institutions has been often poorly worded, ambiguously framed and open to legal challenge by the state entities. There is very often a lack of clear delineation of powers and responsibilities that add up to the confusion over who - the regulators, the line ministries or the judiciary – has the authority over what.

Often it happens that the decisions of independent regulators can be appealed to a line ministry and the line minister concerned often has the superseding power over the regulatory body's decisions or policy directives. In other cases, the judicial, or quasi-judicial authority is not embedded with the regulators and they do not have the status of a civil court, which reduces the weight of regulators' decision over disputes and consumer redress.

Bangladesh: Telecommunication and energy in Bangladesh are the two sectors where independent regulators have been set up to ensure the smooth functioning of the competitive and regulated markets. However, as mentioned before, the Bangladesh Energy and Regulatory Commission (BERC) is just an autonomous body in name. The faulty wording of the BERC Act 2003 has left many doors open for interventions by the Ministry. In the telecom sector, the Bangladesh Telecommunication Regulatory Commission (BTRC) is also meant to set up as an autonomous regulator. In many aspects, this is the case. For instance, the BTRC has an independent budget, which is generated from the licence fees and other sources like charges for specific services, fees, contributions and parliamentary appropriations. It is manned with qualified and competent personnel appointed for a fixed period of time, and has full freedom in matters of staff requirement and salaries, subject to the provisions in the budget. Though set up under the Ministry of Post and Telecommunication, the BTRC reports directly to the Government. The BTRC is also vested with definite duties and power to implement the policy decisions and ensure compliance of set rules and procedures. It has the legal authority to ensure and enforce regulatory measures, and the authority to take punitive actions ranging from imposing fine to closure of services against defaulting operators. A recent episode, however, revealed that autonomy is always easier said than done.

In 2003, the BTRC, through the Ministry of Post and Telecommunications (MoPT), sought the Prime Minister's consent to two licences for fixed line phones, two more for mobile operators in the private sector through international competitive bidding and legalisation of Internet telephony. The proposal, however, was caught in a bureaucratic tangle, since it had irked the state-owned Bangladesh Telegraph and Telephone Board (BTTB), who feared that the move would curtail its monopoly in fixed line operation and reduce revenue earning from international calls. The BTTB, henceforth, launched a crusade against

the Internet telephony, with the back up of the MoPT, who 'explained' to the BTRC the losses that the BTTB might incur if the BTRC's proposal got approved. The MoPT's intervention delayed the clearance process significantly, causing much public concerns in Bangladesh over the triumph of red tape over effective regulation.

Cambodia: As mentioned earlier, an Electricity Law was promulgated in 2001 in Cambodia, on the basis of which the Electricity Authority of Cambodia (EAC) was established as a regulator for the entire power sector. On the basis of the policies by the Ministry of Industry, Mines and Energy (MIME), the line ministry who used to oversee all activities in the whole energy sector, the EAC performs regulatory functions such as the approval of electricity tariff, electricity business licensing, and the development of investment circumstances, which the MIME had executed, and also gives instructions and advice on a power purchase agreement (PPA) from the viewpoint of energy security. On the other hand, the MIME is responsible for power sector policy, planning, development, and technical standards. Electricité du Cambodge (EdC), a hundred percent state-owned electricity corporation, takes charge of power supply throughout the country. EdC had been under the direct jurisdiction of the MIME until 1996, and at present comes under the jurisdiction of the MIME and the Ministry of Economy and Finance. EdC currently serves Phnom Penh and another five isolated provincial systems. In the rest of the country, electricity is supplied by the provincial authorities under direct MIME's jurisdiction, and by small, private entrepreneurs, the REEs (Rural Electricity Enterprises). In a way, the roles of MIME, EAC and EdC have been clearly defined under the Electricity Law.

Prior to the passing of the Electricity Law 2001 in Cambodia, REEs were required to register and have an approval issued by MIME or the provincial offices of MIME (commonly referred to as the Departments of Industry, Mines and Energy - DIME). Licenses were issued for only one year but was renewable. The Law, however, is not very clear or is inadequate in respect of the rights and obligations of these small rural enterprises. A dual concession / licensing regime exists, whereby REEs must obtain a 'concession' from MIME / DIME and then a licence from EAC. This dual system is unclear and probably inappropriate for small village systems with very limited number of customers. The requirement for the concession is an additional barrier and leaves the potential for political interference.

India: The regulatory regime in India is relatively more developed not only in comparison to other countries, but also among the developing countries as a whole with a number of regulatory institutions, some of them with long experience. Obviously, their effectiveness is likely to vary across sectors. They also vary across sectors in relation to the nature, structure, mandate, autonomy, accountability and interface with other agencies and government departments. The regulatory regimes in financial sectors (banking, insurance, stock exchanges) are considered to be more mature than those in the infrastructure sectors (electricity, transport, and communication).

In the telecom sector, though the regulator can be superseded by the government, the sector has performed reasonably well. However, in the power sector, though regulators are more independent, the sectoral performance has been quite disastrous. It may be noted, however, that the problems in the power sector are much more complex, and it is essential to have government co-operation and political will at both national and sub-national levels. The banking sectors regulator, which has a long history is, however, in good grip of the situation and has even managed crisis situations pretty well.

Lao PDR: Lao has adopted a regulatory framework for the electricity, which encourages private sector participation. However, private companies need to work out a partnership with the state-owned monopoly Electricite du Laos (EdL). Hence, as of now, the government is all: owner, policy maker, and regulator. A clear distinction of different types of activities in the sector is yet to emerge. However, due to huge potential of hydroelectric power, which remains largely untapped, electricity scenario in the country is reasonably good. Many parts of the country of course do not have electricity. Similarly, the Ministry of Communication, Transport, Post and Construction (MCTPC) is responsible for telecom policy and regulation. However, the growth performance of the sector remains unimpressive with very low tele-density. Particularly, the government is yet to develop a universal service obligation policy. Bank of Lao PDR (BOL) is the apex institution entrusted with the job of overseeing the banking sector. However, BOL suffers from lack of experience in effectively performing that role. Its mandate includes conflicting objectives and its prudential framework is also not well developed. It does not have effective mechanism to deal with failing or failed banks.

Nepal: The regulatory regime of the Nepalese energy sector is in a very bad shape. In addition to the existence and operation of something called the Nepal Electricity Authority (NEA), which is indeed a regulator and a government-owned utility at the same time, there are other institutions also involved in the power sector development: the Ministry of Water Resources, the Electricity Development Department, and the Electricity Tariff Fixation Commission. Delineation of power / responsibility is nil, which essentially means a lot of overlapping and concurrent authority between these various institutions.

Telecommunications in Nepal falls under the responsibility of the Ministry of Information and Communications (MoIC) and is regulated under the terms of the 1997 Telecommunications Act. The Act itself is the outcome of a National Communications Policy which was initiated in 1992. The Act established a regulatory body, the Nepal Telecommunications Authority (NTA), as an autonomous and corporate body, with a mission of "managing and regularising the Telecommunications Service and making it reliable and easily available to the public".

The Nepal Telecommunications Corporation (NTC) is the incumbent public telecommunication operator and, until recently, held a monopoly over all aspects of telecommunication in Nepal. The chair of the Board of Directors at the same time the Secretary of the MoIC, which means NTC is not fully independent of the government and therefore the corporatisation process, which was initiated under the National Communications Policy of 1992, has not been effectively implemented. For instance, according to the terms of the Act, the MoIC is also chair of the Radio Frequency Policy Determination Committee, which administers and allocates spectrum[9].

This close relationship between the MoIC and the NTC is said to have been the cause of many government interventions into the sector regulation practices. One such example is the licensing of a wireless local loop (WLL) competitor to NTC, which was due to be tendered in 1998 and to start operations by the end of 1999, has still not started. The NTA had announced in the press that the tender documents would be available in December 1999, but they were still working on them in January 2000.

Vietnam*:* Vietnam has made some progress in separating policy and regulatory functions from the provision of services. While separation of commercial operations from ministries is emphasised upon, separation of policy and regulatory functions through creation of independent regulators is not the approach in Vietnam. Regulatory bodies have been created in some sectors. However, they work as a unit under the relevant ministries rather than independent units. Even the central bank of the country - the State Bank of Vietnam - does not enjoy full autonomy, which has become the established norms in most countries. In fact, concerns have been raised that the functioning of the SBV has been constrained by government intervention in various ways and this has been reflected in the overall sub-optimal performance of the sector.

In contrast, the functioning of the MPT in the telecom sector has done wonders for the sector. This has been possible because the government objectives and priorities for the sector are clearly laid out in various policy and legal documents, which have provided the necessary platform for the MPT to spur competition and facilitate and orderly growth of telecom services. This experience probably highlights that the success of regulatory reforms in a sector depends primarily on the ability of the government to set out objectives and priorities, rather than the independence (or lack of it) of the regulatory body.

By way of recommendations, it follows from the above discussion that in the absence of a competition policy and law, an effective regulatory framework is very essential, particularly in the developing countries in order to regulate the specific sectors specially the utility sectors. As far as possible, these regulators should be independent. In most cases, the traditional control of the line ministries over the regulator greatly undermines its independence.

A regulator should be manned by competent, non-political and professional staff, which operates within a statutory framework with substantive and procedural requirements in order to ensure integrity, independence, transparency, and accountability. A regulator should comprise of experts, and be free from bureaucratic control. Often, the independent regulators are routinely staffed with bureaucrats. The existing regulatory bodies are normally headed by former bureaucrats and judges, who help perpetuate the mindset of control over regulation.

The role of the regulator is to advise the line ministry on policy, solve disputes among service providers and ensure that rules and regulations governing the business are followed. They should have independent sources of funds/independent budgets as far as possible. Care should be taken to ensure that the respective sector/economy is not over-regulated. It is essential to strike the right balance.

Consumer Protection and Competition

"Consumers, by definition, include us all", remarked the former US President John F. Kennedy, in his special message on "Promoting the Consumer Interest" in March 1962[10]. "They are the largest economic group in the economy, affecting and affected by almost every public and private decision. But they are the only important grouping the economy who are not effectively organised, whose views are often not heard". The consumers are much better organised in the US now, but in most developing countries, situation is still the same. Hence, the need for consumer protection can hardly be over-emphasised.

Consumer protection refers to actions taken to provide and ensure the rights of a buyer. It also refers to actions taken (sometimes in the form of laws) to protect consumers from defective goods and services. Consumer protection law safeguards the buying

public from dangerous or inferior goods and services and from fraudulent and other unfair selling practices. The areas of consumer concern include quality and safety, labelling and pricing, selling and credit, and advertising. The purchaser has a legal right to enforce any implied or express warranties pertaining to the purchased goods or services against the manufacturer who has introduced that goods or services into the marketplace or the seller who has made them a term of the sale.

Since early times, most societies have had some controls on the form and distribution of goods and services. For example, there were regulations to govern coinage, and weights and measures, and restraints were imposed through the issuance of charters and licenses. In pre-industrial economies, relationships between the producer and the consumer generally operated on the principle of *caveat emptor* (let the buyer beware), which assumes that the buyer knows what he wants, has the necessary knowledge to choose wisely, and has contact with the producer. In industrial economies, however, the principle of *caveat emptor* breaks down. The buyer may be manipulated by skilful (misleading) advertising and generally will not have the technical knowledge necessary to compare intelligently, say, various makes of highly complex automobiles or television sets. In other instances, the buyer may be offered only a limited range of choice within the price bracket that he can afford.

Industrialised societies have made periodic efforts to solve consumers' problems. As industrialism gathered momentum in the late 19th century, a few governments began to set standards for food and to regulate trusts, and individuals started to form co-operatives for mutual protection. In the early 20th century, after World War II, the rapid growth of industry intensified consumer problems and led to a worldwide consumer movement. In the US, the Great Depression of the 1930s resulted in certain protective measures that encouraged government reforms. Consumer protection movement has become a critical part of almost every society in today's world. However, while the consumer movement in western countries is primarily concerned with issues of price and quality of goods and services, the consumer movement in the developing nations gives more priority to basic development issues such as access to these goods and services. Therefore, the developing country consumer movement tries to influence broader economic and social policy making and its implementation.

In 1985, the United Nations (UN) introduced the 'Guidelines for Consumer Protection', which provide a basic framework for consumer protection based on international consensus. Under the guidelines, governments are responsible for enforcing consumer rights and every country needs to have an irreducible minimum of consumer protection measures. These include: 1) To assist countries in achieving or maintaining adequate protection for their population as consumers; 2) To facilitate production and distribution patterns responsive to the needs and desires of consumers; 3) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; 4) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers; 5) To facilitate the development of independent consumer groups; 6) To further international co-operation in the field of consumer protection; and 7) To encourage the development of market conditions which provide consumers with greater choice at lower prices.

With the UN's adoption of the guidelines, consumer rights were finally elevated to a position of international recognition, acknowledged by developed and developing countries alike. Yet, they can continue to be ignored or trivialised by governments, producers and powerful interests.

The main objective of the competition policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy, resulting in:

- the best possible choice of quality,
- the lowest possible prices, and
- adequate supplies to consumers.

To put it differently, ensuring competition is just a means of achieving the above-stated objectives. Obviously, maximising of consumer welfare becomes a predominant concern. Governments, subsequently, need to design and implement a competition policy and law with the understanding that the consumers need the invisible hand of the State to protect their legitimate rights and interests and promote their welfare[11]. An effective consumer policy is a key ingredient to an effective competition policy. It ensures that the benefits of a competitive market are shared equitably with the consumers, and introduces balance and accountability within the system.

This chapter provides a comparative view of the laws and institutions on consumer protection in project countries, as well as the various consumer abuses, which are prevalent therein, with a focus on unfair trade practices. On that basis, it presents some recommendations to advance the cause of consumer protection in the project countries.

Laws and Institutions

Countries all over the world have been going about the business of consumer protection at different speeds, with different degrees of vigour, using a variety of techniques. In developing and least-developed economies, consumer protection law and redress

Table 1.9: Laws and Institutions on Consumer Protection in 7Up2 Countries						
	Bangladesh	**Cambodia**	**India**	**Lao PDR**	**Nepal**	**Vietnam**
Consumer Protection Law	× A draft law is ready	×	Has a comprehensive law, Consumer Protection Act, 1986, which is considered to be one of the best in the world. It has created, among other things, a three-tier consumer grievances redress system	× A draft Decree has been prepared	✓(1998) Consumer Protection Act – administered by the Consumer Protection Council (Ministry of Supplies)	✓ (1999) Ordinance on the Protection of Consumers' Interests – Ministry of Science, Technology and Environment (MOSTE) in co-ordination with other State agencies and ministries
Food Safety	✓ (1959) Bangladesh Food Ordinance – (1967) Bangladesh Pure Food Rules – (1984) Breast Milk substitute (Regulation of Marketing) Ordinance	✓ (1999) *Prakas* on Measures Against Food Products Devoid of Appropriate Packaging Labels	Prevention of Food Adulteration Act, 1954 Fruit Products Order, 1955 Agricultural Produce (Grading and Marketing) Act, 1937 A comprehensive act is under consideration.	✓ - Food registration No 1600 / FDA Administered by the Food and Drug Administration Commission	✓ (1966) Food Act – Central Food Research Laboratory (CFRL) (/ ministry of Agriculture)	✓ (2003) Ordinance on Food Hygiene and Safety – Ministry of Health
Quality, Standards and Measure-ment	✓ (1984) Bangladesh Standards and Testing Institute Ordinance	✓ (2000) Law on the Management of Quality and Safety of Products and Services – Ministry of Commerce	Bureau of Indian Standards Act, 1986. Set standards for products as well as test methods and procedures. Some of them are mandatory.	✓ (1995) Prime Minister's Decree on the Management of Standards and Quality of Products and Goods - Science, Technology and Environment Agency (STEA)	✓ (1980) Nepal Standards (Certification Mark) Act – Nepal Bureau of Standards	✓ (1999) Ordinance on Goods Quality & Ordinance on Measurement
Others	• Bangladesh Essential Commodity Act 1978 • Bangladesh Drug Control Ordinance 1982	• Law Concerning Marks, Trade Names, and Acts of Unfair Competition 2004	• Essential Commodities Act, 1955 • Drugs and Cosmetics Act, 1940	• Prime Minister's Decree on Goods Price Control 2001	• Black Marketing and Certain Other Social Offences Act 1975 • Essential Services Operation Act 1957	• Ordinance on Prices 2002 • Commercial Law 1997 • Ordinance on Advertising 2001 • Drug Law 2005 (replacing the Drug Law 1997) • Competition Law 2004

(✓) *There is a legislation (of law level or subordinate level)*
(×) *There is no legislation*

mechanisms, however, are generally at an infant stage, though some countries did make substantial progress. In fact, even without a comprehensive legislation on consumer protection, most countries have adopted laws or subordinate regulations on weights and measures, food safety, advertisement, pricing, essential goods and services, etc. The salient features of those laws and regulations include:

- They are meant not only to safeguard the consumers against fraudulent acts or unsafe and defective goods and services, but to protect honest producers/sellers from being harmed by unfair/dishonest trade practices by their competitors as well.
- They try to guarantee the right of consumers to enjoy certain essential goods and services despite the bad incidence of poverty.
- They provide for a minimum threshold of health and sanitation, which the public should be able to enjoy.
- They provide for some safeguard measures, if not redressal mechanism against consumer abuses.

All these features apply for 7up2 project countries, as can be seen in table 1.9.

Out of six countries under consideration, only India, Nepal and Vietnam have enacted statutes, whose titles specifically include 'consumer protection' and 'protection of consumer interests' as a part. India adopted its law in 1986 and is one of the first developing countries to adopt such a law. It is also considered to be one of the best in the world. Nepal and Vietnam, however, have been rather late in adopting such legislation (1998, 1999). Bangladesh and Lao PDR are considering their draft laws, while in Cambodia, consumer protection does not seem to be a high priority amid the busy legislative schedule of the country to fulfil its WTO accession commitments.

The two statutes of Nepal and Vietnam, though late-conceived, have got quite progressive features, some of which are as follows:

- They explicitly state some of the universally recognised rights of consumers as rights that are protected by laws. The Vietnam Ordinance on Protection of Consumer Interests dedicates a whole chapter (Chapter 2) to explain the rights and responsibilities of consumers in Vietnam, which includes: (i) the right to safety; (ii) the right to be informed; (iii) the right to choose; (iv) the right to be heard; (v) the right to satisfaction of basic needs; (vi) the right to redress; (vii) the right to education; and (viii) the right to a healthy environment. The Nepal Consumer Protection Act guarantees six out of the eight rights highlighted by the UN Guidelines, including: (i) the right to safety; (ii) the right to be informed; (iii) the right to choose; (iv) the right to be heard; (v) the right to redress; and (vi) the right to consumer education (Section 6).

- Both the laws address issues related to product/service standard and safety. They even clearly provide for standard registration, notification of unsafe or sub-standard[12] products and compensation for damages caused by unsafe or sub-standard products. This feature is particularly important, since it sets the broad framework as well as the ultimate objective for subsequent laws or subordinate regulations on product safety and standards, etc. which is 'to protect the consumers'. In Vietnam, producers/suppliers have the mandate to register, declare the standard of the quality applicable for their goods, services, and must declare the conditions, the duration, the location of the warranty, and provide clear instructions relating to the use of goods, service to the consumer (Art. 14 & 15). The producers/suppliers are also responsible for resolving the complaint launched by the consumer on their goods, services which do not comply with the declared standard, quality, quantity, price or with the contract signed; and are responsible for carrying out warranty of their goods, services for the customer; and compensating for any damage caused thereby (Art. 16 & 17).

- In both countries, the individual consumers are entitled to seek redress, either through administrative complaints at the relevant State agencies in charge or by initiating a lawsuit in a court of law. More important is the fact that the laws confer the right to lodge a complaint or commence a litigation on behalf of a consumer or a group of consumers on social action groups such as 'consumer associations' (Section 22 of the Nepal Consumer Protection Act and Decree 69/2001/ND-CP of the Government of Vietnam on detailed guidance for implementation of the Ordinance on Protection of Consumer Interests of Vietnam).

- Both laws clearly state the activities that are prohibited since they may harm the consumers. Various remedies and punishment for violations are also clearly prescribed, ranging from administrative fine, prosecution of criminal liabilities to seizure of goods and compensation for damages.

In India, the Consumer Protection Act (COPRA) enacted in 1986, also explicitly mentions most of the consumer rights mentioned above. COPRA has been designed with the specific purpose of protecting consumers' rights and providing a simple quasi-judicial dispute resolution system for resolution of complaints. Under COPRA, three-tier quasi-judicial machinery at the National, State and District levels has been established. However, despite the existence of such a holistic law, the situation in India (with

Table 1.10: A Look Across the State of Administration on Consumer Protection Issues in 7Up2 Project Countries						
	Bangladesh	**India**	**Cambodia**	**Lao PDR**	**Nepal**	**Vietnam**
Law enforcement capacity	Poor	Medium	Weak	Low	Total failure	Consumer protection rules and regulations need to be updated and equipped with more teeth
Financial and human resources	Limited	Medium	Limited	Limited	Limited	Limited
Political will & Government's responsiveness	Low. A bill on consumer protection has been under consideration since 1998 with the Ministry of Commerce. Its fate is not yet known even until today.	Reasonably good. Media and consumer movement, which is relatively strong, play important role in the process.	Some progress has been made. However, the Government is currently working to meet the priorities set by their WTO commitments.	Several government officials acknowledged the necessity of having a legal framework for consumer protection. However, they also pointed out that this would not be a priority of the government due to other more pressing needs.	Low government's responsiveness coupled with unstable political stability	Governments have made progressive moves towards completing the legal framework for consumer protection. However, administrative bureaucracy and corruption continue to be major hindrances.
Misleading advertisements		Prohibited by law and the enforcement is also quite good	Prohibited by law	Reported to exist	Prohibited by law	- Untruthful and comparative advertisements are very prevalent; - Dishonest, promotional programmes and fraudulent door-to-door marketing schemes
Unsafe and sub-standard, unlabelled products	Prevalent	Prevalent	Prevalent	Prevalent	• The availability of contaminated food is very common; • Rampant adulterated drugs;	Prevalent

Unfair trade practices	• Arrangements between diagnostic centres and doctors in sharing the price paid for diagnosis by patients; • Doctors forcing patients from public hospitals to private clinics and labs to make money; • Pharma companies bribing the doctors to ensure that they prescribe their medicines.	Arrangements between diagnostic centres and doctors in sharing the price paid for diagnosis by patients. Pharma companies bribing the doctors to ensure that they prescribe their medicines.		• Price hikes in the telecom sector; • Price fixing of drinking water distributors / suppliers; • Tied selling practices are reported to exist in the markets for agricultural products and fuels, schools (uniform, books and stationary) and hospitals;	• Rampant black marketing despite the presence of State agencies in charge; • Tied selling is rife in the education and health sectors, in addition to some other markets such as cements; • Creation of artificial scarcity, especially in the market for agricultural products • Low due to various unfair trade practices, such as creation of artificial shortage of foods and black marketing.	• Exclusive dealing to restrict consumers' choice of products (e.g. in the markets for beers, Internet services in apartment buildings); • Tied selling in schools and hospitals, as well as in some other products such as helmets.
Consumers' access to basic needs	• Reported poor service in transportation and health sectors; • Price hikes of essential commodities were reported by consumers to have been caused artificially by a group of traders through collusion.	About 30% of the population live under the poverty line.	• 40-45% of the population live under the poverty line; • In 2000, only 17% of the population had access to improved sanitation and 30% had access to clean water • About 50 0,000 people were short of food in 2004.	• The road network has a very low density. 40% of villages are more than 6 km away from a main road, half of which are inaccessible during rainy seasons; • Only 50% of the population have access to safe water in villages. • 50% of the population do not have toilets .		

respect to consumers' redressal), is constrained with problems (like delays in judgement, non-compliance with orders etc.).

COPRA also envisages the establishment of Consumer Protection Councils at the Centre and in the states whose main objective is to promote and protect the rights of consumers. These Councils are advisory bodies and meet once a year with a generalised agenda.

Be that as it may, other project countries, though yet to have an explicit statute on consumer protection, have also made some moves towards ensuring and protecting the basic rights of consumers. At the present, most countries have rules and regulations in their statute books to protect consumers, ranging from product quality and safety issues, to availability of essential goods and services in the markets, to fair prices of products. Cambodia, for instance, have made significant progress in this direction. The Law on Management of Quality and Safety of Products and Services 2000 of Cambodia, in addition to setting standards and providing for standards registration and notification, prohibits deceitful, misleading or false commercial advertisement or any advertisement that is likely to cause confusion on the quality and safety of products and services, harming consumers. Any act to falsify or attempts to falsify products or services is also severely prohibited. Penalties for violations, including fines and imprisonment, are also clearly defined.

Notwithstanding the presence of various rules and legislations on consumer protection, the state of consumer welfare in 7Up2 project countries is not so bright if one has to look critically at the administrative practices, as well as the prevalence of consumer concerns in these countries.

Low law enforcement capacity and limited resources (financial and human) can be easily observed across the board. In most of the cases, weak political will and government's responsiveness add up to the problems. It happens more than once that the laws are implemented on paper but no enforcement has ever been undertaken by practice, such as the case of the Consumer Protection Act and other related laws in Nepal. Enforcement has been a total failure and the State agencies in charge admittedly could not take any action against black marketers or suppliers of adulterated products or contaminated foods. In the case of Vietnam, despite public opinions against the unfair trade practices undertaken by several businesses and profiteers, the courts could not rule in favour of victims due to flawed laws and government rules. Very often, the laws fail to act as significant deterrents to wilful violators, since the provision of penalty or punishment under these laws is either so vague or negligible that everybody ignores the same. Moreover, despite realising that existing laws and rules are quite flawed and outdated, the legislatures' and governments' responsiveness to initiating changes remains disappointingly low, therefore aggravating further the anguish of the consumers.

Most Prevalent Consumer Concerns

The need for advertising is very often justified on the ground that the consumer needs accurate information on goods and services. In order to make informed decisions, consumers need to know not only their own preferences, but also the prices, performance, and availability of all goods and services they might want to consume. In reality, however, advertising is producer driven, and it is simply too costly for consumers to seek to acquire all of the information they would require to make fully rational decisions. The existence of this 'bounded rationality' provides advertisers with the scope to engage in 'persuasive' advertising to influence consumer preferences, or even to deceive consumers[13]. Provision of untruthful information and misleading advertisement, therefore, is an unfair trade practice that is heavily taxing the consumers everywhere. The lower the level of expendable income in an economy is, the bigger the grief that consumers have to bear as a consequence of misleading advertisement.

Misleading advertisements are one of the consumer abuses that are most common in 7Up2 project economies. Consumer representatives, when answering the project perception survey, all reported cases of misleading advertisements, sometimes with grave damages done. The laws of Cambodia, Vietnam and Nepal explicitly prohibited this practice, however, to no avail. Several aspects of misleading advertisements that are detrimental to consumer welfare are recorded through surfing media reports and consumer feedbacks, such as:

(a) Untrue information abusing the credulity of the consumers or exploiting their lack of knowledge or their inexperience;
(b) Inaccuracy, ambiguity, exaggeration or omission misleading the consumer;
(c) Claims that are incapable of objective substantiation;
(d) Fictitious endorsements presented as though they were genuine testimonials;
(e) Inexplicit price information or overestimation of the value of goods or service;
(f) Unfair comparison with other businesses or their products; and
(g) Non-availability of the advertised products at the price stated or baits advertising for the purpose of switch selling.

Several such advertisements are undertaken under the forms of door-to-door marketing schemes, phoney promotional programmes, or spot advertising, which

usually escape the scrutiny of the local authorities (which are often understaffed and ill-equipped with legal knowledge). Some led to severe consequences, for instance, the various multi-level marketing schemes in Vietnam, which cost the consumers billions of Vietnam *dong* (VND), or the casualties reported in gas explosion cases caused by fraudulent door-to-door marketing schemes.

Another area of consumer concerns common in 7Up2 countries is that of product safety (including both food and consumer goods, as well as services). Substandard, hazardous, expired and counterfeit goods are greatly rampant in the markets and consumers are always cheated due to their gullibility. This issue, though not a new one even for developing economies, seems to an irremediable problem for them.

All 7Up2 countries have got one or more laws or regulations in their statute books on issues such as food safety, weights and measurements, standardisation, or product testing. However, including the cases of India, Vietnam and Nepal, where a framework legislation on consumer protection has been adopted, the link between these issues and the protection and promotion of consumer welfare has not been strong. Clear regulations or provisions on product liability are still lacking, except for one or two negligible articles here and there. The scope for compensation is also very limited. This loophole, therefore, leaves the door open for sub-standard, hazardous and counterfeit products to overwhelm the markets, since producers, suppliers, distributors, and retailers, etc can get away easily with their violations. The situation is probably slightly better in India than in Nepal and Vietnam.

The prevalence of sub-standard, unsafe products in these countries, however, does not merely affect the consumer welfare; it also results in severe consequences on the overall competitive environment. Whereas in Nepal and Bangladesh, traders grieved over the rampant adulterated and contaminated foods and drugs, offered at predatory prices and so easily available that they are snatched at the lower end of markets from producers of safe products. Producers and suppliers in Vietnam and Cambodia were reportedly driven out of the market by counterfeit, fake products. Sometimes, stiff competition forces producers to produce sub-standard products, such as the case of small-scale steel producers in Lao PDR, or to sell expired goods to increase revenue. Competition, in these cases, is negatively affected, without effective remedies.

Last but not least, the emergence of several types of 'unfair trade practices' is also a looming threat on the state of consumer welfare in 7Up2 project economies. However, except for misleading advertisements, most of other 'unfair trade practices' are not covered by the existing laws and regulations of those countries. The Consumer Protection Act 1998 of Nepal does mention explicitly the term 'unfair trade practices', however, defines them quite narrowly as "the sale or supply of consumer goods or services by making false or misleading claims about their actual quality, quantity, price, measurement, design, make, etc., or the sale or supply of consumer goods produced by others by affecting their quality, quantity, price, measurement, design, make, etc". Other practices such as tied selling, exclusivity restricting consumers' choice, multi-level marketing, collusive price hikes (price fixing), abuse of dominant to prescribe unreasonably high price, etc are completely new to the legal framework of all countries. These practices, recently, have been addressed in the Competition Law 2004 and the Ordinance on Prices 2003 of Vietnam. However, effective enforcement and effective consumer protection against such unfair trade acts remain yet to be seen, since the laws are still very young. In the meantime, the unfair trade acts continue to be rampant on the markets of those countries without being checked.

Another commonality regarding the state of consumer welfare between 7Up2 project countries is the limited access of consumers to basic needs. Safe water, sanitation, and education remain among the daily pressing issues of the common man in all project countries, especially in the rural areas. They, worryingly, go beyond the realm of legislations on essential commodities and services, for instance in Nepal and Bangladesh. The main causes of this situation are of course the bad incidence of poverty, low level of development, and poor governance practices on the administration's behalf.

Towards Building Effective Regimes on Consumer Protection

The transitioning from a command and control economic mechanism into a market-based system certainly results in the destabilisation and replacement of the old legal and administrative system in 7Up2 project countries. On the other hand, the low policy-making capacity, and the low law enforcement capacity as well as poor governance, act as significant hindrances against the development of a better, updated system to take care of the various newly emerging issues of the market-based economy. The strong legacy of the old economic mechanism and mindset, which has been in place for a long time, versus the short history of reforms, also increases the resistance to changes in the society and the State. One most critical issue facing the 7Up2 countries regarding consumer protection issues, therefore, is to increase the level of political will and government support. Consumers have a right to a responsive government that is proactively looking out for their interests. Responsiveness of the governments should be demonstrated in many facets, such as:

- Upgrading and updating the legal framework for consumer protection and reserving sufficient resources for the administration to be able to enforce the laws effectively;
- Establishing clear, enforceable expectations and rules of behaviour for firms or business persons providing consumer goods and services;
- Effectively monitoring sector-specific performance through objective, periodic measurement, including consumer surveys;
- Educating consumers about their rights, responsibilities, and opportunities;
- Actively monitoring business behaviour and responding to abuses quickly and effectively;
- Responding to consumer complaints quickly and fairly; and
- Paying more attention to ensure universal availability of essential commodities and services to the poorest consumers.

A strong and organised consumer movement in project countries could also help to a great extent in improving the welfare of the individual consumer in this direction. They provide an effective forum for consumers to state their concerns, constituting a collective voice in lobbying with the State for consumer-friendly reforms, with a bottom-up approach. Consumer organisations also help to address the disputes between consumers and enterprises through mediation or publicising the abuses. Good practices have been observed in the case of the Consumer Association of Bangladesh (CAB) and the Vietnam Standards and Consumers Association (VINASTAS) and should be replicated, especially in countries where none such organisation exists, such as in Cambodia and Lao PDR.

Consumers' basic right is to be protected against market abuse, which includes not only product safety and liability and other relevant issues, but anti-competitive behaviours as well. What constitutes 'unfair trade practices' should be clearly defined by the government, who should institute an enforcement mechanism to swiftly and aggressively respond to such practices. The complementarity between consumer protection and competition policy in this regard can be developed, for instance, towards having a single institution to administer both types of issues, so as to promote consumer welfare and protect competition in the market at the same time. An example is the case of Vietnam, as the new Competition Law 2004 of the country intends to address both unfair trade practices affecting consumers and other competition-restricting acts.

In the first place, performing the consumer protection function can provide useful insights as to how the competition authority should execute competition policy. As in many cases which happened in 7Up2 project countries, anti-competitive business strategies undertaken involved a great deal of advertising and marketing. In the new market economy, where consumption patterns are no longer decided by the State, advertising and marketing become principal resorts of enterprises, which may go to the extent of abusing these tools. A sound understanding of how consumers have been cheated or misled by unfair advertising or marketing will provide the competition authority with useful insights into the way the market operates, on which basis the competition authority can design better competition policies, pass better rulings. The vigilant consumers will be an enormous source of information, a great friend of competition. Besides, understanding consumers' grievances will also help the competition officials form better/new remedies, which are more focused on general welfare.

In small economies, as in most of 7Up2 project countries, many competition abuses might happen on a small scale, which negatively affect consumers rather than distorting competition. Uniting two functions into one single institution not only helps to save resources at the central level, but it also gives a better reach and approach to the provincial-level authorities.

On the other hand, understanding competition, understanding the way markets work also has important implications for the design of consumer protection policies. Without a continuing reminder of the benefits of competition, a consumer protection programme might tend to impose controls that might ultimately diminish the very competition that increases consumer choice in the longer term. Very often, consumer activists would tend to overlook the broader benefits of economic efficiency, of competition to advocate for a more-than-required consumer protection agenda. Reconciling the two policies into one institution would help eliminate this clash of power and interests.

Anti-competitive Practices

The deeply rooted legacy of the old command and control economic mechanism in 7Up2 project countries, notwithstanding recent reform efforts, has consequently led to the existence of an inefficient administrative system, which, among other externalities, hampers entrepreneurship and competition in the market. These administrative obstacles, created by various government policies or actions, have real costs to the economy, which means that even potentially competitive firms often cannot compete because any efficiency advantages they may have are consumed by the costs of administrative hassles. However, a more troubling fact is that even if policy barriers to competition are removed, competition in the market in these countries can still be distorted or limited by several anti-competitive practices of firms, such as colluding to fix prices and

discourage new entries, or abusing market power or monopolies to prevent entries by competitors in order to keep prices and profit high, etc.

Many believe that markets in general are less competitive in developing countries. With the exception of Brazil, China, India, and Indonesia, domestic markets in developing countries tend to be small, with low human capital, poor infrastructure, volatile economies, and few manufactured inputs produced domestically[14]. Evidence from the 7Up1 and 7Up2 projects also suggests that developing country markets are prone to anti-competitive practices and unfair trade practices; and that these practices are not only taxing the consumers heavily, but also negatively affecting the business environment thereby. Since the 7Up2 project countries, with the exception of India, did not have a competition law, the anti-competitive practices discussed here are suspect in nature and cannot be considered as clear cases of such practices as there were definitive investigation or adjudication into the cases, and they are based primarily on media reports.

Most Prevalent Anti-competitive Practices

Abuses of market dominance should rank among the most common anti-competitive practices in 7Up2 project countries. The traditional State direct ownership of many firms and industries, notwithstanding the mass privatisation wave recently, has resulted in the existence of a huge State sector, comprising of many dominant enterprises in several key sectors, in these economies. While problems may not lie with the size of these dominant enterprises (which might be either State-owned, private-owned, or foreign-owned), or the overall structure of any particular industry, incumbent firms have always been known as having the tendency to use their considerable power to ensure that competition never succeeds, to retain their market position or increase rents. This, unfortunately, is exactly the case in 7Up2 economies.

Among the various dominant state-owned enterprises mentioned in table 1.11, several of them are reported to have engaged in anticompetitive practices. For instance, Lao Brewery is reported to have been abusing its monopsonistic power to buy maize from the small farmers in Lao PDR at below cost prices, as there is no other local brewery; whereas in Vietnam, VNPT has been reported to abuse its dominance in network services to drive its smaller competitors nearly to bankruptcy by refusing them technically possible interconnection. In Cambodia, monopolisation practices happened in the education and telecom sectors, while in Nepal and Bangladesh, problems were also observed in the telecom sector, where the governments are major players or monopolists. It is, however, not only the dominant SOEs in these countries that abused their dominance. Similar cases were mentioned as having been carried out by foreign and domestic private companies as well, for example in the beer market in Vietnam, or in the market for daily newspapers in Nepal. The dominant enterprises reportedly used their enormous distribution network, created by a myriad of exclusive contracts (in the first case), or their enormous capital reserve to allegedly set predatory price (in the second case) to drive out competitors.

Abuse of dominance, nonetheless, is not the only way firms can engage in anti-competitive practices. Vertical restraints between manufacturers or suppliers and downstream distributors in the form of exclusive dealing and geographic market restrictions can also raise significant entry barriers. In addition, firms that would be price-takers individually – and unable alone to control any significant part of the market - can work together to control the market, thus increasing prices and discouraging entry. Collusive behaviour is not uncommon, and several cases of price-fixing, as indicated in table 1.12, have been uncovered and reported in all 7Up2 project economies. The cartels very often worked under the sham covers of business or trade association. The individual enterprises, in these cases, did not seem to have any choice other than doing likewise with the whole 'family', otherwise they would face serious trouble including danger to their lives. More troubling is the fact that these business or trade associations had always got away with their 'actions', due to the weak rule of the law, or due to the total absence of relevant laws and regulations, especially competition law. Illustrative examples can be quoted of the price-setting conspiracy in the market for taxi services in Vietnam, or the syndicate system in Nepal.

Other anti-competitive practices, which are also prevalent and troubling in the 7Up2 countries, are collusive tendering and tied sales. Almost all cases of collusive tendering happened in the market for government contracts for infrastructure construction. The main reasons behind this high incidence of bid-rigging, besides firms' own incentives to seek extra rents, are believed to be the generally low economic management capacity of the governments and poor governance practices in project countries, in particular, the prevalence of corruption, bribery, and nepotism. The irony is that while the natural trend is to go for open, competitive bidding, 7Up2 countries' governments very often had to return to limited tendering, private negotiations and direct appointments as a way out.

Tied sales happened to a great extent in the education and health sectors, where the upholding of professional ethics should help to protect the helpless consumers from being cheated. It is indeed the other way round. The mandatory purchase of uniform and

Table 1.11: The Degree of State Dominance in Some Key Sectors in 7Up2 Economies						
	Bangladesh	**Cambodia**	**India**	**Lao PDR**	**Nepal**	**Vietnam**
Electricity	A major share (73%) of electricity is generated and supplied by the Bangladesh Power Development Board (BPDB), which is also a major shareholder of the Power Grid Corporation – responsible for high-voltage transmission and distribution in the whole country	The State-owned EDC (Electricite du Cambodge) holds a virtual monopoly over most of the electricity generation, transmission and distribution activities in the country	Largely in the public sector. Very few private players in all segments	The State-owned EDL (Electricite du Lao) holds a 46% share of the market for electricity generation and a monopoly in the transmission and distribution market.	Nepal Electricity authority owns 79% of the installed generation capacity and has monopoly in the transmission and distribution of electricity	The electricity in Vietnam is solely managed by Electricity Corporation of Vietnam (EVN), a state-owned monopoly, whose share in total installed generation capacity is 85% currently
Telecom services	Bangladesh Telegraph and Telephone Board (BTTB), an SOE, has a monopoly (with 95% of market share) in fixed line telecom services, in addition to monopolies in providing international telephone services, facsimile and other data transaction services	The government is a major stakeholder of many enterprises. The Ministry of Post and Telecom-munication of Cambodia (MPTC) – the sector regulator – is itself a service provider in the market for fixed line telephone services	State-owned enterprises dominate. However, quite a few private players, some of them are quite strong, especially in the mobile telephony segment	Lao Telecom, a joint venture between the State of Lao (51% of capital) and a Thai investor, is a dominant player in both the markets for fixed line telephone services (86.5%) and cellular services (66.6%) as well as in the market for Internet access (75%)	The State-owned Nepal Telecom is the only mobile telephone services in the country	The State-owned Vietnam Post and Telecommunication Corporation (VNPT) is a dominant player in both the markets for fixed line services and mobile services
Commercial banking	At the end of 2002, 04 nationalised banks with 3496 branches held 45.6% of assets and 50.3% of deposits		State sector dominates. Quite a few strong private players	Four state-owned banks account for 70.7% of the total deposits	Two public banks, Nepal Bank and *Rastriya Banijya Bank* dominate the market with a combined market share of 32.95% in deposits and 31.92 percent in loans	The State sector's total share levels at 70-805 of all lending activities till 2004

Transp-ortation	The State-owned Bangladesh Biman dominates in domestic air transport	Railway transportation is under State monopoly	Railway is under government monopoly. Road transport is quite free except in passenger transport segments in some states. Air transport is quite competitive	The State-owned Lao Aviation is a monopolist in the domestic aviation sector, and a dominant player (53% of market share) in the international sector		- Railway is under State monopoly - The State-owned Vietnam Airlines is a dominant player in the market for domestic passenger air transport
Other manufa-cturing industries or services where SOEs hold dominant positions			• Oil and gas • Steel	• Cement • Beer • Tobacco • Steel • Insurance • Fuel imports and supply • Clean water	• Sugar • Import of petroleum products	• Plastics • Garment and textile export • Cement • Insurance • Fertilisers • Sugar • Steel

textbook from the schools has come to be accepted as a way of life in several places. Doctors were reported to force patients to do diagnostic tests, even if such tests were not necessary, to raise revenues or accepted bribes from pharmaceutical companies and prescribed only some specific types of medicines. Denounced by the media and the consumers, such practices, however, continue to exist, due to the absence of an effective legal framework regulating these practices in the 7Up2 countries.

By way of suggestion, in the absence of a comprehensive legislation on competition, all these anti-competitive practices generally escaped the scrutiny of the law, or were addressed in an ad hoc manner, through administrative decisions, under sectoral regulations or other piecemeal rules and regulations. Of all the anti-competitive practices reported above, only a few of them have been properly dealt with, judged in a court of law for instance, to set precedent for any future violators. In some cases, some warnings were all the measures that have been undertaken to stop the violators. An example in Vietnam, where the victim of an exclusive dealing and abuse of dominance case actually lost, alarmingly points to the urgent need for the 7Up2 economies to adopt and enforce competition law.

Perspectives on Competition Policy

The effectiveness of any law in a country depends on the extent to which the law has actually evolved in the country in tandem with socio-economic and historical developments in the country. It is necessary that there be some amount of acceptability and ownership of the law among the stakeholders.[15] This is possible only if their expectations are taken into consideration while drafting the law. This was one of the most important findings of the 7Up project that came out with the suggestion of a bottom-up approach to the formulation and enforcement of a competition regime.

The three broad groups of stakeholders whose behaviour and interests are important for the competition culture in a country are:
- the consumers;
- the business;
- the government; and political class

It may be noted here that we are talking about not only their attitude towards and the role in regulatory measures, but also their attitude towards the process of competition in general. The effectiveness of a regulatory regime in a jurisdiction, thus, depends on the extent to which it succeeds in bringing a balance among the objectives that these three groups pursue. This is not an easy task, as many of them may be in conflict with one another.

Consumers as a group are possibly the largest beneficiary of an appropriate competition policy and law regime and hence have a very high stake. Consumption is the sole end and purpose of all production and the interest of the producer ought to be attended to, only in so far as it may be necessary for

Table 1.12: The Most Common Anti-Competitive Practices in 7Up2 Markets

(+++) Significant; (++) Moderate; (+) Existing but insignificant; (—) No specific example quoted

	Bangladesh	Cambodia	India	Lao PDR	Nepal	Vietnam
Collective price-fixing	++ Practiced by business and trade associations; Observed in the road transport sector and private bank lending market	++ Observed in the market for inland water passenger transport	++ Allegations in cement and steel Believed to be present in several services: transportation, banking	++ Practiced by many business and trade associations; Observed in the markets for drinking water, private colleges and trishaw passenger transport	+++ Practiced by many business and trade associations; Several industries are affected by this practice, such as construction brick, passenger air transport, telecom, foreign exchange, and road transport.	++ Practiced by business association; Observed in the markets for taxi, commercial bank lending, and pharmaceutical products
Market sharing	—	—		++ Observed in the market for trishaw passenger transport	—	—
Bid-rigging	--	+++ Reportedly common in government contracts	+++ Believed to be present in government tenders	+++ Reported to exist in privatisation deals and in the logging industry	+++ Most prevalent in contracts for infrastructure construction	+++ Most prevalent in government contracts for infrastructure construction
Tied selling	+++ Observed in the health sector, e.g. contractual arrangements between diagnostic centres and doctors in sharing the price paid for diagnosis by patients; or pharma companies bribing the doctors to ensure that they prescribe their medicines	—	+++ Observed in education (school uniform) and health (prescription of medicine, diagnostic testing) sectors	+++ Observed in education (school uniform) and health (prescription of medicine) sectors. Other markets affected include those for agricultural products and fuel	+++ Most common in the education (textbooks and uniform) and health (pathological test) sectors	+++ Observed in the markets for school uniform and textbook, health diagnostic tests, helmet and pre-paid Internet card

Resale Price Maintenance	—		++ Believed to be present in some sectors. It was reported to be practised by a major automobile company	--	+ Undertaken by noodle manufacturers	+ + Use of floor and ceiling prices is observed in several industries
Creation of Artificial Scarcity and Output restriction	—		+ Occurs but occasionally	--	+++ Most common in the market for agricultural products	++ Reported in the floating glass and sugar industries
Price Discrim-ination	—	—	—	--	++ Undertaken in the commercial bank lending market	++ The existence of the dual price system can be quoted as an example
Predatory pricing	—	—	—	--	+ Cases reported in the markets for noodles and daily newspaper	+ Reported case in the soft drink market
Unreas-onably high price	++ Consumers complaints reported regarding essential commodities such as rice, edible oils, vegetables and cereals	—	Reportedly in Bt cotton seeds	—	++ Observed in the telecom sector, especially mobile service charge	--
Refusal to deal	—	++ Observed in the telecom markets (between mobile service providers)			—	+++ Observed in the telecom market (between mobile service providers)
Abuse of dominance		—		+++ Observed in the market for agricultural produces where SOEs abuse their monopsonistic power. Other cases include the markets for air passenger transport, motorcycles, and plastic water pipes		+++ Observed in the markets for beers, Internet service in apartment buildings and life insurance

Box 1.2: Promotional Strategy Foreclosed New Entrant

Laser, the first Vietnamese brand of bottled draught beer, was foreclosed by 'big brothers' in the international beer industry from its own national market.

Tran Qui Thanh, President of the Executive Board of the Tan Hiep Phat Corp, appealed to relevant State agencies and government officials in a meeting held on April 7, 2004 that Laser beer, their new product, could not access retail shops, distribution agencies and bars, etc, due to pressure from foreign beer brand-holders who were dominating the Vietnam beer market. Thanh quoted beer brands like Tiger, Heineken and Bivina (produced by the Vietnam Beer Joint-Venture) as direct rivals of Laser. Owners of retail shops, distribution agencies and bars said that they "dare not" sell or distribute Laser beer, or even have Laser advertisement boards hung at their places. The aforementioned beer producing joint-ventures reportedly forced distribution agencies, retail shops and bars to sign a contract with them, which included an exclusive term preventing these sellers and distributors from selling, exhibiting, introducing, marketing… or even allowing marketing staff of any other beer brands to work on their business sites.

"This is an anticompetitive practice which is aimed at preventing any newcomers from getting access to the distribution channels and hence customers, which will definitely result in those newcomers not being able to develop their brands and quitting the market even before real competition starts", said Tran Qui Thanh, President of the Executive Board of the Tan Hiep Phat Corp.

As compensation, these shops and distributors would receive a 'sponsor' amount between VND50mn (US$3174) and some VND100mn (US$6349) per annum. This strategy had enabled these beer brands to effectively prevent any promotional campaigns of Laser anywhere in Vietnam, from metropolitan cities to provincial areas. Right after its introduction onto the market with a promotional programme named 'The week of Laser beer', which entitled customers at restaurants and bars in Ho Chi Minh City to drink Laser beer free of charge; Laser was so heavily pressured by big players on the beer market that no restaurants or bars dared to sell it any longer.
To make matters worse, as a warning signal, just recently, a beer shop was brought to court by one of those big beer producers due to so-called 'impeachment of economic contract'.

The decision of the Ho Chi Minh City People's Court was that the beer shop 'Cay Dua' was not permitted to advertise, sell or allow Laser marketing staff at their site until November 2004; in accordance with the contract signed between the shop and the Vietnam Beer Joint-Venture since November 2003.

Lawyers representing 'Cay Dua' and Tan Hiep Phat Corp argued that the contract was not an economic contract, but simply a sponsor or site leasing contract; and that the contract did not entitle fair rights and obligations to both signatory parties, but was in favour of Vietnam Beer JV. The court, rejecting these arguments, said that the signatory conditions as well as substantive provisions of the contract were in compliance with relevant laws and regulations; hence the contract was legitimate, effective and must be respected.

Though analysts opined that the terms of the contract allowed Vietnam Beer JV to compete unfairly and maintain its dominant position, the contract was able to escape the scrutiny of the law, as Vietnam was yet to have a Competition Law at the time, while the existing Commercial Law and the State Ordnance on Economic Contracts did not cover these areas clearly.

Source: *VietnamNet 04.07.2004 & 18.05.04*

promoting the interest of the consumer (Adam Smith, Wealth of Nations, 1776). The protection of the interest of the consumer is, thus, as important as, if not more, than, the protection of the interest of the producer.

The business community is at the other end of the spectrum and its perception on competition policy may not always coincide with that of the consumers. While admitting that market power can sometimes be abused, businesses often maintain that the effects of market dominance and size are not necessarily undesirable and any adjustments necessary should be left to the markets to correct.

Given that there can often be conflicts between business and consumer interests, the government policy and institutions need to play the role of arbiter. Broadly speaking, competition law and policy (CLP) has to deal with many tradeoffs in its objectives and instruments. The survey conducted under the project made an attempt to gauge the level of awareness among the different stakeholder groups and to understand their mood on some widely debated issues related to competition legislation. As India is at a different stage of development in terms of competition policy, the survey was not conducted there[16]. Due to resource constraints and other reasons, the survey was not based on a representative sample but a small sample comprising relatively more aware people among different stakeholder groups. Hence, the findings of the survey should not be considered as evidence, but mere indicative of the perceptions of the stakeholders which are discussed here.

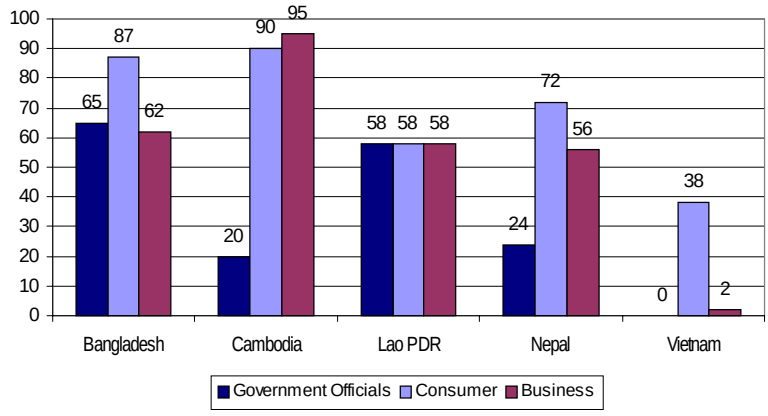
Level of Awareness

The level of awareness on competition issues is generally very low in most developing countries.

However, the survey results are quite encouraging. Vietnam has introduced its competition law very recently. Yet, all the government officials interviewed were aware of the existence of the law. The level was quite high among the business people as well. The awareness is not of course so high in the civil society. This should however be noted in this context that the survey was not conducted on a random sampling basis and relatively more aware respondents were chosen.

When one goes to Lao PDR, the picture is quite different. Although it already has competition legislation, more than half of the respondents cutting across groups expressed their ignorance about it. Bangladesh and Cambodia do not have a competition law and hence not much can be said about the level of awareness in these countries. Nepal does not have a competition law but its consumer law has several competition provisions. However, the law is hardly implemented. Obviously, the level of awareness in the country was found to be quite low.

Figure 1.5: The Level of Awareness on the Existence of Laws and Regulations on Competition



Prevalence of Anticompetitive Practices

Except in Bangladesh, a huge majority of respondents in all countries thought that the prevalence of anti-competitive practices is quite significant. In all countries, the people thinking it to be significant constituted the largest group followed by the people who thought it was moderate. Obviously, the respondents who thought they were insignificant were in the smallest group in all the countries. It was only in Nepal where people thought prevalence of anti-competitive practices was significant or moderate and nobody thought it was insignificant. Interestingly, in Bangladesh, the majority of consumer respondents thought that the prevalence of anti-competitive practices is quite significant. The majority of policymakers thought it to be moderate, while majority of business respondents considered to it be insignificant. Such information however is not available for other countries.

Need for Competition Law

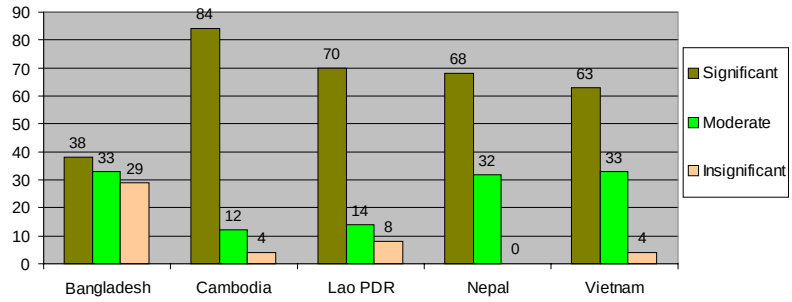
It is generally believed that business people, particularly in developing countries, are against the adoption and implementation of a competition law. Surprisingly, the survey results give a totally different picture. In Bangladesh, Lao PDR, and Nepal all the business people interviewed agreed that there is need for a comprehensive competition law. In Cambodia and Vietnam also, an overwhelming 95 and 90 percent of business people agreed for the same. It is however difficult to say anything conclusive on the views of the business people on this. While most of them agree that ideally there should be a competition law, many of them also feel that given the attitude of the government officials who invariably control enforcement mechanism as experiences have shown, such a law may not be desirable. All the policy makers in all the 7Up countries opined that there is a need for a comprehensive competition law. Among the consumer respondents, only in Bangladesh and Cambodia, all of them felt the need for such a law. In Nepal, Lao PDR and Vietnam, 92, 90, and 60 percent of the consumer respondents respectively, were in favour of a comprehensive competition law. Such lower percentage of consumers asking for a competition law may be due the fact that they are less aware of the issues rather than their reluctance towards having a competition law.

However, such a huge acceptance of a competition law among the business community is quite interesting. Maybe they find it difficult to oppose the need for such a law in principle. However, they might argue for a law that would be simple and would not have much biting power raising the fear of its abuse. It may also be due to the fact that they understand that even the business people might suffer damages as buyers due to anticompetitive practices in raw materials, capital goods, etc. There can also be the possibility that the local business people often become the victims of anti-competitive practices of the mighty trans-national corporations (TNCs).

Objective of Competition Law

Historically and across nations, the objectives of competition policy have varied. The most common objectives are to maintain and encourage competition in order to promote efficient use of resources and consumer welfare. However, other 'public interest' objectives are also included within the ambit of competition policy. These may include equity / fairness, protection of small businesses, equality of opportunity, freedom of economic action, decentralisation of economic decision making / power and so on.

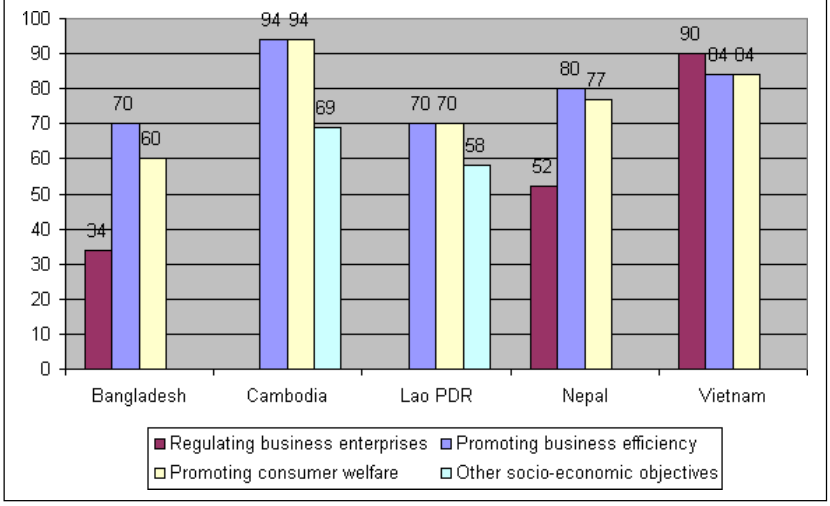
Figure 1.6: Perceptions on the Prevalence of Anti-competitive Practices



Often, this is done by including employment, regional development and growth of small and medium sized enterprises etc. among the objectives of competition law. For example, one of the objectives of the new South African Competition Act that was passed in 1998 and came into force in 1999, was to further the increase in the spread of ownership, especially amongst historically disadvantaged persons. In general, efficiency, consumer welfare and at times fairness are seen as the key objectives and competition law as an instrument to achieve these objectives. The survey made an attempt to gauge the mood of the stakeholders on the desired objectives of competition law in these countries.

In Cambodia, Vietnam and Lao PDR, the stakeholders put equal weight on promoting business efficiency and consumer welfare as the objectives of competition law, at 94 percent, 84 percent and 70 percent respectively. However, in Vietnam, 90 percent of them also talked about regulating business enterprises, while in Cambodia and Lao PDR, a significant proportion of them, at 69 percent and 58 percent respectively, also mentioned about other socio-economic objectives. In no other country they talked about other socio-economic objectives. In Bangladesh and Nepal, they put business efficiency above consumer welfare despite the fact that there were more consumer respondents than business respondents in both the countries. Such low rating for consumer welfare was probably covered by them, when 52 percent of them in Nepal and 34 percent of them in Bangladesh also wanted the law to regulate business enterprises.

Figure 1.7 The Opinions on the Desired Objectives of Competition Law



Status of Competition Authority

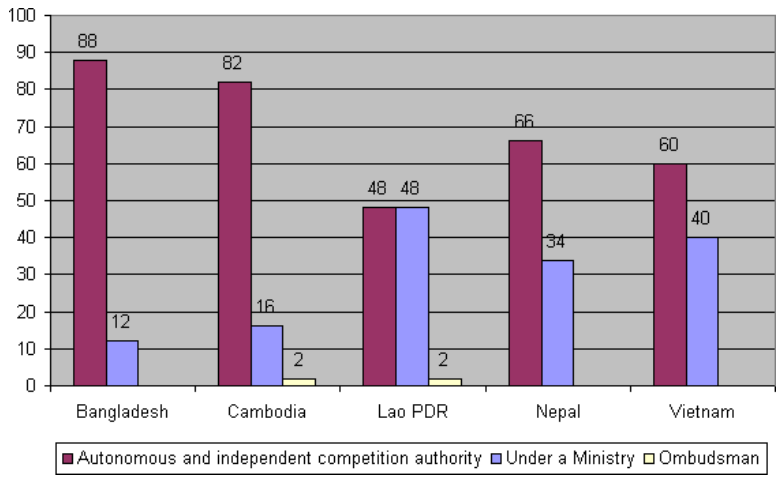
The status of the authority in charge of enforcing a competition law is also an issue that gets mention quite often. The World Bank-OECD model law suggests that the enforcement agency should be independent from any government department and should receive its budget directly from (and report to) the legislature. The UNCTAD model law however does not make any specific suggestion in this regard. Some of course think that absolute independence may cause accountability problems. Some even think that in developing countries people do not take agencies that are independent of government too seriously.

In the 7Up2 countries, however, the stakeholders expressed their opinion in favour of an independent authority in all countries except in Lao PDR, where they were divided in two equal groups of 48 percent, and while one group supported an independent authority, the other supported the idea of a department under a government ministry. In Vietnam also support for a government department is reasonably high at 40 percent with the rest supporting an independent authority. It may be noted in this context that in both Lao PDR and Vietnam, competition legislation is in place and the enforcement of the same has been left with government departments.

Conclusion

All countries have been pursuing market-oriented economic policy regimes since almost a couple of decades. Yet, markets or the private sector for that matter are far from being developed in these countries. Problems exist not only in areas with natural monopolies with classic cases of market failures, but also in other areas where competition can generally be ensured. This is not a surprise. Historically, and across countries, markets have not developed on their own. They had to be nurtured and developed. Thomas Jefferson, the third president of the United States once said, "The price of freedom is

Figure 1.8: Perceptions on the Structure of Competition Authority



eternal vigilance." Similarly, the price of free market is eternal regulatory vigilance. The role of an impartial and effective regulatory framework overseeing free markets is thus extremely important.

Recent body of research has shown that differences in physical capital and educational attainment can only partially explain the differences in productivity that exist between developed and developing world. The differences in capital accumulation and productivity are to a great extent driven by differences in institutions and government policies that are called social infrastructure. Undoubtedly, regulatory bodies including the competition agency are important components of social infrastructure. An appropriate regulatory framework is thus important not just for the sake of markets but as a development requirement.

However, the state of the regulatory framework that exists today in most of these countries is not very encouraging. Out of the six countries, only three, India, Vietnam and Lao PDR have competition legislations. In India, despite its rather long history, the current state of affairs regarding the competition regime is quite discouraging. In Vietnam, it has become effective very recently and the competition authority seems to be gearing up to face the challenges ahead. In Lao PDR, however, no such movement is taking place. In Nepal, though a draft is ready, nobody knows when the law will see the light of the day. In Bangladesh, though the government has often admitted that there is a need to have a competition law, there has been no concrete progress in this regard. In Cambodia too, no serious progress could be achieved despite the fact that it was to enact a competition law by the end of 2005 in view of its commitment while entering the WTO, and the deadline has already been missed. Thus, there is a real fear that it will adopt a competition law hurriedly without much debate and discussion and the law adopted may not be appropriate for the country.

Development of sectoral regulation is also quite inadequate. Many sectors that require regulation urgently remain unregulated or under-regulated or inappropriately regulated. It is extremely important to identify the sectors that need regulation and put an appropriate regulatory framework in place. In many cases, regulation is still in the hands of line ministries themselves or some agency under them. This lack of sufficient autonomy not only affects proper functioning, it also creates problems of conflicts of interests. In many sectors, state owned enterprises are operating simultaneously with private enterprises. As a result, the regulating ministry or department is also the owner of some of the market players. It is difficult to expect regulatory impartiality in such a situation. In India, the situation is slightly better than other countries, though there is a huge scope for improvement.

If at all it becomes difficult to create an independent regulator due to political economy reasons, care must be taken to avoid conflict of interest situations. For example, if the Ministry of Telecom continues to hold sufficient influence on the telecom regulator, the state owned telecom service providers must not be owned by the same ministry. They may be shifted to some other ministry such as Ministry of Industry or say, Ministry of State Enterprises. Nevertheless, the regulators should be given sufficient functional autonomy. This is not to say that the Government or the Ministry should not have any business in this regard, but that that should happen only in extreme situations.

Governments in many developing countries are reluctant to adopt and implement a competition law with the pretext that the business is not yet ready for it. However, our survey in the 7Up2 countries indicates that, this may not be the case. Businesses in these countries seem to be willing to accept competition law. Hence, if the governments adopt and implement competition law taking them, along with other stakeholders, into confidence, there should not be any major problem.

It is also well recognised now that a competition law delivers desired outcomes only if it is complemented by appropriate consumer protection and sectoral regulatory laws. So much so that many countries have now adopted a hybrid law that addresses both competition and consumer protection issues. But as we have seen, except for India, Nepal and Vietnam, no other country has a consumer protection law. Even

in Nepal, it is hardly implemented. In Vietnam, of course, the newly enacted competition law also includes some consumer protection provisions. Lao PDR is in the process of a consumer protection legislation. Bangladesh is also in such a process, but it has been a few years since the law was drafted and nobody knows when it could be placed in the parliament.

In sum, all these countries need action in areas of competition law, consumer protection law and other regulatory laws. They need to look at the issues in a comprehensive manner and should try to plug all the gaps in this regard. A comparison of the six countries, however, shows that India is much ahead of others in this regard, though it has its fair shares of problems and failures. Hence, others can draw useful lessons from India including on how things could go wrong. In smaller countries like Cambodia and Lao PDR, it might be useful to include competition and consumer protection in a hybrid law. Or they might have different laws to be implemented by one agency. A similar approach can be taken in terms of sectoral regulation as well. Different regulatory laws for different sectors can be implemented by a single agency. This would help in a situation of paucity of resources both financial and human. Such an approach can also help in inter-sectoral learning as well as resolving interface problems to a great extent. One must of course be careful to see that one agency does not become overloaded.

The regulatory reforms policies in these countries seem to have been an amalgam of regulation, administrative intervention and political decision with the business lobby working as a strong pressure group. Consumer lobby is almost non-existent or has by and large been bypassed in the process, except in relatively fewer cases where consumer concerns have been highlighted by the media. The problem is exacerbated by the fact that the capacity of other stakeholder groups is also limited. As we have seen in our survey, consumer and other civil society groups are generally less aware in these countries compared to policy makers and businesses. Such asymmetric power equations may lead to political capture of regulation or capture by producers group.

The challenge, therefore, lies in making the markets more competitive and in creating independent effective regulatory institutions that address market failures, fairness and distributional objectives. The response to such challenges lies, to a great extent, in adequate capacity building of the regulators, policy makers and other stakeholders.

Notes:

* This chapter has been researched and written by Nitya Nanda and Alice Pham. The authors are grateful for valuable comments from experts in the Project Advisory Committee and the International Advisory Board of CUTS C-CIER, and other country researchers. Any remaining mistakes are the authors' own.

1 World Bank and OECD, A Framework for the design and Implementation of Competition Law and Policy, 1998.

2 Ironically though apart from perestroika and glasnost, the same party congress also called for a rapid transition to Communism whichCommunism, which is now completely forgotten.

3 Nepal Consumer Protection Act, 1997, Section 6(1) (c)

4 Ibid, Section 7.

5 Ibid, Section 8(1)(b).

6 GDP in PPP Dollar is a better proxy of market size as it is likely to have a closer correspondence with the volume of market transactions rather than the value of it.

7 India is not included in the diagram below due to its disproportionate size compared to other countries.

8 Country Presentation by the RGC at the 3rd UN Conference on Least Developed Countries, at Brussels, 14-20, May 2001 (http://www.unctad.org/en/docs//aconf191cp40cam.en.pdf).

9 International Telecommunication Union (ITU) (2001), Nepal Internet Case Study, Geneva

10 http://www.thenetwork.org.pk/state.htm

11 Pradeep Mehta, Competition Policy and Consumer Welfare, in "Towards A Functional Competition Policy for India-", edited by Pradeep Mehta, CUTS, 2006.

12 In accordance with the Nepal Consumer Protection Act 1998, "sub-standard consumer goods mean consumer goods of any of the following conditions: (1) Consumer goods in which the quantity of an essential ingredient has been lowered, or any other material has been mixed, in such a manner that the quality falls short of the standard determined under Section 11 of this Act; (2) Consumer goods, which are stale, rotten or stored or prepared in dirty or toxic, conditions or in which any chemical, colour or flavour has been used, so that they become harmful to health; (3) Consumer goods, which are fully or partly made of any diseased or disease-generating animals or birds or harmful vegetation; (4) Consumer goods of a quality, which falls short of the minimum necessary standard or exceeds the maximum standard prescribed, if any, in this Act or in the orders issued under the rules framed under this Act."

13 Wallace J., Denise Ironfield & Jennifer Orr (2004), Analysis of market circumstances where industry self-regulation is likely to be most and least effective, Tasman Asia Pacific Pty Ltd, Australia

14 World Bank (2003), Global Economic Prospects 2003: Investing to Unlock Global Opportunities, Washington D.C.

15 Pistor, K (2000), "The Standardiszation of Law and its Effect on Developing Economies", G-24 Discussion Paper No. 4, United Nations, New York & Geneva.

16 Indeed a similar survey could serve little purpose in India and the attributes considered here are not comparable between India and the other countries.