

FRIENDS OF COMPETITION

— HOW TO BUILD AN EFFECTIVE COMPETITION REGIME IN
DEVELOPING AND TRANSITION COUNTRIES



कट्स  CUTS
Twenty Years of
Social Change

1984 to 2003

#0301

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Prologue

I have been extremely delighted and hugely satisfied to write this paper after great thought, study and useful comments by several experts, whose names are mentioned below. This paper has been written up on the basis of the experience gained in a path breaking project: 7-Up, which involved a comparative study of competition regimes in seven developing countries of the Commonwealth. These are: Kenya, Zambia, Tanzania and South Africa in Africa; and Pakistan, Sri Lanka and India in Asia. While being inside the ring, and closely watching and observing the implementation processes, their pluses and minuses, I dare say that this labour of mine will be of great help to people who wish to see a healthy marketplace governed by an effective competition regime in their countries.

This paper, being published as a Handbook by CUTS, will certainly help in strengthening capacities of countries to achieve a healthy competition culture. The paper was circulated widely and we have received many comments, which have been taken note of and incorporated wherever possible. Among the various comments that were received, few are quite worthy of reproduction here:

“In a nutshell, this is one of the most thoughtful and concise papers on capacity building that I have ever read. I really like many parts of your paper. Not many people have gone so far as you have, for example in the reasons why competition authorities have had difficulties in enforcing their laws; the various stakeholders who must be brought within the ambit of a capacity building program; and the various things that can and must be done to build a competition culture within these groups. I must say, I really like your “friends of competition” idea. It has a nice ring to it. If you don’t mind, I will borrow this phrase in my future work”, Paul Crampton, OECD, Paris.

It is this quote, which has helped me to name this document, as “Friends of Competition”—an idea which I have floated in the Tool Kit (Pg-24) section of this paper.

In doing this paper, which is the result of a two-year study project, I am thankful to DFID (and the British taxpayers), my colleagues in CUTS and others: advisers for the 7-Up project etc for giving me the opportunity to learn and creatively contribute to the development of a healthy marketplace. The handbook will also enable countries, whether or not having a competition law, to appreciate the contours of an effective competition regime, and the know how and do how.

The recommendations need to be tailored to each situation and each country depending upon myriad factors. But they are generally a good guide for effective implementation of a competition regime in any country.

Lack of capacity often leads to miscarriage of justice, which has multiple adverse effects. A comrade in arms, Diwakar Babu of Consumer Guidance Group, Vijaywada, Andhra Pradesh, writes about a case of restrictive trade practice: tied sales of books and stationery by a local school, and charging

prices higher than those prevailing in the market. The District Forum under the Consumer Protection Act (COPRA) dismissed the case and stated that it is not an 'unfair trade practice'. The forum did not understand the difference between UTP and RTP, which too is covered under COPRA. In India, virtually every forum under COPRA can try simple anti-competitive abuses, but such cases, which come to light, show a crying need for capacity building.

A very useful comment also came in from Russell Damtoft, Counsel for International Technical Assistance, Federal Trade Commission, USA, which I reproduce below:

"Effective competition enforcement cannot happen without a strong institution; a strong institution will not develop without real political support; real political support will not exist unless the people themselves become persuaded of the value of competition policy. In our country (USA) it was relatively easy. The abuses of the late 1800s were obvious to all, and a public anger at the behavior of monopolists led to the passage of our laws. To this day, the public generally supports what we do, and our elected officials make sure our institutions are strong.

"From this, it should follow that the most important capacity building task should be to build support for the idea at the level of the general public. Yet how can this be done by an institution that is not itself strong? This is reminiscent of the old riddle, "which came first, the chicken or the egg?" One useful lesson can be drawn from the Peruvian INDECOPI agency. It brought its first cases in areas that everyone can understand: cartels among bread bakers and chicken producers. Bringing cases that the average citizen can understand and then publicizing them aggressively, in simple language, is a very useful strategy".

Acknowledgements

I must also acknowledge with gratitude the use of various resources in writing this paper: reports of the World Trade Organisation (WTO), the United Nations Conference on Trade and Development (UNCTAD), Organisation of Economic Cooperation and Development (OECD), the World Bank, Society for Participatory Research in Asia (PRIA) and various other individuals.

Other than those—Paul Crampton, Russell Damtoft and Diwakar Babu—who have been quoted above we also received very useful comments on this draft from Arvind Mayaram of the Government of Rajasthan; Malathy John of Institute of Policy Studies, Sri Lanka; David Ongolo, Adviser of CUTS, Kenya; Helene Chadzynska of OECD; and my colleagues at CUTS: Nitya Nanda, Anjali Bansal, Deborah Akoth, Ralf van de Beek and Swati Mathur. My gratitude for their painstaking efforts to look at the whole text and contribute their insightful comments.

The Epilogue, at the end of this handbook, gives the future direction that all stakeholders, particularly the civil society movement, need to follow to spread the competition culture in various countries. Comments and queries are welcome at: cuts@cuts.org.

Jaipur
January, 2003

Pradeep S Mehta
Secretary General

Introduction

Over 2000-2002, CUTS has implemented a path breaking project on a Comparative Study of Competition Regimes of Seven Developing Countries of the Commonwealth: South Africa, Zambia, Kenya and Tanzania in Africa, and Pakistan, Sri Lanka and India in Asia. The project, popularly called the 7-Up project¹, has the goal of building a healthy competition culture in developing countries. It is argued that a healthy competition culture helps to:

- enhance consumer welfare,
- promote fair trading,
- encourage innovation,
- preserve scarce resources,
- contribute to environmental conservation,
- achieve economic efficiency, and
- check concentration of economic power.

The achievement of a healthy competition culture will thus promote an orderly growth and industrial democracy, enhance economic development and enable proper resource allocation, which is a necessary condition for growth, poverty reduction and sustainable development.

One of the objectives of this project is to assess the needs for capacity building in each of these countries so as to strengthen the competition culture. This paper attempts to do that.

The purpose of this paper is to outline an ideal capacity building programme for promoting an effective and healthy competition regime/culture in the targeted countries. This would also be applicable to most developing and transition countries. However each programme will need to be tailored with suitable variations to suit the individual nature and character of the socio-politico-economic environment in each country. This paper draws on the lessons and experiences (both negative and positive) of the 7-Up countries as well as other developing and developed countries. It attempts to lay out a road map for capacity building, prepare a guide, as it were. This paper is divided into eight chapters, with a beginning and an end.

The first chapter introduces the paper. The second chapter looks at the Contextual Background, while the third chapter examines the Principles of Capacity Building and the fourth chapter speaks about the Development of the Know-What. The Fifth Chapter lays out the Science of Institution Building for Competition Regimes, while Chapter VI lays out a road map for proper sequencing of the competition law. Chapter VII lays out the needs assessment, while Chapter VIII, the longest, assembles the Nuts and Bolts and the Tool Kit. Chapter IX, the last one, speaks about the Flanking Measures and the Way Ahead.

The paper also contains a beginning, an unorthodox Prologue, and another unorthodox Epilogue, the beginning of the end.

Some chapters may include some materials which are of a repetitive nature, but that has been done only to emphasise the issues and the thrust required to implement an *effective* competition regime.

Contextual Background

Before we delve into the ABC of capacity building specifically for an effective competition regime, it will be useful to examine the background and context of capacity building. Both capacity and capacity building have been defined in various ways. A review of literature reveals that donors usually employ the term capacity building to cover several divergent concepts. There is a range of different phrases used by different donors like capacity development, capacity strengthening, organisational strengthening, institutional growth, institutional development and so on. In some cases capacity building has been equated with the essential infrastructure. Some also look at not only the provision of training and consultancies for the institutions but also for the interlocutors, as the methodology for delivering capacity building.

Both capacity and capacity building have been defined in various ways. But none of these definitions satisfactorily takes into account the salient identity of institutions in developing and transition countries.

A careful analysis of these definitions reveals that the emphasis is either on the project or on infrastructure as the 'object' and planning, monitoring or evaluation as the 'process'. None of these definitions satisfactorily takes into account the salient identity of institutions in developing and transition countries. These are generally resource starved, and lack political commitment and public acceptance. As a result, these definitions have largely remained inadequate to explain the multi-dimensional and complex attributes of capacity.

The definition of capacity which is rooted in the Southern context and which takes into account the complexities of the Southern development context is by and large elusive. Tandon (2002²) defined capacity from the vantage point of Southern institutions as: "...it covers the *totality* of an organised effort of an organization to fulfill its mission". This process has reinforced that three types of capacities are the most relevant for Southern, as well as transition country institutions.

Types of Capacities

- 1 Perspective:** The critical component of capacity is related to the perspective, which drives the intellectual and conceptual analysis of the regulatory structure in the national policy space. The perspective includes values, ethics, and the political ground, which create the foundation of market regulatory institutions.
- 2 Resource base and legal capability:** Experience suggests that material resource base is an increasingly important element of capacity as far as regulatory institutions are concerned. This includes the physical infrastructure and assets and resources, and an inbuilt political independence. It is this capacity which in fact provides a strong ground for taking an autonomous and independent position on the issues of market distortions without being subject to political interference and regulatory capture.

3 *Institution building:* Another critical component in capacity is related to institution building. It involves the internal and external relationships and linkages. Each institution operates in a locally specific context through a network of relationships with other actors, which not only provides the basis for its pursuit of purposes and mission but also provides the basis for its legitimacy. Therefore, the ability of institutions to nurture, cajole, coax, influence and confront these relationships and actors is a primary arena of capacity.

The capacity of an institution to manage its internal systems and procedures is crucial to foster and pursue its mission and purposes. In this context, the internal capacity to relate and respond to the external environment and become adaptive and resilient is a prerequisite to achieving the goals of the organization. Therefore, enhancing capacity for organizational management and renewal is critical for its success.

Principles of Capacity Building

In recent years there has been debate and discussion on the phrase 'capacity building' itself. Some have argued to replace the word 'building' with 'development' or 'enhancement'. To them the latter terms were coined to distinguish between the initial creation/building of capacity, and a larger concept, that goes further to look at the subsequent use, updating and retention of capacity once it is built (UNDP, 2001).

Proper utilization of existing capacity is as important as building new capacities.

It is indeed true that many a time capacity that has been created or built is not used effectively. Therefore, proper utilization of existing capacity is as important as building new capacities. The term 'building' has acquired a distorted connotation, implying that something from scratch has to be initiated. But there is hardly any situation when one has to begin from the scratch. One set of capacity that exists may require reinforcement and here the capacity actually means augmenting the existing capacities (Tandon, 2002²).

The above understanding of capacity building leads to the expectation that it would follow certain principles. It is suggested that capacity building should underpin the following desirable principles:

It is essential to build capacities related to a locally based, locally articulated and locally originated capacity for critical reflection, learning, documentation and dissemination.

1. Local context: It is essential to build capacities related to a locally based, locally articulated and locally originated capacity for critical reflection, learning, documentation and dissemination. The local bodies know and understand their constituency and their needs better than anyone else. Most of the developing and transition countries are going through a process of economic, social and political change. In this light, it is essential to initiate a dialogue with the community with whom they work on the need for specific laws, structures and programmes. Capacity building initiatives should be looked at in this context and related to the work they are involved in. Therefore, interventions towards building capacity of competition agencies should be rooted into the changing context and as per requirements of institutions themselves.

2. Continuous and ongoing process: This view implies that capacity formation in an institution is an ongoing and long-term process. Thus the meaning of capacity may change as purposes undergo re-statement and re-articulation. At different stages in the life of an institution, different types of capacity may become important. The ongoing nature of capacity building encourages the acknowledgement of its dynamic and procedural nature as opposed to mere events and structure.

3. Evolutionary and incremental learning process: The formation of capacity of an institution is a learning process. A lot of this learning is evolutionary, continuous and does not depend on external inducements. The capacity building through an external intervention can only be a facilitative process, which builds new or additional capacity on top of the capacity that already exists within the body.

Capacity building involves all individuals, systems and resources and will need to be pursued at different levels.

- 4 Synergistic total:** Capacity building means development of both individual and the collective. It involves all individuals, systems (organization) and resources and will need to be pursued at different levels (individual, organization and sector). It is essential to focus not only on the individuals in an organization, but also on the organization itself as well as on the whole regulatory sector. A capacity building initiative should have inherent human potential as its focus. The focus of capacity building should be a combination of skill up gradation and enhancement of potentials. Growth of individuals is key to any meaning of capacity. The relevance of the organisation to its changing context is the measure of its effectiveness. As a regulator, building relationships with other actors, locally, nationally, regionally as well as globally, becomes important for effective functioning and sustainable impact. Alliances, partnerships, networks provide the necessary platform for sharing and learning information, experiences and ideas.
- 5 Futuristic in approach:** Capacity building has to be in relation to a search for relevance, identity, and clarity of roles and perspective building. There is a need for it to be more futuristic in its approach. It is important to look at the regulatory sector's future needs and see how best one can use different methodologies to enhance existing capacities as a whole.
- 6 A systemic approach:** Capacity building should be looked at from a systemic approach. There is a growing realization that the institutions in developing and transition countries are only one component of the set of actors involved in promoting an orderly marketplace. There are other sets of actors whose capacities have to be enhanced to strike a balance. This would operationally mean building effective linkages, coalitions and alliances between the range of regulators and other economic and development actors. This would also require promoting, engaging and sustaining dialogues across all sets of actors.

Areas of Capacity Building

In the foregoing, we place Tables (I & II) for a quick look at the needs of capacity building, while Table: III is a synoptic table which draws distinction between Traditional Approach and Capacity Building in Technical Assistance Programmes, which are of recent currency following the WTO Doha Declaration deliverables.

Table I: Capacity Related to Organizational Management and Renewal
<p>Organisational Development</p> <ul style="list-style-type: none"> ● Envisioning Mission, Vision and Values ● Organizational Management ● Strategic Planning ● Leadership Development ● Governance
<p>Human Resources Development</p> <ul style="list-style-type: none"> ● Information and Knowledge Management ● Communication and Networking ● Financial Management ● Information Technology ● Financial Mobilization

Table II: Capacity Related to Objectives Management
<ul style="list-style-type: none"> ● Perspectives on Regulation and Economic Development ● Participatory Planning, Monitoring and Evaluation ● Research and Survey Methodology ● Regulatory Impact Assessment ● Documentation and Reporting ● Process Documentation ● Participatory Training Methodology (Training of Trainers)

Table III³: Traditional Approach v/s Capacity Building	
Traditional Approach	Capacity Building
<ul style="list-style-type: none"> • The service is essentially conceived by the provider. Low degree of diversification and responsiveness to the beneficiary's particular needs 	<ul style="list-style-type: none"> • Service is beneficiary-driven and adjusted to specific needs of the countries and publics concerned. Needs monitoring and programme's responsiveness to satisfy those needs are encouraged.
<ul style="list-style-type: none"> • Emphasis on transferring solutions from developed to developing countries. 	<ul style="list-style-type: none"> • Building capabilities, i.e. creation of local skills, relationships and institutions capable of dealing with competition policy matters in developing countries.
<ul style="list-style-type: none"> • Focus on competition issues and little concern for implications of competition policy for environment, social protection or cultural identity. 	<ul style="list-style-type: none"> • Competition policy issues are analysed in a broader perspective of economic and sustainable development.
<ul style="list-style-type: none"> • Beneficiaries essentially include governments and semi-public industry associations. 	<ul style="list-style-type: none"> • Beneficiaries comprise governmental agencies, private sector, academic institutions and members of civil society.
<ul style="list-style-type: none"> • Programmes are mainly conceived as single agency services is little scope for partnership. Limited use of human resources in the recipient country. 	<ul style="list-style-type: none"> • Multi-provider service is truly encouraged to exploit synergies and provide value to the beneficiaries. Partnership with local institutions, and beneficiaries is encouraged. Local human resources are used whenever possible.
<ul style="list-style-type: none"> • Service offer is segmented essentially on the basis of location i.e. on a regional, sub-regional or national level. 	<ul style="list-style-type: none"> • Services offered are more geography free and segmented according to the beneficiaries' interests, similar approaches in problem solving, scope for coalition building, etc. Distance learning and Internet are extensively used.
<ul style="list-style-type: none"> • Emphasis on discretionary events. The provider's time horizon is limited and follow-up is not fully integrated into the programme concept. 	<ul style="list-style-type: none"> • More emphasis on relationships and durable interaction. The TA programmes are expected to develop progressively and to 'grow like a tree'.
<ul style="list-style-type: none"> • Little attention is paid to cross-cultural differences and to psychological or social distance between beneficiaries and providers. 	<ul style="list-style-type: none"> • Cross-cultural differences are recognised and integrated into the service concept. Teamwork is based on trust and human partnership and involves both beneficiaries and providers. Efforts are made to reduce cultural and social distance between partners and participants.
<ul style="list-style-type: none"> • Too much administration and not enough management. Bureaucratic imperatives are often given priority over beneficiary-orientation. 	<ul style="list-style-type: none"> • Pressure to reduce bureaucracy. Flexibility and enthusiasm are considered as essential ingredients of the programme success. When tensions between bureaucratic rules and common sense occur they are arbitrated in a manner that benefits the overall programme objectives.

The Development of the Know-what?

In the context of the discussion at the WTO Working Group on Trade and Competition Policy, it has been argued by an Indian official⁴ in his *personal capacity*:

“The first and foremost step towards capacity building is to have a ‘state of play’ report on the competition law and policy of the country concerned. This should involve detailed analysis of the existing policies and law and institutional arrangements in place. An assessment of the evolution of competition policy and contrasting it with the level of development of other relevant economic institutions and policies need to be studied. This report should be comprehensive and should form the basis for any further technical assistance or capacity building activities in that country.

“What is important at this stage is to understand the complementary policies pursued by the country concerned - its industrial and investment policies in the past few years and the extent to which such policies have undergone transformation and the extent to which competition policy has kept pace with changes in other areas of the reform process. Active involvement of the country’s government is essential because the appreciation of the state of play in respect of the policy scenario by outside experts might get prejudiced by the level of development of their own countries or that of other countries with which they are familiar”.

The first and foremost step towards capacity building is to have a ‘state of play’ report on the competition law and policy of the country concerned. An assessment of the evolution of competition policy and contrasting it with the level of development of other relevant economic institutions and policies need to be studied.

This piece of advice is extremely relevant, though with some variations. For example, active involvement of government is not the only factor, which is essential to appreciate the state of play in the policy scenario.

Other interlocutors in the policy scenario include the clients of the system and other economic actors, who are constantly watching, interacting and influencing the policy developments. The 7-Up project involved detailed analyses of the competition law and policy scenario in each of the seven developing countries by *local* researchers, which went through a grinding process of debate at the national level, through national reference groups (NRGs) on no less than three occasions, other than circulation of draft reports.

The NRGs comprised of all possible stakeholders: government officials from trade and consumer affairs ministries, competition authority, business chambers, consumer groups, trade unions, media, academics, economists, lawyers and other experts.

One of the most important findings of the 7-Up project is that in almost all of the project countries, competition authorities have difficulties in implementing the competition law.

These problems are caused mainly due to the lack of capacity in the authorities to deal with the issues, which is compounded by other factors. The other factors include the following but are not limited to them:

<i>MACRO</i>
• Lack of political will or political market failure
• State's ignorance and inaction at all levels
• Ignorance and lack of awareness all around
• Inertia, indifference and inaction by all stakeholders
• Lack of strong consumer movement
• Insufficient size of economy
• Insufficient resources and their priorities
• Poor data systems
• Lack of collateral institutions
• Inadequacy in judicial systems
• Complexities of law and the overall legal system
• Multiplicity and compatibility of laws
• Insufficient coordination and compatibility among the competition law and regulatory laws
• External influence

<i>MICRO</i>
• Poorly drafted law
• Lack of specific guidelines
• New law and its novelty
• Prejudices against the law as being externally induced
• Unrealistic expectations
• Poorly funded agency
• Rigidities of enforcement
• Poor leadership through bad appointments
• Lack of experience in the authority
• Lack of indigenous competition policy expertise
• Lack of suitable and trained staff
• Lack of academic and curricula
• Lack of third party/private action
• Inadequate research capacity in the country
• Poor data bases

A capacity building programme needs to take all factors into account, and to devise methods and coping strategies to ensure effective implementation of the competition regime within the given environment.

A capacity building programme needs to take all the above and other specific factors into account, and to devise methods and coping strategies to ensure effective implementation of the competition regime within the given environment.

The science of capacity building is another important area to be reflected here. Much of it has been dealt with under the contextual background at the beginning of this paper. It offers a good anvil to design serious capacity building programmes. However the issue of the science of capacity building, especially in the context of a competition regime, is divided into two more chapters: Institution Building and Capacity Building. The distinction will be evident from the foregoing chapters.

The Science of Institution Building for Competition Regimes

Much discussion on capacity and institution building has taken place in the WTO Working Group on the Interaction between Trade and Competition Policy over the last five years. The OECD has also been working on it assiduously over many years, has conducted several projects and published a large number of documents. Their cogent findings and other expert advices are being used here. The process of establishing competition regimes in developing countries has found a number of inter-related dimensions, including:

- Crafting a competition law appropriate to the countries economic circumstances, legal environment and the socio-cultural situation;
- Establishing the priorities of the competition authority;
- Building the competition agency, including recruitment and training of staff, development of case-handling expertise, etc;
- Developing a competition culture, including through relevant public education activities;
- Developing support from the public and the highest authority in the country.

The most fundamental step that should be taken by policy makers in any country that has made a commitment to embracing a more market based economy is to build a competition culture.

Building a Competition Culture⁵

Effectively enforced competition laws and economic reform guided by competition principles are being increasingly recognised as essential prerequisites for economic development, growth and rising levels of economic welfare.

There are strong links between competition policy and numerous pillars of economic development, such as policies on governance, privatisation, deregulation/regulatory reform, trade liberalisation, the attraction of FDI, creation of entrepreneurial class of SMEs, agriculture, health, innovation.

The most fundamental step that should be taken by policy makers in any country that has made a commitment to embracing a more market based economy is to build a competition culture. An extremely helpful first step of this task can be to conduct an assessment of the country's most basic needs and priorities in relation to competition. Such an assessment should cover three principal areas:

- an evaluation of the level of understanding of the benefits of competition, its strong links to other policy areas, and the level of commitment to competition among key constituencies in the country;
- the nature and extent of institutional restrictions on competition; and
- the effectiveness of any regime that may exist for addressing private anticompetitive conduct, or, in the absence of any such regime, what would be required to establish one.

The Buy-in of Key Constituencies is Critical

Experience strongly suggests that the building of a competition culture within a developing or transition country is likely to be slow and tenuous at best unless key stakeholders understand the benefits of competition, are aware of at least some of the important links between competition policy and other important policy areas, and believe that greater competition in the economy will in fact improve the well-being of most people in the economy.

In this regard, the key stakeholders include politicians, public servants, the business and legal communities, sectoral and other regulators, academics and the press. If any of these stakeholders does not understand the benefits that typically are associated with greater competition, or if they are sceptical about the prospects for those benefits to materialise within an acceptable timeframe, the process of transitioning to more competitive markets may be difficult and characterised by regressive periods along the way.

Consideration should be given to adopting a comprehensive strategy for building support and enthusiasm for competition among these stakeholders, as well as among the general public.

Accordingly, consideration should be given to adopting a comprehensive strategy for building support and enthusiasm for competition among these stakeholders, as well as among the general public. This is where the press and educational institutions can be particularly helpful. By sensitising journalists, professors and students to the benefits of competition and the various ways in which competition can be distorted, advocates of competition can cultivate important allies who are capable of galvanizing public opinion in support of pro-competitive reform in various sectors. In turn, public support for greater competition can make it much more difficult for politicians to abandon, undermine or resist market reform efforts.

Institutional Distortions

Even in the most advanced industrialised countries, institutional restraints continue to have a far greater aggregate distorting impact on competition than all private restraints combined. This is in part because distortions of competition brought about by laws, regulations and other institutional restraints typically exist in basic infrastructure industries such as transportation, telecommunications, energy, agriculture, health, financial services and a broad range of professional services.

Even in the most advanced industrialised countries, institutional restraints continue to have a far greater aggregate distorting impact on competition than all private restraints combined.

A needs assessment in the competition policy field should begin with a review of the extent to which competition may be distorted by laws, regulations, supply management schemes, licensing regimes, procurement policies, investment restrictions, product standards and other institutional mechanisms. The key focus of this assessment should be to identify sectors where there may be significant potential for reducing the distorting impact of the institutional restrictions on competition in the pursuit of other legitimate policy objectives.

In the assessment of how best to structure the transition to competition in various industries, consideration should be given to:

- (i) achieving transition in an optimal time-frame – this often is “as quickly as possible”;
- (ii) minimising the jurisdictional overlap between sectoral or other regulators and the domestic competition agency (if any exists) – one way of achieving this is to give to the latter agency exclusive jurisdiction over private anticompetitive conduct;

Another broad area that should be addressed in conducting an assessment of the most basic needs of a country in building a competition culture is the effectiveness of any competition law regime that may exist. If no such regime exists, the assessment should focus on what would be required to establish such a regime.

- (iii) designing the sequencing process in a manner that maximises the promotion of competition – too often, this consideration is ignored, with the result that the paramount goal is lost, for example, when privatisation or deregulation occurs before an effective competition law regime is established, thereby permitting privatised/deregulated firms to replace former institutional barriers to competition with new private anticompetitive restraints;
- (iv) encouraging efficiency enhancing behaviour by regulated entities, for example, by establishing a price caps regime rather than a rate of return regime;
- (v) establishing measures to prevent cross-subsidisation between regulated entities and their competitive affiliates;
- (vi) establishing sunset provisions or objective benchmarks for terminating the mandates of regulators; and
- (vii) ensuring that someone other than the regulator is responsible for determining whether those benchmarks have been met.

Private Anticompetitive Conduct

The third broad area that should be addressed in conducting an assessment of the most basic needs of a country in building a competition culture is the effectiveness of any competition law regime that may exist. If no such regime exists, the assessment should focus on what would be required to establish such a regime.

Among other things, an effective competition regime is required to ensure that the benefits of liberalisation and market reform are not undermined or completely lost due to the establishment of private anticompetitive restraints in the place of former institutional distortions of competition. In addition, an effective competition regime is critical to encouraging competition and preventing anticompetitive conduct in new industries and other markets that may not be directly affected by liberalisation or market reform initiatives.

Although some have argued that the establishment of an effective competition law regime is unnecessary where barriers to external and internal trade are eliminated, this view fails to recognise that many markets are local in nature, e.g. due to transportation costs, the perishable or fragile nature of particular products, local preferences or other factors. Moreover, liberalisation initiatives alone cannot address exclusionary conduct by local dominant firms, mergers to create monopolies, or anticompetitive behaviour by international cartels.

The Crucial Ingredient

One of the most crucial ingredients for successful implementation of a competition regime is to find an anchor or a godfather for it in the political governance structure of the country. Few suggestions are illustrated below:

One of the most crucial ingredients for successful implementation of a competition regime is to find an anchor or a godfather for it in the political governance structure of the country.

- **Referral organisations**

The matter should be anchored in a referral organisation, which all the branches of the government refer to, such as the President's office or the Prime Minister's office. These will have the authority to deal with conflicts and disputes among the various branches and agencies of the government.

- ***Planning organisations***

Another useful anchor could be such bodies, which are structurally and functionally organised to look at long term issues, such as Planning Commission or Planning Board. They can place the needs and the imperatives of a competition regime into the national development plans.

- ***Other cross-cutting organisations***

There are other cross-cutting organisations in the government, such as the public audit authority or the attorney general's office which have to deal with the whole spectrum of governance issues, which can be good allies. Parliamentary committees dealing with the department concerned can also be good allies.

Sequencing the Competition Law Implementation

In terms of establishing the competition agency's priorities a phased approach maybe appropriate to the design and implementation of a competition law. The sequencing illustrated below is a refined version based upon a presentation made by Gesner Oliviera (former chairman of the Brazilian Competition Agency) at a CUTS meeting⁶ (2002). He developed this on a simple idea inspired by World Bank's Shyam Khemani and Mark Dutz⁷ (1996).

Different Stages of Institutional Development of National Competition Regimes			
<p><i>I: START</i></p> <ol style="list-style-type: none"> 1. Competition advocacy and public education 2. Control of horizontal restraints 3. Checking abuse of dominance 4. Exceptions and exemptions, including on public interest grounds 5. Technical assistance 	<p><i>II: ENHANCEMENT</i></p> <ol style="list-style-type: none"> 6. Merger control 7. Vertical restraints 8. Development of the effects doctrine 	<p><i>III: ADVANCEMENT</i></p> <ol style="list-style-type: none"> 9. Regulation 10. International cooperation arrangements 	<p><i>IV: MATURITY</i></p> <ol style="list-style-type: none"> 11. Second-generation international arrangements 12. Pro-active competition advocacy

Given its limited resources and novelty, the agency should start with actions which will most likely benefit the market and build its own acceptability. Gradually it would introduce measures, which require more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of price fixing or collusion, the latter being positively welfare diminishing and easily identifiable by the polity and public.

Given its limited resources and novelty, the agency should start with actions which will most likely benefit the market and build its own acceptability.

Development is a continuum, and the stages will never be all this clear, and in some cases different priorities will be appropriate. In some economies, especially those that have a legacy of state-owned or other dominant firms, abuse of dominance/monopolisation might also require a priority similar to that given to horizontal restraints.⁸ However, in exercising its powers to tame public sector monopolies, the agency has to do it slowly rather than follow the rule book. This is because, while people as consumers would like some restraint on public sector's anticompetitive and anti-consumer behaviour, the establishment feels subconsciously threatened when action is taken against them. This is often reflected in public support, often orchestrated by politicians

and trade unions, that it is people who are being penalised when public sector firms are upbraided. Often these are linked to privatisation fears and that also to foreign companies.

The stages suggested are organised according to the degree of difficulty authorities face in doing a cost-benefit analysis of the impact of competition measures on social welfare. However, it might well be argued that legally sound prosecution of price collusion turns out to be more difficult than a merger review. In fact, it is generally easy to establish the ill effects of a collusive behaviour but often difficult to prove in a court of law, due to lack of legally-sound and solid evidence. Therefore the actual plan should take into account the damage caused to the economy and consumers of a particular anti-competitive act, but also the chances of success and the expected return on the money spent in pursuing the case, given the relative probabilities of success through other lines of action or public policies. The above illustrated sequencing is what has been more or less adopted under the new Competition Act, 2003 of India.

Need of the Hour

With respect to building the competition agency, some key steps will include securing appropriate financial resources to:

- Acquire physical premises and equipment;
- Recruit and train agency staff;
- Develop internal procedures for investigation and prosecution of cases;
- Develop data-bases and information channels, and create institutional memory;
- Develop and implement compliance education programmes for business;
- Network with other competition agencies in both developing and developed countries; and
- Conduct public education activities.

Public education is vital to facilitate the acceptance of competition policy principles as a central element of the national economic and development policy, both with the polity and the public.

Activities engaged in by the competition agency should aim at creating a “competition culture” by the effective implementation of the competition law. Public education is vital to facilitate the acceptance of competition policy principles as a central element of the national economic and development policy, both with the polity and the public. This could be facilitated by:

- Building strategic alliances with other economic actors/stakeholders in the country, such as sectoral regulators, government agencies, media, legislature, academia, bar associations, consumer organisations, chambers of commerce;
- Doing or getting research done into possible areas of economic governance and activity which reduces competition and diminishes consumer welfare, and disseminating the results widely as both academic outputs and reader-friendly briefings;
- Conducting public meetings and seminars for all stakeholders to demonstrate the benefits of enforcement actions, and build institutional credibility; and
- Undertake other measures that enhance transparency and public appreciation of competition policy and actions, including a media strategy which can reach out to a large audience.

Key Points

The most important factors underpinning the development of successful national competition institutions are:

- Technical competence,
- Enforcement capability,
- Credibility,
- Independence, and
- Capacity, preparedness and will to take swift action

The key ingredients to build credibility involve the development of, first, a reputation for technical competence, second, a reputation for independence, and lastly, public confidence for taking swift and decisive action.

Each of the above five factors are strongly inter-related. Technical competence of lawyers, economists and other professional staff, including investigators, who are employed by the competition agency have to be developed at an early stage so that powerfully resourced companies can be effectively and expeditiously dealt with. A dedication to training and the development of skills is imperative to develop the necessary technical capacity in the medium to long term.

The key ingredients to build credibility involve the development of, first, a reputation for technical competence, second, a reputation for independence, and lastly, public confidence for taking swift and decisive action.

Credibility can be enhanced through nurturing and promoting a consumer movement, which could be achieved through advocacy, training, openness and transparency of decision making, and an outreach programme. The track record of the competition agency will be an important element of such an outreach effort.

In the next chapter, we take a look at the needs of governments, competition authorities and civil society.

The Comprehensive Needs for Implementing an Effective Competition Regime

The 7-Up project reflected how the competition authorities went about implementing the competition laws, and what type of problems and hurdles they encountered. A similar assessment was also done with civil society organisations. Along with these experiences, CUTS has also garnered experiences of other countries, which are being laid out in this chapter as a part of the comprehensive needs assessment.

- Drafting of policy, law and regulations;
- Capacity and resources to conduct research in areas where anticompetitive behaviour is endemic, and for building up data banks
- Preparation of Guidelines for investigating and prosecuting various types of anti-competitive practices;
- Peer review of cases handled;
- Know how on private action;
- Guidance on advocacy, especially in countries, which do not have such a tradition;
- Budget preparation and management, and staffing planning;
- Guidance on outreach: how to spread the word most effectively;
- Cooperation with other competition authorities;
- Guidance on handling cross border cases; and
- Technical assistance through:
 - ◆ resources,
 - ◆ internships,
 - ◆ seminars,
 - ◆ continuous training,
 - ◆ case study specific workshops,
 - ◆ courses,
 - ◆ placement of experts with hands-on experience and knowledge of local language,
 - ◆ South-South cooperation due to similarities of development and other factors.

The civil society's expectations were a little less, and centred around mainly:

- Recognition that the consumer movement is the countervailing power in the marketplace and a strong ally of competition policy and economic reforms;
- Resources to engage in competition and regulatory policy issues specifically and economic reforms generally;
- Capacity building on competition policy and law, through trainings etc by both competition authorities and advanced consumer groups in both developed and developing countries; and
- Coalition building at national and international levels.

In the next chapter, we look at the nuts and bolts of the capacity building programme.

The Nuts and Bolts

The competition authorities in most 7-Up countries are constrained by lack of resources, which include fiscal and human i.e. qualified and experienced staff. In many countries where the competition law and policy are relatively new areas, it is difficult for the authorities to find personnel that are trained in the economics and legal aspects of competition policy and law. Therefore it is necessary that the staff get training outside with another similar authority or institution. On the job training will of course evolve as the person progresses through experience gained on the job.

On the other hand, it was well recognised that for effective enforcement of competition law a vocal and well-informed constituency is an imperative. This will require a strategic and comprehensive approach, while the capacity building programme will need to be targeted at several levels:

For effective enforcement of competition law a vocal and well-informed constituency is an imperative.

- staff and members of the competition authorities
- staff and members of the regulatory authorities
- staff of government departments/agencies at national and sub-national levels
- staff and members of voluntary organisations, including consumer groups
- staff and members of trade unions
- staff of businesses and their chambers
- staff of professional associations
- media persons
- academia
- research community
- legislators at the national and sub-national levels
- legal community, and
- select judiciary

The strategic approach to a capacity building programme will need to take care of:

- strengthening the capacity of the institutions dealing with competition issues
- creating a market for competition law & policy, and
- providing the backbone/infrastructure for effective implementation

The Tool Kit

Following are a few ideas through which such capacity building programmes can be undertaken to build effective competition regimes in the 7-Up as well as similar countries:

1. Awareness generation

a) *Media*: One good method of creating public awareness is through media interaction, advertising and publicity. Besides, publication and distribution of literature through various targeted means is also desirable. This is a dynamic process that needs to be ratcheted as and when the authority decides cases,

which helps to put the issues in the right perspective. Publicity without examples is quite dry, and people do not understand the issues. Writing regular periodical columns can also be very helpful.

b) *Public meetings*: Well- designed and implemented public meetings with simple literature can be very effective in raising basic awareness. Such meetings can be organised under the banner of social organisations such as Rotary Club and Lions Club, university and college teachers associations and so on. The meets can also be organised as sessions during other meetings in an organisation. There are several such opportunities: professional association meets, trade union and staff association meets, and even staff annual meetings. These types of activities can best be executed by the consumer movement and/ or the compliance and education departments of the competition authorities (to be set up where they do not exist, and properly resourced, where they do exist).

c) *Vehicles*: It is important to identify a raft of institutions (vehicles) who can carry out these activities. The competition agency alone cannot do it. For example, bar associations; consumer organisations; business chambers, professional associations etc should be roped in to assist the awareness generation programme.

d) *National Competition Day*: Another useful method is to declare a National Competition Day, which can allow focus activities around the country to raise awareness. Among the 7-Up countries, Zambia is doing an activity like this. The EU member states also celebrate national competition days, though they are not on the same day in all the member countries.

e) *International Competition Day*: The UNCTAD is also considering an International Competition Day, following a series of recommendations made at several events following the Jaipur Declaration adopted at a regional seminar organised by UNCTAD, CUTS and the MRTP Commission of India in April, 2001 at Jaipur.

2. Specialised courses

It was observed in the 7-Up countries that there is very little understanding of competition issues among professionals, economists and lawyers. For example, the course for company secretaries in India requires a study of only the Indian competition law, but there is hardly any company secretary who has to deal with it. They are more interested and engaged in the compliance and administration of the company law. Moreover, none of the undergraduate courses in economics, law or business management require a detailed study of competition issues.

These lacunae can be overcome by offering both long term and short term training courses by open and regular universities and colleges. Business chambers, professional bodies, NGOs and development research and training institutions can be roped in to offer such courses.

In fact looking at this vacuum, CUTS has conceptualised a specialised institution offering training courses on competition and economic regulations to countries in the developing world. The proposed institution will also offer research services and consultancies to governments and competition authorities.

The overall approach will help to build up a cadre of competition and regulatory professionals in the country, which can appreciate and build the competition culture.

There is a high turnover of competition authority staff, who get pinched by the private sector or move onto another interesting patch.

At another level, it has also been seen that there is a high turnover of competition authority staff, who get pinched by the private sector or move onto another interesting patch. For example an economist moves from the competition agency to a new regulatory authority, or to a voluntary organisation and vice versa. Such courses can help create a pool of trained and well-oriented personnel.

There is a plus side to this also. Often the pool of trained experts, when they move out of the agency, does tend to gravitate together and offer support to the agency and its objectives by acting as messengers.

Lastly, some universities and their economics and law faculties need to offer specialised course on these issues. In the 7-Up countries we did not come across any university offering such courses for degree or under-graduate programmes. One university in South Africa has just launched a short-term training course, while few universities in India offer long-term courses and doctoral degrees in consumer protection. This does have a small section on competition law but the thrust is on consumer protection. Thus competition issues need to be part and parcel of both the law and economics curriculum at universities and other institutes of higher education.

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3. Case study seminars and handbooks

The focus here would be on competition law enforcement and targeted at members and the staff of competition agencies. A small panel of experienced competition law enforcement officials from the developed and developing countries would be drafted into such programmes, as is being done by the OECD secretariat and other competition authorities such as the US Federal Trade Commission and Department of Justice. In such seminars, they discuss various recent cases handled by them in various countries. The cases are chosen carefully so that they bring into light the different dimensions in otherwise similar looking cases. In so far as possible, case studies from the country or the region will be good training materials.

Case study seminars and handbooks will need to be designed to include various types of competition abuses in one category, with examples brought in from several jurisdictions to train competition officials and other stakeholders.

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The staff or members of competition authorities in developing countries are used to work in a legal environment, where everything is clearly defined and there is very little room for any 'analysis' as such. The 'rule of reason' approach is yet to gain ground here, resulting in competition authorities taking more of a structural approach even though their competition laws recognise the importance of behavioural approach. This is because, even though they consult foreign legal experts and documents while drafting their law, they do not practice it while implementing the law as they lack the tools and means to execute the analysis required.

Thus judges and lawyers interested and involved in competition law enforcement should be given special training on competition issues. In order to assist in developing the relevant jurisprudence, publication of a handbook outlining

how other jurisdictions have dealt with for instance 'rule of reason' cases, would be quite useful.

4. Exchange of officials

Although pedagogic training is necessary, there is no substitute for practical experiences. Thus it would be useful for the competition officials of new or inadequately developed competition authorities to see how the competition authorities in other countries handle different cases, particularly in similar countries. This can be done through exchange of officials and experts in two ways. On one hand, officials from new and underdeveloped countries can do internship or study visits to other countries' competition authorities to gain first-hand knowledge there. On the other hand, experienced staff from competition authorities can visit underdeveloped competition authorities for short duration and guide the officials there in handling their cases.

It would be useful for the competition officials of new or inadequately developed competition authorities to see how the competition authorities in other countries handle different cases, particularly in similar countries.

We found this style operating quite well in South Africa in the 7-Up project. Similar experiences also emerged in this research from other countries, such as the placement of a New Zealander expert with the Zimbabwean competition agency through the good offices of the Commonwealth Secretariat.

An important point which emerged here, is that if a developed country official is imparted training, and if he leaves the job on return, then the capacity is lost to the agency. Further, due to confidentiality regulations he will not get sufficient exposure when on placement with the foreign agency. On the contrary, when a foreign expert is posted to a developing country agency, s/he brings the experience to everyone at the receiving end and without the confidentiality hassles.

5. Two-way secondment of officials

In order to orient relevant people on enforcement of the competition law, the authority could invite officials from the private sector and consumer activists on short-term secondment to them. That will provide valuable cross-fertilisation opportunities and ensure that neither an anti-business nor an anti-consumer mentality infects the authority or its staff persons.

In order to orient relevant people on enforcement of the competition law, the authority could invite officials from the private sector and consumer activists on short-term secondment to them.

On a slightly different note, the UK government has a good scheme, where officials from NGOs are seconded to the government on a short term basis (usually one year) to work and gain first hand experience about the functioning of the government. In turn they bring in freshness to the government agency by furnishing inputs which do not have the same biases as those from civil servants. Similarly, civil servants are seconded to private sector to gain a better understanding of how things work on the other side of the fence.

6. Lectures and literature for judges and lawyers

The judges and lawyers in the developing countries are generally used to working in a legal environment where they do not get much exposure to competition issues. Sometimes some of the judges could be dealing with competition problems as a member of the authority or in appeal matters. On the other hand many lawyers will need to appear before either the authority or the appeals court to argue matters relating to competition cases. As many judges or lawyers will need to deal with competition issues, one cannot think of a structured training programme, as even they will not be interested. One

way to deal with such issues is through lectures on occasions and distribution of simple literature to the legal community.

Secondly, lawyers working on competition cases may need to be specifically targeted for better appreciation of competition laws, and how they are being implemented in other countries.

7. Seminars on competition and regulatory issues

A number of seminars need to be organised to build greater awareness on these issues among the different stakeholders, especially among the consumer organisations.

The awareness on competition and regulation issues in general is at an extremely low level in most of these countries. Because of this, the governments find it easy to put retired bureaucrats and judges in or send people from government ministries/departments on deputation/secondment to the regulatory authorities on the pretext that they are the only people who have some understanding on these issues.

This is the order of the day in India. In Pakistan an engineer was posted as the chairman of the authority, who had little understanding of the complexities of the issues. However he used his innate common sense to deal with complex cases. In Thailand, the competition agency is headed by a businessman who is expectedly partisan and therefore action against business is extremely poor. Thus people are hardly aware of the existence of the competition law.

In the overall, such handling of competition law creates an atmosphere of regulatory inertia and/or capture which makes the entire regulatory system ineffective. Therefore a number of seminars need to be organised to build greater awareness on these issues among the different stakeholders, especially among the consumer organisations. Our experience showed that the consumer movement is not well developed in most of the 7-Up countries, and therefore are not even engaged in action on competition issues.

Another good way forward is to organise international well-designed and structured seminars where staff and members of the competition agencies are exposed to good and bad practices or successes and failures from other countries.

Thus regular seminars need to be organised for all stakeholders. Another good way forward is to organise international well-designed and structured seminars where staff and members of the competition agencies are exposed to good and bad practices or successes and failures from other countries. UNCTAD, WTO, OECD etc are already doing such programmes depending upon their available resources. It would be good, if such seminars are done by more professionally organised outfits who have experience of delivering trainings on economic issues.

8. Research

Research is extremely crucial for investigation and prosecution. Often cases can fail for want of adequate or even sufficient information and analyses. This can be quite crucial for determining the success of the competition regime and the concomitant internal confidence and external support. Very often, the competition and regulatory authorities find that the business entities are their only sources of information. Ironically these are the entities that are supposed to be regulated, and prosecuted when found engaged in anti-competitive practices. As a result, it has been seen frequently that there is not enough background material or competition agencies cannot do proper analysis of cases by virtue of which the prosecution fails or doesn't deliver the desired results.

Research is extremely crucial for investigation and prosecution. Often cases can fail for want of adequate or even sufficient information and analyses.

Some research is being done in countries like India and South Africa, but it is either esoteric or insufficient and thus of little use in competition law enforcement. In one case in Sri Lanka, when the competition agency was

asked for some background information on a sector, in turn they asked the 7-Up project partners' researcher⁹ to help them in analysis. Thus research needs to be conducted by the authority in house by engaging suitable staff. Where they face problems of finding suitable staff or do not have sufficient budgets, the job can be done through external agencies for which sufficient budget and freedom needs to be provided to the competition authorities.

Furthermore, as was seen in the case of South Africa, analysis of issues and sectors is done by the competition agency for further debate. In India, the Telecom Regulatory Authority is engaged in regular research and puts out Discussion Papers on specific issues of tariffs, new methods and standards. This too helps in building the competition culture in the country and leads to informed decision making in both regulatory capacity and suitable policy responses.

9. Awareness at the sub-national and users level

It is extremely important to build awareness and capacity at the sub-national and users level, especially in large countries like India, and to enable them to prosecute offenders. For example in India under the existing competition law, the state governments are also authorised to bring forward complaints to the competition authority but we have not come across a single case under the extant law, where such action was taken. Similarly, the central government is also empowered but no such instance has been reported. Only in one case, the central government's consumer affairs secretary sent a letter to the competition authority regarding airlines cartelising on fares, but nothing came out of it.

Many cases are reported on transporters unions operating as cartels at district level, but no action is taken because of the neo-criminal nature of the truck operators. A properly empowered transport office can bring these cases before the competition authority.

In local government construction works, contractors often collude to put in successful bids, which result in much higher costs. Therefore training of engineers in the public works departments on bid-rigging can help to bring these cases before the competition authority.

Tied sales is another malady, which is resorted to by all and sundry but hardly any action is taken on them. Goods and services retailer associations flagrantly violate the competition law by fixing prices. Whether it is the small convenience store or the cable operator, or the laundry. The list is huge.

10. International and regional cooperation

International cooperation is an essential element of any capacity building programme to provide resources for coping with financial problems, training needs and confronting cross border competition issues. In the case of South Africa the competition authority's beautiful premises were built with donations from Norway. This enables them to work efficiently. They are also able to organise many seminars and trainings from such donations raised from donors, which has helped them tremendously to build up a competition culture. On the contrary, the Zambian competition authority operates out of the main post office building on the 4th floor, whose lift has been out of order for many years. This has however not prevented them from being fairly effective, which is of course due to the dynamism of the chief executive of the competition authority.

International cooperation is an essential element of any capacity building programme to provide resources for coping with financial problems, training needs and confronting cross border competition issues.

The Tanzanian competition law was virtually a non-starter, which has now been accelerated by multiple grants from the DFID, SIDA and the World Bank.

India has now drafted a new law, which will be more in line with the changed economic scenario. It has been adopted by the parliament in the winter session of 2002. To implement the same properly, the Government of India has also expressed a need for capacity building.

Kenya, Sri Lanka and Pakistan are also in the process of enacting a new competition law, and will need to do capacity building programme in their countries to promote the competition culture. They too will require financial and technical support.

The four African countries in the 7-Up project along with other authorities in the region have set up a network forum of competition authorities to exchange information and experiences: Southern and Eastern African Competition Forum (SEACF). It covers Kenya, Malawi, Mauritius, Mozambique, Seychelles, Swaziland, South Africa, Tanzania, Zambia, Zimbabwe and the Secretariats of SADC and COMESA. Such a model is very good for promoting networking, information sharing, cooperation on action, and thus capacity building.

In most of the 7-Up countries, despite having a competition law, a healthy competition culture is yet to be built up. As a result people are unable to perceive the deleterious effects of anti-competitive practices.

In order to build a constituency the same approach also needs to be taken at the regional level, as many countries are integrating regionally. This will foster cooperation with other competition authorities to assist in confronting cross border competition issues. For example, the COMESA treaty requires common approaches on competition law and the adoption of a regional competition policy. It is understood that the COMESA is already engaged in developing a regional competition policy, the first draft of which is under debate. The CARICOM already has adopted a regional approach to a competition policy, though it has not yet blossomed fully.

11. Friends of competition

In the ultimate analysis, it is crucial to build up a constituency for competition in the country. In most of the 7-Up countries, despite having a competition law, a healthy competition culture is yet to be built up. As a result people are unable to perceive the deleterious effects of anti-competitive practices. Often consumers consider a business practice or a public policy measure as quite normal even if the practice has an adverse effect on competition. One of the ways to overcome this is to build a “friends of competition” brigade.

a) Strengthening the consumer movement: This can be done by resourcing and strengthening the capacity of consumer organisations and similar NGOs to do research and bring forward complaints before the competition authority. In India, this environment does exist but much more needs to be done. Often consumer organisations run from hand to mouth, or are managed by part time volunteers. Thus they cannot effectively participate in bringing forward complaints on anticompetitive behaviour. They need to be professionalised and resourced accordingly.

In the 7-Up countries, India and Pakistan have well funded consumer organisations, supported by DFID among other donors. In Sri Lanka and South Africa, the consumer movement is very weak, while Tanzania does not

even have a consumer group. In Kenya and Zambia there are dedicated activists struggling to establish a strong consumer group, and they should succeed. DFID, Southern Africa has expressed an interest in promoting the consumer movement in the region to deal with competition policy issues as well as a broad raft of economic reforms.

In South Africa, which has the best competition regime among the seven countries, the consumer movement is very weak. This leads to undesirable outcomes where people feel that the competition law will not help her/him. Thus the competition regime exists as an elite thing. A head of a consumer group, a lawyer in fact, has joined the competition agency as a professional. She was earlier a part time member of the Competition Tribunal.

In developed countries like the USA and UK, consumer and other specialised advocacy groups are quite active in bringing up anticompetitive issues. The EU has planned to provide both financial and technical support to consumer groups to intervene in merger cases.

b) Consumer protection elements in the competition law: Many competition agencies, such as in Australia, Bulgaria, Canada, Colombia, Peru, Poland, Russia, Tanzania, UK, US, and Zambia cover consumer protection also. That pays dividend to the competition agency. All these agencies have seen political goodwill that their consumer protection work generates and adds to the agency's competition mission.

A right to private action should be provided in the competition law, so that prosecution is not the exclusive preserve of the nominated agency.

In India, the former competition law: Monopolies and Restrictive Trade Practices Act also covered Unfair Trade Practices (consumer protection) and thus got a huge mileage in this work. The new law has dropped UTPs and proposes to transfer all pending cases to the fora under the Consumer Protection Act, which has a much wider and deep reach through out the country. While the new Competition Commission will have benches in the national capital and perhaps few in regional metropolitan cities, the Consumer Protection Act has forums at the district level, a state commission at the state capital and a National Commission at the national capital. The only problem is that while the competition agency has powers of interim injunction, the consumer fora do not have such a power until now. A case has been made out to grant such powers to the National Commission and the State Commissions, but not to the district forums.

c) Right to private action: Both the old and the new Indian competition law have provided powers to consumers, their organisations, businesses and their organisations, and the state and the central governments to file complaints. Such a right to private action should be provided in the competition law, so that prosecution is not the exclusive preserve of the nominated agency. This can greatly help overcome the lack of resources in the competition agency to analyse and prosecute anti-competitive behaviour.

d) National Competition Policy Council: One broad-based systemic issue which cropped up in Pakistan and India was to have a National Competition Policy Council. This should include all stakeholders and issues of a systemic nature affecting competition be brought before it for better understanding and appropriate recommendation to the government and/or the competition authority.

Flanking Measures

The 7-Up activities have succeeded in raising the ante on competition policy and law in all the targeted countries with the establishment of informal national reference and advocacy groups. They will now demand a better competition regime than what exists.

The OECD has established eight Global Forums to deepen and extend relations with a large number of non-OECD countries in various fields such as investment and competition

More such initiatives need to be promoted and supported by the international community to promote an effective competition culture in developing countries. The OECD is also engaged in building capacity of developing countries. It has established eight Global Forums to deepen and extend relations with a large number of non-OECD countries in various fields such as investment and competition.

The OECD Global Forum on Competition organises two meetings every year to share experiences on 'front burner' competition issues with a network of high level officials from over 55 countries. It also puts out a huge number of studies in this area which are very useful as resource and reference materials. The regular OECD committees: Trade Union Advisory Committee and the Business Advisory Committee, non government organisations such as the International Bar Association (IBA), Consumers International also participate along with international and regional organisations such as World Bank, UNCTAD, WTO, and COMESA and UEMOA.

UNCTAD is engaged in research and training of competition policy and government officials in a very exclusive manner.

UNCTAD is another international organisation which is engaged in research and training of competition policy and government officials in a very exclusive manner. Due to a large membership, it has a larger reach than OECD. It has adopted the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The Set) in 1980, which is reviewed every third year at a high level conference. Other than this, UNCTAD periodically organises intergovernmental group of experts meetings, to which non-government actors are also invited.

Efforts by non-governmental agencies such as: International Bar Association and Consumers International are quite worthy but much more needs to be done. Further, two focussed new initiatives will be quite welcome:

- International Competition Network (ICN-an informal body of competition authorities, with NGOs in subsidiary bodies, steered by the US and EU competition authorities) and
- International Network of Civil Society Organisations on Competition (INCSOC-an informal body of civil society organisations, research institutions, academics, media persons, lawyers, and parliamentarians with competition authorities and government departments as affiliate members. This has been floated by CUTS and other consumer organisations and research institutions from all over the world.)

Efforts by non-governmental agencies such as: International Bar Association and Consumers International are quite worthy but much more needs to be done.

When I write this, the ICN has established a Working Group on Capacity Building and Implementation of Competition Law under the joint chairmanship of the European Commission and the South African Competition Tribunal, which is targeting 15 developing and transition countries, including some from the 7-Up project. This working group should be coming out of a report by mid-2003. This document will be worth perusing. Further details can be obtained from their website at www.icn.org.

Other than ICN, both OECD and UNCTAD too have done much work in assessing the capacity building needs of competition agencies around the world. Their websites can be consulted at www.oecd.org and www.unctad.org.

The INCSOC too is undertaking a programme of a detailed assessment of the capacity building needs of civil society organisations on country-wise basis. A report is expected to be ready by end 2003. It can be reached at www.incsoc.net.

The Way Ahead

The UK's DFID, USAID and the Scandinavian countries are providing generous funding and technical support to many of these countries. The Canada-based International Development Research Centre and Canada International Development Agency too are very active in this area. On the other hand, international organisations such as UNCTAD, OECD, the World Bank, regional banks, the Commonwealth Secretariat and other developed country agencies like the two US competition agencies: Federal Trade Commission and the Department of Justice, Australian Consumer and Competition Commission are providing technical support too.

Strengthening the consumer movement will go a long way in promoting effective markets and good governance in developing countries, at substantially lower costs than similar, though required, efforts put into governmental or quasi-governmental initiatives.

All these initiatives need to be systematised, tailored and enhanced to promote the competition culture in the developing world. The design of the 7-Up project was to enhance learnings within and among developing countries, which also need to be replicated in other countries.

There were a few major departures in the 7-Up project from other types of technical assistance programmes. These included conducting research on the competition scenario, holding multi-stakeholder dialogues, and learning from each other's experiences, in a bottoms up approach, without any prescriptive approaches. Through this process the gains have been huge. The project itself has led to substantial capacity building in the targeted and other countries.

Clearly one strong need to promote competition culture in developing countries, and promote economic reforms generally, is to enable the consumer movement through resourcing and capacity building. Strengthening the consumer movement will go a long way in promoting effective markets and good governance in developing countries, at substantially lower costs than similar, though required, efforts put into governmental or quasi-governmental initiatives.

This paper may not have covered everything which is desirable to build capacity on a competition regime. Furthermore, one will need to tailor the programmes according to resource availability and priority in each country. But the imperative is to provide tailor-made capacity building programmes in each of the 7-Up and other developing countries.

Epilogue: The Future Challenges

As I wrote in the Prologue, this handbook is a good guide for all stakeholders to understand the needs of having an effective competition regime, and how to go about in achieving it. It is another milestone in our quest for an orderly market place, which respects consumer sovereignty. CUTS has travelled over twenty years in consumer activism, and concomitant research and advocacy. It is celebrating its 20th Anniversary in March 2003. In this context, it would be appropriate to reproduce a Message for the Anniversary Souvenir from Professor Frederic Jenny, my guru in competition policy, who has been relentlessly pursuing the spread of competition culture around the world. He writes:

In the ultimate analysis, CUTS must get the ear of the politicians to foster competition policy.

“My first interaction with CUTS dates back to the early nineties when I was invited to a conference on competition law and development in Delhi organized by Pradeep Mehta. It was a small conference but there were very influential people present and I was particularly impressed both with the level of sophistication and with the intensity of the discussion. I realized that CUTS was well informed, well connected in India, influential and a formidable advocate for competition and consumer policy.

Later on I read CUTS literature which I found quite balanced and placing competition issues in the larger context of development and consumer policy. I was then involved in the 7-Up project, which I think is one of the most interesting projects I have seen in recent years on two issues: the issues of competition policy and economic development, and the issue of how the goals of competition policy should relate to the socio-political context of the countries in which those policies are to be implemented. I was impressed both by the importance of the ideas underlying the project and its comparative nature and by the high level of professionalism and insight of the researchers selected in the seven countries.

How we do it is the challenge. It is possible.

In the ultimate analysis, CUTS must get the ear of the politicians to foster competition policy. It is listened to but not heeded by policy makers. Indeed CUTS has done well to push for competition policy with consumer organisations and competition authorities but this is not sufficient. It has to think of new strategies to get the political elite involved”.

Indeed the challenge before us is to reach out to the political elite in all countries to see the benefit of a competition law and policy. How we do it is the challenge. It is possible.

As a successful example of succeeding with the powers, while lobbying on consumer policy issues, let me recall a story of another comrade in arms: Dr Zafarullah Chaudhry of Gonoswasthya Kendra (Public Health Centre) in Dhaka, Bangladesh. In the 1980s, he was relentlessly pursuing the adoption of a Rational Drug Policy for Bangladesh. It was not an easy task, considering

the overpowering influence of the pharmaceutical lobby. He met the then President: General Ershad Mohammed, who had a tick in his left eye. Zafarullah alarmed Ershad that the tick was due to Ershad's consumption of entero-vioform, a drug banned in the west, to regulate his upset stomach. Voila, Ershad promptly signed on the dotted line.

Incidentally, Zafarullah had based his campaign on a committee report of India, which had recommended to the Government of India to adopt a rational drug policy and publish a list of essential drugs. In spite of vigorous campaigning by the Voluntary Health Association of India and other NGOs, alas, the report's recommendations were never accepted. One only wishes that there was a dedicated and informed activist like Zafarullah here and a target like Ershad in India at that time.

The Guidelines also ask Governments to have competition laws in place by following the principles laid out in the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, but many governments have not bothered to do so.

Having a list of essential drugs which are available as generic medicines at a low cost in the marketplace for the poor is one of the important recommendations of the UN Guidelines of Consumer Protection, 1985. But very few countries have actually brought in an essential drugs list.

The Guidelines also ask Governments to have competition laws in place by following the principles laid out in the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, but many governments have not bothered to do so. For example, when the WTO came into being in 1995 only about 35 countries had a competition law. Today, after seven years, nearly 100 countries have a competition law, with more in the queue.

Some people think that a competition law is a 'first world luxury'. They are highly mistaken. It is as much applicable in a poor country as it is in a rich country, but it will need to be adapted to the local scenario. Innovative ways will have to be evolved to design and implement an effective and appropriate competition law. In poor and small countries, the retail level abuses will be more important than industrial organisation questions, such as mergers and acquisitions. However marketing shenanigans will be ubiquitous. For instance, large companies may enter into price fixing arrangements to milk their customers. The same can happen in a village too.

Some people think that a competition law is a 'first world luxury'. They are highly mistaken. It is as much applicable in a poor country as it is in a rich country.

One interesting case of a restrictive business practice, that I came across in my career is that of an old illiterate widow who was cheated by a photographic studio by withholding her pictures. This happened in a village in Rajasthan, India, and there were only two such studios in the little town close to her village. She needed the pictures to affix on her loan papers from a development bank, to obtain cheap credit to sow her small farm. She went to the other studio, but did not succeed, as the fellow knew of her arrangements with the other one. Due to delay in getting the pictures in time, the soft loan could not be disbursed. Consequently, she had to borrow from the village moneylender at usurious rates to sow her fields, which could not be postponed.

Following this rip-off, she bumped into a consumer activist in the same area and narrated her woes. The activist filed a complaint at the local consumer forum, under the Consumer Protection Act, 1986, which has the authority to prosecute restrictive trade practices. She won and was compensated for the extra interest that she had to pay for this collusive action and violation of her rights. Since then, she has become a consumer activist herself. Illiteracy is not a stumbling block for her.

This was a micro example. However, at a macro level too, a small and poor country benefits from a competition law, by regulating the business behaviour of sellers and retailers. Many times the fear of the stick works more effectively than using the stick itself. Thus often the benefits of a law do not get reported.

However, competition laws in many countries are not really effective. It needs a committed polity, dedicated consumer movement and an honest bureaucracy to effectively implement the same. The law needs to be implemented, and the recommendations of this handbook will be very useful to organise the whole system.

We are available to speak and do what ever is necessary to help countries implement their laws.

The challenge in a developing country is to find ways as to how to shock the political elite, or even how to make it a political issue, so that governments act on protecting competition in the market place and not competitors!

Jaipur
January, 2003

Pradeep S Mehta
Secretary General

Further Readings

- 1) International Cooperation and Competition Policy, October 2002, Gesner Oliveira, presented at 'Brainstorming Meeting on Competition and Investment Issues' organised by CUTS under the Project on International Working Group on the Doha Agenda on 8-9th November 2002.
- 2) Technical Assistance and Capacity Building Programme, November, 2002, Faye Sampson, presented at 'Brainstorming Meeting on Competition and Investment Issues' organised by CUTS under the Project on International Working Group on the Doha Agenda on 8-9th November 2002.
- 3) UNCTAD Model Law on Competition, TD/RBP/CONF.5/7 (Geneva, 2000)
- 4) WTO, 2002, Support for Progressive Reinforcement of Competition Institutions in Developing Countries Through Capacity Building (WT/WGTCP/W/182)
- 5) WTO, 2002, Communication from the European Community and its Member States (WT/WGTCP/W/184)
- 6) "Capacity Building for Effective Competition Policy in Developing and Transition Countries", Contribution by the OECD Secretariat at the UNCTAD Intergovernmental Group of Experts 4th Session, Geneva, 3-5 July, 2002

CUTS Publications

- 1) "Pulling Up Our Socks", the final report of the 7-Up Project (2003)
- 2) Towards a Healthy Competition Culture... (2003)
- 3) Challenges in Implementing a Competition Policy and Law: An Agenda for Action (2002)
- 4) Competition Policy and Law Made Easy (2002)
- 5) All About Competition Policy & Law (2000)

Endnotes

- 1 The 7-Up Project has been extremely successful and there are plans to replicate the same in seven other countries of Africa. The main difference is that the new countries do not have a competition law, while the original 7-Up Mark-I countries had a competition law. The new project has been titled 7-Up Mark-II. A similar project is also on the anvil for seven countries in Asia, entitled 7-Up Mark III.
- 2 Tandon Rajesh (2002); *Voluntary Action, Civil Society and the State*; Mosaic Books, New Delhi.
- 3 Adapted from a presentation by Ricardo Melendez-Ortiz of International Centre for Trade & Sustainable Development, Geneva: “Contribution to the discussion on capacity building in the WTO”, 8 March, 2001.
- 4 Augustine Peter, Director, Trade Policy Division, Department of Commerce, Government of India in a presentation at the UNCTAD Intergovernmental Group of Experts 4th Session, Geneva, 3-5 July, 2002.
- 5 This part of the paper has been adapted from “Capacity Building for Effective Competition Policy in Developing and Transition Countries”, Contribution by the OECD Secretariat at the UNCTAD Intergovernmental Group of Experts 4th Session, Geneva, 3-5 July, 2002.
- 6 8-9 November, 2002.
- 7 Khemani, R. Shyam & M.A. Dutz, 1996. *The Instruments of Competition Policy & Their Relevance for Economic Development*, PSD Occasional Paper No. 26 (Washington, World Bank).
- 8 Russell Damtoft, Federal Trade Commission, USA in a personal communication to the writer.
- 9 Malathy Knight John, Research Fellow, Institute of Policy Studies, Colombo.