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At the Crossroads: Making Competition Law Effective in Pakistan Symposium on Competition Law and Policy in Developing Countries

Joseph Wilson

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At The Crossroads: Making Competition Law Effective In Pakistan

*Joseph Wilson**

I. Introduction	566
II. The Competition Regime: An Overview	567
A. History	567
B. Objective and Scheme of the MRTPO	568
1. Offences under the MRTPO	569
a. <i>Undue Concentration of Economic Power</i>	569
b. <i>Unreasonable Monopoly Power</i>	571
c. <i>Unreasonably Restrictive Trade Practices</i>	574
d. <i>Other Circumstances</i>	576
2. Mandatory Registration of Certain Undertakings, etc.	577
3. Undertakings Exempt from the Application of the MRTPO ...	578
C. Organization, Functions and Powers of the Authority	579
1. Qualifications of Members	580
2. Organizational Framework	580
a. <i>Research and Investigation Wing</i>	580
b. <i>Registration Wing</i>	580
c. <i>Management Information Wing</i>	581
d. <i>Administration Wing</i>	581
3. Functions of the Authority	581
4. Powers of the Authority	581
5. Appeal from the Orders of the Authority	582
D. Factors Impeding Implementation of the MRTPO	583
1. Industrial, Social and Legal Framework	583
2. Substantive Provisions of the MRTPO	584

* B.A., LL.B. (Punjab); LL.M. (Georgia); LL.M. D.C.L., (McGill); Assistant Professor of Law, Lahore University of Management Sciences, Lahore, Pakistan. The author wishes to thank his wife, Saneeta Hina Wilson, for her patience during the course of writing of this article, particularly since it was right after their wedding. And to Haroon Mumtaz and Nadia Sattar for their research assistance.

3. Institutional Capacity of MCA	584
4. Enforcement Record	585
a. <i>Cement Cartel: Chronology</i>	587
b. <i>Other Cartels</i>	589
5. Concluding Remarks	589
III. The Challenge Ahead: Making A Competition Regime Effective	590
A. The Proposed Law	590
B. Determinants of an Effective Competition Authority	591
1. Qualified Leadership	591
2. Independence	592
3. Transparency	592
4. Maintenance of Databases	592
5. Annual Review of Functioning of Agency	593
6. Human Resource Audit	593
7. Comparative Study	594
8. Competition Advocacy	594
IV. Conclusion	594

I. INTRODUCTION

Just as the first merger wave of the late 1880's in the United States resulted in the birth of Sherman Act,¹ the recent global merger wave of the early 2000's, coupled with the growing liberalization of trade, prompted a large number of developing and transitional economies to adopt competition laws.² Pakistan is one of the few developing countries with a competition law in place for more than three decades: the Monopolies and Restrictive Trade Practices Ordinance of 1970 ("MRTPO" or the "Ordinance"). While the Ordinance contained fairly strong provisions, the agency entrusted to implement it, the Monopolies Control Authority ("MCA"), was rendered clawless by the social and legal framework, in addition to its staff's lack of expertise. This deficiency, combined with the changes in the relevant national and global markets through increased trade across nations, and the growing presence and power of the multinational corporations ("MNCs")³ has created an urgent need to overhaul the

¹ Sherman Antitrust Act, ch. 647, 26 Stat. 209, (1890) (codified as amended at 15 U.S.C.A. §§ 1-7 (2000)).

² JOSEPH WILSON, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAW 62-64 (2003); see also William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997).

³ As stated by Wilson

The growing power of corporations' vis-à-vis countries is arguably skewing the balance

competition regime in Pakistan. Indeed the government of Pakistan, as this paper goes to press, is considering repealing the MRTPO and implementing a new Competition Act in its place.⁴ Similarly, the MCA will be replaced by a new National Competition Commission.⁵

This paper is divided into two parts. Part II of the article canvasses the history of the MRTPO, describes its various provisions, outlines the organizational framework of the MCA, and documents its enforcement record. Part III makes recommendations for ensuring the effectiveness of the new Competition Authority in implementing the new Competition Act.

II. THE COMPETITION REGIME: AN OVERVIEW

A. History

The 1960's was a decade of rapid economic growth in Pakistan, which at the same time became concentrated in the hands of twenty family groups.⁶ These groups collectively held "two thirds of the industrial assets, 80 percent of banking and 70 percent of insurance in Pakistan."⁷ This growing concentration of market-shares in the hands of a few prompted the government to commission a detailed study into the trade, commerce, and industry of the country. To this end, in 1963 the government constituted an Anti-Cartel Laws Study Group,⁸ which in its report found that certain monopolies, cartels, and vertically-integrated situations existed in the country. On the basis of the Anti-Cartel Laws Study Group report, a draft anti-monopoly and anti-cartel law was published in the Gazette of Pakistan

between public and private needs. Big corporations exert disproportionate clout over national legislation. For example, Jeffrey Garten believes that Boeing-McDonnell Douglas exerts formidable control over U.S. trade policy. And companies like Exxon-Mobil Corp. "deal with oil-producing countries almost as equals, conducting the most powerful private diplomacy since the British East India Company wielded near-sovereign clout throughout Asia."

WILSON, *supra* note 2, at 43 (footnotes omitted).

⁴ Khaleeq Kiani, *National Competition Commission to Replace MCA*, THE DAWN, Dec. 3, 2005, available at <http://www.dawn.com/2005/12/03/eb7.htm>.

⁵ *Id.*

⁶ UL HAQ, MEHBUB, THE POVERTY CURTAIN: CHOICES FOR THE THIRD WORLD 5-6 (1976). See also Pakistan: *Competition and Price Regulations*, EIU VIEWSWIRE, Oct. 18, 2005, available at 2005 WLNR 16882705 [hereinafter *Pakistan: Competition*] ("No major monopolies remain in Pakistan (apart from public-sector utilities), despite the pre-1970s dominance of cartels and monopolies controlled by a handful of powerful families.")

⁷ *Id.*

⁸ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GLOBAL FORUM ON COMPETITION: ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS, CONTRIBUTION FROM PAKISTAN 2, (Feb. 9, 2005), available at <http://www.oecd.org/dataoecd/14/44/19936969.pdf> [hereinafter CONTRIBUTION FROM PAKISTAN].

(Extraordinary) on June 28, 1969 for public comment.⁹ On February 26, 1970, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 ("MRTPO" or the "Ordinance") was promulgated.¹⁰ It came into force on August 17, 1971.¹¹ Section 8 of the MRTPO stipulated the establishment of the Monopoly Control Authority ("MCA") for the implementation of the MRTPO. The MCA was constituted the same day the MRTPO became effective.¹²

B. Objective and Scheme of the MRTPO

The MRTPO was the first piece of legislation relating to competition law in Pakistan.¹³ While it was enacted some three years prior to the present day Constitution of Pakistan, constitutional ground for such legislation was laid in Article 38(a), which provides for "preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest."¹⁴ The Article proscribes concentration of power if it deters general interest. Although general interest is not defined in the Constitution or interpreted by the courts, it arguably could encompass "consumer welfare"—the very rationale of competition laws.¹⁵ Consumer welfare, a term coined by Judge Robert Bork, means things that are good for consumers, such as "low prices, innovation, and choice among differing products."¹⁶ It should be noted, however, that "consumer welfare" under Bork's definition also

⁹ Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pakistan) (Published in the Gazette of Pakistan, Extraordinary, Feb. 26, 1970) [hereinafter MRTPO].

¹⁰ *Id.*

¹¹ *In re Messrs Jupiters Textile Mills Ltd.*, Monopoly Control Authority, 1986 CLC 2744 at 2745.

¹² CONTRIBUTION FROM PAKISTAN, *supra* note 8, at 2.

¹³ *See Sanaullah Woolen Mills Ltd. v. Monopoly Control Authority*, PLD 1987 Supreme Court 202, 208.

¹⁴ The State shall:

[S]ecure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

Pak. Const. (1973), art. 38 (a).

¹⁵ "Competition" may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree. Conversely, "monopoly" and "restraint of trade" would be terms of art for situations in which consumer welfare could be so improved, and to "monopolize" or engage in "unfair competition" would be to use practices inimical to consumer welfare. ROBERT H. BORK, *THE ANTITRUST PARADOX*, 61 (1978).

¹⁶ *Id.*

includes “producer welfare”—that is, the benefit that accrues to suppliers of goods and services.¹⁷ The MRTPO, however, does not have consumer welfare as its underlying objective. The circumstances leading to its legislation prompted the drafters to have diffusion of economic power as the primary purpose of the Ordinance.

1. Offences Under the MRTPO

Since the objective of the MRTPO is to diffuse economic power, it therefore defined the offences that thwart that goal. The offences under the MRTPO are: (i) undue concentration of economic power; (ii) growth of unreasonable monopoly power; and (iii) unreasonably restrictive trade practices.¹⁸ It also discourages trade practices which prevent, restrain, or lessen competition.¹⁹

a. Undue Concentration of Economic Power

Undue concentration of economic power is not defined by the Ordinance. However, Section 4 lists the circumstances under which undue concentration of economic power exists.²⁰ First, it provides an assets-based

¹⁷ See WILSON, *supra* note 2, at 18.

¹⁸ MRTPO, *supra* note 9 at pmb. & § 3.

¹⁹ See *id.* § 2(n); see also Haji Ismail Dossa v. Monopoly Control Authority, PLD 1984 Karachi 315, 323. The objects of the Ordinance were, *inter alia*:

[T]he prevention of undue concentration of economic power in the hands of individuals and their families, the sharing of benefits of industrial development by the general public, the elimination of largely narrow family oriented attitudes of the entrepreneurs and the subsequent establishment of professional management in control of enterprises then managed and controlled by big business family groups.

Rafhan Maize Products Company Ltd. v. Monopoly Control Authority, PLD 1986 Lahore 346, 354.

²⁰ The MRTPO states that undue concentration of economic power will be deemed to exist if:

(a) there is established, run or continued an undertaking the total value of whose assets is not less than [one hundred and fifty million] or such other amount as the Authority may by rule prescribe, and which is-

(i) not owned by a public company, or

(ii) is owned by a public company in which any individual holds or controls shares carrying not less than fifty percent., or such other percentage as the Authority may by rule prescribe, of the voting power in the undertaking;

(b) there are any dealings between associated undertakings which have or are likely to have the effect of unfairly benefiting the owners or shareholders of one such undertaking to the prejudice of the owners or shareholders of any other of its associated undertakings.

MRTPO, *supra* note 9, § 4. See also Monopoly Control Authority (Value of Assets) Rules,

test for any private or public company in which an individual owns more than a fifty per cent share and the total “value of assets”²¹ of that company is not less than one hundred and fifty million Pakistani Rupees (or US \$2.5 million).²² The MCA is empowered to modify the total value of assets threshold from time to time. Second, Section 4 lists the situation in which:

there are any dealings between associated undertakings which have or are likely to have the effect of unfairly benefiting the owners or shareholders of one such undertaking to the prejudice of the owners or shareholders of any other of its associated undertakings.²³

Section 2(b) of the MRTPO defines “associated undertakings” as:

any two or more undertakings interconnected with each other in the following manner, namely: —

- (i) if a person who is the owner or a partner, of an undertaking or who directly or indirectly holds or controls shares carrying not less than thirty per cent of the voting power in such undertaking, is also the owner or a partner, of another undertaking or, directly or indirectly, holds or controls shares carrying not less than thirty percent of the voting power in that undertaking; or
- (ii) if the undertakings are under common management or common control or one is the subsidiary of another.²⁴

The second situation listed by Section 4 is reflective of abuse of position in corporate control rather than undue concentration of economic power. Section 4(b) protects a specific group of people, whereas the notion of “undue concentration of economic power” is used to protect the general public rather than a subset of it. Although misplaced in the scheme, Section 4(b) is useful and may be placed under a proper heading in the new

1991 (Pakistan) (English text published in the Gazette of Pakistan, Extraordinary, Part II, April 11, 1991).

²¹ “[V]alue of assets’, in relation to an undertaking, means the value of assets of the undertaking at cost less depreciation at the normal rates at which depreciation is calculated for purpose of assessment of income-tax.” MRTPO, *supra* note 9, § 2(o). See also Sanaullah Woolen Mills Ltd., PLD 1987 Supreme Court at 204 (“The term ‘value of assets’ includes not only fixed assets but also current assets.”); *id.* at 213 (“Assets in their entirety have to be taken into account, that being the sole criterion for determining economic power of undertaking.”).

²² Calculated using the exchange rate as of Jan. 2006, one U.S. Dollar is equal to sixty Pak Rupees (US \$1 = PRK 60).

²³ MRTPO, *supra* note 9, § 4.

²⁴ *Id.* § 2(b). Section 2(m) defines “undertaking” as “any concern, institution, establishment or enterprise engaged in the production, supply or distribution of goods, or in the provision or control of any service.”

Competition Act.

Where the Authority finds undue concentration of economic power under Section 4, it may:

- (i) require the firms or companies concerned, not being public limited companies, to be converted, within such time and in such manner as may be specified in the order, into public limited companies;
- (ii) require the controlling shareholders of the public limited companies concerned to offer such part of the stocks and shares held by them within such time and in such manner as may be specified in the order to the general public, including the National Investment Trust and an investment institution established or controlled by Government;
- (iii) prescribe the circumstances in which and the conditions on which the associated undertakings concerned may deal with each other.²⁵

b. Unreasonable Monopoly Power

Section 5 lists the circumstances whose presence would constitute unreasonable monopoly power.²⁶ In effect, Section 5 is the merger control

²⁵ *Id.* § 12(a).

²⁶ The MRTPO states:

(1) Unreasonable monopoly power shall be deemed to have been brought about, maintained and continued if—

(a) there has been created or maintained any such relationship between two or more undertakings as makes them associated undertakings where they are competitors in the same market and together produce, supply, distribute or provide not less than [one-third] of the total goods or services in such market;

(b) there has been any acquisition by one person or undertaking of the stock or assets of any other person or undertaking, or any merger of undertakings, when the effect of the acquisition or merger is likely to create monopoly power or to substantially lessen competition in any market, including any acquisition which creates any such relationship as is referred to in clause (a);

(c) any loan is granted by a bank or insurance company to any of the associated undertakings of amounts greater or on terms more favourable than for loans made available to other undertakings in comparable situations, or any loan is granted by a bank or insurance company to a person undertaking not associated with it on the condition or understanding that the borrower or any of its associated undertakings will make any loan to a person or undertaking associated with the lender.

(2) No such relationship, acquisition, merger or loan as is referred to in subsection (1) shall be deemed to have the effect of bringing about, maintaining or continuing unreasonable monopoly power if it is shown—

(a) that it contributes substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

law of Pakistan. Section 5(1)(a) proscribes contractual arrangements between competitors in a relevant market whereby they become “associated undertakings” and enjoy an aggregate market share of 33.33% in the market with respect to the production, supply, and distribution of goods and services.²⁷ Section 5(1)(a) deals with the market share of associated undertakings only and does not apply to a single firm having more than one-third of the market share.

Section 5(1)(b), akin to Section 7 of the Clayton Act of the United States,²⁸ prohibits the acquisition of stocks and assets of one person or undertaking by any other person or undertaking when the effect of such acquisition is “likely to create monopoly power or to substantially lessen competition.”²⁹ Monopoly power is defined in Section 2(g) as “the ability of one or more sellers in a market to set non-competitive prices or restrict output without losing a substantial share of the market or to exclude others from any part of the market.”³⁰ Substantial lessening of competition is not defined by the Ordinance, nor has any court in Pakistan interpreted its meaning thus far. The Ordinance does not require any pre-merger notification; however, certain undertakings holding twenty per cent or more market share are required to be compulsorily registered with the Authority pursuant to Section 16 of the Ordinance.³¹ If such a registered undertaking becomes a party to a merger transaction, it will need to give prior notice of a merger proposal to the MCA.³² Undertakings not registered with the Authority may, however, seek advice from the Authority, under Section 10(d), as to the consistency of their merger proposal with the provisions of the Ordinance or any rules made thereunder.³³

Section 5(1)(c) proscribes the grant of a loan by a bank or an insurance company (collectively referred to as a “financial institution”) to any of its associated undertakings at a below-market rate.³⁴ It also prohibits the grant of a loan to any undertaking which is not associated with that financial institution when the loan is conditioned on the undertaking subsequently extending the loan to the financial institution’s associate undertaking. The

(c) that the benefits of such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.

Id. § 5.

²⁷ *Id.* § 5(1)(a).

²⁸ Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 USC § 12 (1982)).

²⁹ MRTPO, *supra* note 9, § 5(b).

³⁰ *Id.* § 2(g).

³¹ *Id.* § 16.

³² *Id.* § 10.

³³ *Id.* § 10(4); *see also* Brooke Bond Pak. Ltd. v. Aslam Bin Ibrahim, 1997 CLC 1873 (Karachi).

³⁴ *Id.* § 5(1)(c).

objective of this provision is to prevent “price discrimination” by giving undue competitive advantage to undertakings associated with a financial institution over other undertakings, which are not associated with such institutions.

Section 5(2) provides an efficiencies defense to a merger which would otherwise be anti-competitive.³⁵ In addition, it provides an exception to a merger that would result in a stronger national firm in the business of exporting goods. While this provision is intended to make national firms stronger in international market, such mergers may now be reviewed by countries where the goods are exported under the “effects test.”³⁶ Finally, it provides an exception for mergers that result in or lead to technical progress.³⁷

In addition to the above exceptions, the merging parties have to prove that such efficiencies or promotion could not reasonably have been achieved by less anti-competitive means, and that such efficiencies and promotion clearly outweigh the adverse effects on competition.³⁸ If the Authority believes that unreasonable monopoly power exists, it may:

- (i) require the person or undertaking concerned to divest himself of the ownership of any stock or shares or other beneficial interest in any undertaking or of any assets within such time and under such conditions as may be specified in the order;
- (ii) require the person concerned to divest himself of any position held by him as an officer, director or partner in any undertaking with such time and under such conditions as may be specified in the order;
- (iii) require the person or undertaking concerned to divest himself or itself of the management or control of any undertaking within such time and under such conditions as may be specified in the order;
- (iv) prohibit the person or undertaking concerned from acquiring the stock or assets of, or the undertaking from merging with, any other undertaking;
- (v) limit the total loans which may be made by any bank or insurance company to any single individual or undertaking, or to any undertaking associated with such bank or insurance company;
- (vi) limit the investments of any undertaking engaged in the banking, investment or insurance business;
- (vii) require the person or undertaking concerned to take such actions specified in the order as may be necessary to restore competitive prices and eliminate restrictions on output or entry of competitors in

³⁵ MRTPO, *supra* note 9, § 5(2).

³⁶ WILSON, *supra* note 2, at 2.

³⁷ MRTPO, *supra* note 9, § 5.

³⁸ *Id.* § 5(2)b–c.

the market.³⁹

Section 5 has certain pitfalls. It defines monopoly power in terms of the market share of associated undertakings alone and fails to take account of market concentration. The calculation of market concentration is an important index to ascertain whether the merger will be anti-competitive.⁴⁰ Furthermore, in 1996 the MCA framed the Monopoly Control Authority (Computation of Market Shares) Rules for determining market share.⁴¹ The bases provided in the rules are simplistic and fail to give an accurate count of the market shares.⁴² In addition, the Ordinance defines “market”⁴³ in terms of geographic region only and fails to take into consideration the “relevant product market” dimension of a market.

c. Unreasonably Restrictive Trade Practices

Section 2(n) of the Ordinance defines “unreasonably restrictive trade

³⁹ *Id.* § 12(b).

⁴⁰ In the U.S. and other countries whose competition laws are modeled after the U.S., Herfindahl-Hirschman Index (HHI) is employed for ascertaining the market concentration, which gives importance to the market share of each firm in the relevant market. The HHI is calculated by squaring the market share of all firms in the market and then summing the squares. *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.5 (1997 rev. ed.), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

⁴¹ The Monopoly Control Authority (Computation of Market Shares) Rules, 1996 (Pakistan) (English text published in the Gazette of Pakistan, Extraordinary, Part II, Nov. 26, 1996).

⁴² The rules state:

For the purposes of the Monopolies and Restrictive Trade Practices (control and Prevention) Ordinance, 1970 (V of 1970) the information collected through the following sources shall be utilized for determining the market share of an undertaking(s) beside the data published in the Monthly Statistical Bulletin of the Federal Bureau of Statistics of the Federal Government.

- (i) Information supplied by the undertaking(s);
- (ii) Information available with the Ministries/Division and other Department of the Federal Government or the Provincial Government particularly their annual reports, periodic economic survey, data base for monitoring economics activities (particularly database of C.B.R. for industrial production and commercial activities/trade flows), etc., etc.;
- (iii) Information published in the periodical and newspapers specializing in surveillance and monitoring of the economic activities;
- (iv) Information supplied or published by the trade associations.

Id. § 3.

⁴³ MRTPO, *supra* note 9, § 2(f) (“‘Market’ in relation to any goods or services, means the geographic region in which competition in the production or sale of such goods or the provision of such services takes place.”).

practice” as “a trade practice which has or may have the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner.”⁴⁴ Section 6 lists trade practices which are considered unreasonably restrictive.⁴⁵

Section 6(1)(a) prohibits agreements between actual or potential competitors for price fixing,⁴⁶ market division,⁴⁷ limiting output,⁴⁸ limiting

⁴⁴ MRTPO, *supra* note 9, § 2(n).

⁴⁵ The MRTPO states:

(1) Unreasonably restrictive trade practices shall be deemed to have been resorted to or continued if there is any agreement—

(a) between actual or potential competitors for the purpose or having the effect of—

(i) fixing the purchase or selling prices or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services;

(ii) dividing or sharing of markets for any goods or services;

(iii) limiting the quantity or the means of production, distribution or sale with regard to any goods or the manner or means of providing any services;

(iv) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of services;

(v) excluding by means of boycott any other person or undertaking from the production, distribution or sale of any goods or the provision of any services;

(b) between a supplier and a dealer of goods fixing minimum resale prices, including—

(i) an agreement with a condition for the sale of goods by a supplier to a dealer which purports to establish or provide for the minimum prices to be charged on the resale of the goods in Pakistan; or

(ii) an agreement which requires as a condition of supplying goods to a dealer to the making of any such agreement;

(c) which subjects the making of any agreement to the acceptance by suppliers or buyers of additional goods or services which are not by their nature or by the custom of the trade, related to the subject-matter of such agreement.

(2) No such agreement as is referred to in subsection (1) shall be deemed to constitute an unreasonably restrictive trade practice if it is shown—

(a) that it contributes; substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

(c) that the benefits from such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.

Id. §6.

⁴⁶ A horizontal price fixing agreement among competitors exists if it is formed to raise, depress, fix, peg, or stabilize the price of a commodity. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

⁴⁷ THOMAS V. VAKERICS, *ANTITRUST BASICS* § 6.02 (1985) (“Agreements between competitors to divide markets include agreements not to compete with each other in: (i) certain specified geographic areas or territories; (ii) certain customers or classes of

technical development or investment, and boycotts.⁴⁹ Cartels fall within the ambit of Section 6(1)(a). Section 6(1)(b) prohibits vertical price fixing, that is, agreements between a supplier and dealer of goods to set minimum prices at which goods will be resold. Section 6(1)(b) applies only if the goods are sold in Pakistan.⁵⁰ Section 6(1)(c) prohibits “tying arrangements” or tied-selling.⁵¹

Section 6(2) provides similar exceptions and conditions for allowing restrictive trade practices as those provided by section 5(2) above. Where the Authority believes that unreasonably restrictive trade practices are being carried out, it may:

- (i) require the person or undertaking concerned to discontinue or not to repeat any restrictive trade practice and to terminate or modify any agreement relating thereto in such manner as may be specified in the order;
- (ii) require the person or undertaking concerned to take such action specified in the order as may be necessary to restore competition in the production, distribution or sale of any goods or provision of any services.⁵²

d. Other Circumstances

Section 7 of the Ordinance empowers the Authority to prescribe circumstances and conditions, in addition to those listed in Sections 4 through 6, under which “undue concentration of economic power” and/or “unreasonable monopoly power” shall be deemed to exist, and to list trade practices which shall be deemed to be “unreasonably restrictive.”⁵³ Before prescribing such circumstances, conditions, and practices by General Order, the Authority must be satisfied that such prescription is in the public interest and shall notify all persons and those undertakings likely to be affected by such General Order, by publishing the draft General Order in the official Gazette for public comment and consultation.⁵⁴

customers; and (iii) the manufacture or sale of certain products or types of products.”).

⁴⁸ An agreement between competitors to limit output or production is considered illegal because it reduces the supply of a product or service, which then increases its price.

⁴⁹ WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 1:3 (1984) (“Boycotts typically involve a situation in which competing firms with shared market power exploit this power to cut off a competitor’s access to a critical resource, source of supply, or customer base necessary to enable the boycotted firm to compete.”).

⁵⁰ MRTPO, *supra* note 9, § 6(1)(b).

⁵¹ HOLMES, *supra* note 49. (“A tying arrangement is one in which the availability of one item (the ‘tying’ item) is conditioned upon purchase of another item (the ‘tied’ item) from the seller, or upon agreeing to not purchase the tied item from the seller’s competitors.”).

⁵² MRTPO, *supra* note 9, § 12(c).

⁵³ *Id.* § 7.

⁵⁴ *Id.*

2. Mandatory Registration of Certain Undertakings, etc.

Section 16 mandates certain agreements, individuals, and undertakings which are in situations that are likely to represent concentration of market power to register with the Authority.⁵⁵ These situations include: (i) when an undertaking produces, distributes, sells, or provides not less than one-

⁵⁵ The MRTPO states:

(1) In order that information relevant to the performance of its functions under this Ordinance is available to the Authority, the following undertakings, individuals and agreements shall be registered with the Authority in such manner as may be prescribed by rules, namely:—

(a) An undertaking which, during the next preceding calendar year produced, distributed, sold or provided not less than one-third of the total production or supply of any goods or services.

(b) Associated undertakings engaged in the same line of business, which during the next preceding calendar year produced, distributed, sold or provided not less than [one-third] of the total production or supply of any goods or services.

(c) An undertaking which during the next preceding calendar year, by itself or together with its associated undertaking, both produced and distributed by wholesale or by retail or by both not less than one third of the total production and supply of any goods.

(d) An undertaking which is not owned by a public company and the total' value of the assets of which is not less than [fifty million] rupees.

(e) An undertaking which, by agreement or otherwise, establishes minimum resale prices for retailers or wholesalers with regard to goods which it produces or distributes.

(f) An undertaking which, by itself or together with its associated undertaking, is the sole distributor or supplier for more than one undertaking of any goods or services.

(g) A bank, investment company or insurance company which, in relation to any other undertaking, is an associated undertaking.

(h) An individual who holds or controls, whether directly or indirectly, shares carrying not less than fifty per cent. of the voting power in undertakings owned by a public company the total value of the assets of which is not less than fifty million rupees.

(i) An agreement for any such acquisition or merger as is referred to in clause (b) of sub-section (1) of section 5.

(j) An agreement of the nature referred to in sub-section (1) of section 6.

(k) An agreement for the distribution or sale of any goods which directly or indirectly,—

(i) limits the areas in which, or the persons to whom, the product may be re-sold;

(ii) prohibits or restricts the distribution or sale of other goods by the distributor;

(iii) limits the persons through whom the distributor may distribute or sell such goods.

(l) Any licence of patents or technology which limits the freedom of the licensee to use such patents or technology in the manufacture of any goods or to sell the goods produced under such licence at such prices, in such areas, to such persons and for such uses as the licensee may choose, or which limits the freedom of the licensor to grant additional licences to such persons and on such terms as he may choose.

(m) Such other persons, undertakings, agreements or franchise as the Authority may by rule prescribe.

third to the production or supply of a particular good or services; (ii) when associated undertakings competing in the same market and collectively providing at least twenty percent of any goods or services in that market; (iii) when an undertaking solely, or together with its associate undertaking, produces and distributes, by whole or retail, not less than twenty percent of the total production and supply of any good within a province; (iv) when a private undertaking's total value of assets is not less than one hundred and fifty million rupees; (v) when an individual holds more than a fifty percent share in a public undertaking whose total value of assets is not less than one hundred and fifty million rupees; (vi) when an undertaking establishes minimum retail prices for retailers and wholesalers.⁵⁶ Section 16 requires merger, market division, and exclusive dealing agreements to be registered with the Authority.⁵⁷

3. Undertakings Exempt From the Application of the MRTPO

Section 25 exempts certain undertakings and activities from the application of the MRTPO, such as:

- i. an undertaking owned by a federal or provincial government;
- ii. an undertaking owned by a corporate body established by government or whose Chief Executive is appointed by or with the approval of the federal or provincial government;
- iii. anything done by a person or an undertaking in pursuance of any order by the federal or provincial government;
- iv. anything done by a "trade union" or its members for carrying out its purpose;⁵⁸
- v. activities of certain industries which are regulated by industry-specific regulators.⁵⁹

Most developed competition regimes have provided exemptions from the

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The Industrial Relations Ordinance defines "trade union" as:

[A]ny combination of workers formed primarily for the purpose of furthering and defending the interests and rights of workers in any industry or establishment and includes an industry-wise federation of two or more collective bargaining agent unions and a federation at the national level of ten or more collective bargaining agent unions.

Industrial Relations Ordinance § 2(xxix) of 2002 (Pak.) (English text published in the Gazette of Pakistan, Extraordinary, Part I, Oct. 26, 2002).

⁵⁹ Examples of industry-specific regulators in Pakistan are: the National Electric Power Regulatory Authority (NEPRA); Pakistan Telecommunications Authority (PTA); Oil and Gas Regulatory Authority (OGRA); and Pakistan Electronic Media Regulatory Authority (PEMRA).

competition laws to government bodies, certain industries, and activities.⁶⁰

The first three exemptions are arguably akin to the “state action” exemption to the antitrust laws recognized by the U.S. Supreme Court in *Parker v. Brown*.⁶¹ While state action exemptions are legitimate and may be allowed in certain situations, such exemptions should not be available to government-owned undertakings where they are competing and doing business in a market with private undertakings.

Exempting trade unions (or labor unions) from the reach of competition law has precedents in developed competition regimes. The rationale adduced for such exemptions is that employee collective action will strike a balance between the bargaining power of the labor vis-à-vis that of the management of the undertaking.⁶²

The last exemption avoids any potential conflict between the provisions of the MRTPO and those of other statutes regulating certain industries.

C. Organization, Functions, and Powers of the Authority

Section 8 of the MRTPO provides for the constitution of the Monopoly Control Authority. It provides that the Authority shall be composed of no less than three members, one of whom shall serve as the Chairman of the

⁶⁰ “Since 1914, the U.S. Congress’ focus has been on writing exceptions to the Sherman Act’s coverage and other American antitrust statutes. This has led to the isolation of several industries and activities from the reach of U.S. antitrust laws.” Lawrence L.C. Lee, *Taiwan’s Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law*, 6 IND. INT’L & COMP. L. REV. 583, 603 (1996). “For example, public utilities, broadcasters, common carriers, banking and financial enterprises, as well as professional baseball organizations, have been held largely exempt from antitrust laws.” *Id.* at 603, n.136.

⁶¹ *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 277 (1978). (“*Parker v. Brown* involved a challenge to a California program which restricted the marketing of raisins in order to maintain prices. The Supreme Court upheld the program, holding that the Sherman Act, 15 U.S.C. §§ 1–7 (1976), was not intended to prohibit state-imposed restraints of trade.”).

⁶² “Both a statutory and a non-statutory exemption protect labor unions from antitrust prosecution.” Davidson M. Douglas, *Labor Unions in the Boardroom: An Antitrust Dilemma*, 92 YALE L.J. 106, 120 (1982).

Believing that employee collective action served a valuable function in equalizing bargaining power between labor and management, Congress explicitly exempted labor unions from antitrust prosecution under the Clayton Act in 1914. Section 6 of the Act states that “[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. 15 U.S.C. § 17 (1976).”

Id. at 121, n.64.

Authority.⁶³ The members of the Authority are appointed by the Federal Government.⁶⁴

1. Qualifications of Members

Section 8 does not require any specific expertise or professional qualifications to become a member of the Authority. It prohibits a person to be appointed as a member if he has or acquires any financial interest that is likely to affect adversely his ability to perform his functions as a member.⁶⁵ Before assuming office, each member is required to make a vow of secrecy and fidelity to the Authority.⁶⁶ Members are appointed for a term of five years.⁶⁷ In case a member dies, resigns, or otherwise ceases to hold office before the end of his term, the vacancy shall be filled by appointment of another member for the remainder of the term of the member vacating the office.⁶⁸

2. Organizational Framework

The MCA is organized into four wings:

a. Research and Investigation Wing

The Research and Investigation wing is responsible for conducting research on the cases which fall within the purview of the Ordinance. It also conducts comparative studies of other jurisdictions' competition regimes and keeps track of developments in multilateral organizations, such as the World Trade Organization ("WTO") and the International Competition Network. It also regularly monitors the prices of selected items in the national markets.⁶⁹

b. Registration Wing

The Registration Wing registers individuals, undertakings, and agreements under section 16 of the Ordinance.⁷⁰ It renders opinions to other wings of the Authority, handles court cases, and prepares reference for the Law Division of the Federal Government.⁷¹

⁶³ MRTPO, *supra* note 9, § 8(1).

⁶⁴ *Id.*

⁶⁵ *Id.* § 8(2).

⁶⁶ *Id.* § 8(3).

⁶⁷ *Id.* § 8(4).

⁶⁸ *Id.* § 8(5).

⁶⁹ 1997 GOV'T OF PAK. MONOPOLY CONTROL AUTHORITY ANN. REP. [hereinafter 1997 ANN. REP.].

⁷⁰ *See supra* Section II(B)(1)(b).

⁷¹ 1997 ANN. REP., *supra* note 69.

c. Management Information Wing

The Management Information Wing ("MIS") maintains a database on undertakings, individuals, and agreements for monitoring and policy purposes.⁷² It collects, compiles, and updates data on various industrial sectors. In practice, however, data is not obtained on a regular basis; rather, case-specific information is collected as required.⁷³

d. Administration Wing

The Administration Wing provides administrative support to staff and officers of the Authority.⁷⁴ It is also responsible for managing the accounts of the MCA, preparing annual budgets,⁷⁵ and ensuring disbursement of funds.

3. *Functions of the Authority*

Section 10 of the Ordinance lists the following functions of the Authority:

- (a) to register undertakings, individuals and agreements;
- (b) to conduct enquiries into the general economic conditions of the country with particular reference to the concentration of economic power and the existence or growth of monopoly power and restrictive trade practices;
- (c) to conduct such enquiry into the affairs of any undertaking or individual as may be necessary for the purposes of [the] Ordinance;
- (d) to give advice to persons or undertakings asking for the same as to whether any actions proposed to be taken by such person or undertaking are consistent with the provisions of [the] Ordinance, or any rules or orders made thereunder; [and]
- (e) to make recommendations to the Federal Government or a Provincial Government or to the appropriate authority or officer of such Government for suitable Governmental actions to prevent or eliminate undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices.

4. *Powers of the Authority*

The Authority has legislative, quasi-judicial, investigative, and administrative powers. The MCA is empowered to frame rules under the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Ordinance⁷⁶ and to appoint such officers and staff as it may deem necessary.⁷⁷ It also has the power to summon information from any undertaking concerning its “organization, business, trade practices, management and connection with any other undertaking.”⁷⁸ For any proceeding or inquiry under the Ordinance, the Authority enjoys those powers vested in the Civil Court under the Code of Civil Procedure, 1908, in relation to the following matters:⁷⁹

- i. for summoning and enforcing the attendance of any witness and examining him on oath;
- ii. for receiving any document or object as evidence;
- iii. for requisitioning any public record from any Court or office; and
- iv. for issuing commissions for the examination of witnesses and documents.⁸⁰

The Authority may also initiate an action on its own or upon reference from the Federal Government on any matter that falls within the purview of the Ordinance.⁸¹ Where an individual or an undertaking fails to comply with the order passed by the Authority, or willfully fails to register as required by the Ordinance, or knowingly furnishes false information or makes false statements, the Authority may impose a penalty not exceeding one hundred thousand rupees (US \$1667).⁸² If the offense is a continuing one, the Authority may also direct the guilty individual or entity to pay ten thousand rupees (US \$167) per day, from the day the offense occurred.

5. Appeal from the Orders of the Authority

Any person against whom an order has been passed by the Authority may proffer an appeal to the High Court within sixty days of the communication of such order. The order can only be challenged on the following grounds:

- i. that it is contrary to law or to some usage having the force of law;
- ii. that it has failed to determine some material issue of law or usage having the force of law;
- iii. that there has been a substantial error or defect in following the procedure provided in the MRTPO which may possibly have

⁷⁶ MRTPO, *supra* note 9, § 24.

⁷⁷ *Id.* § 9.

⁷⁸ *Id.* § 21.

⁷⁹ *Id.* § 15.

⁸⁰ *Id.*

⁸¹ *Id.* § 14.

⁸² MRTPO, *supra* note 9, § 19.

produced error or defect in the order upon the merits.⁸³

D. Factors Impeding Implementation of the MRTPO

1. Industrial, Social, and Legal Framework

Soon after the promulgation of the MRTPO, the nationalization process under the Economic Reform Order of 1972 was initiated, restricting the scope of the Ordinance.⁸⁴ During the early 1970's, thirty-two large manufacturing units were nationalized, and virtually all heavy industry was transferred to the public sector.⁸⁵ The Board of Industrial Management was created to oversee the thirty-two nationalized undertakings and ten corporations. All nationalized undertakings were exempt from the application of the MRTPO under Section 25.⁸⁶ During this era, the focus of MCA's enforcement was on diversification of the shared equity of the undertakings. A large number of private undertakings which did not meet the "total value of assets" threshold were converted into public companies.⁸⁷

In 1976, the Foreign Private Investment (Promotion and Protection) Act ("FPIA")⁸⁸ was promulgated to provide for "the promotion and protection of foreign private investment in Pakistan."⁸⁹ The Act granted protection to foreign investment in "industrial undertakings" in Pakistan established on or after September 1, 1954.⁹⁰ While domestic undertakings, after being nationalized, were exempt from the application of Section 25 of the MRTPO, foreign undertakings were not touched out of fear of the FPIA. There were virtually no undertakings that came within the ambit of the MRTPO.

To further minimize the role and independence of the Authority, in 1981 the MCA, together with the Securities and Exchange Authority, were placed as departments into a newly formed Corporate Law Authority ("CLA").⁹¹ The Chairman and Members of the CLA were also nominated as Chairman and Members of the MCA for performing the functions under

⁸³ *Id.* § 20.

⁸⁴ CONTRIBUTION FROM PAKISTAN, *supra* note 8, at 2.

⁸⁵ *Id.*

⁸⁶ MRTPO, *supra* note 9, § 25.

⁸⁷ CUTS CENTRE FOR INTERNATIONAL TRADE, COMPETITION REGIME IN PAKISTAN: WAITING FOR A SHAKE-UP § 5.1 (2002), available at <http://www.cuts-international.org/Pakistan-report.pdf> [hereinafter "WAITING FOR A SHAKE-UP"]; see also CONTRIBUTION FROM PAKISTAN, *supra* note 8, at 2.

⁸⁸ Foreign Private Investment Act (Promotion and Protection), No. XLII of 1976 (1976) (Pak.).

⁸⁹ *Id.* at pmbl.

⁹⁰ *Id.* § 1(3).

⁹¹ See CONTRIBUTION FROM PAKISTAN, *supra* note 8, ¶ 7.

the MRTPO.⁹² The priority of the CLA was the enforcement of corporate laws; the enforcement of MRTPO was further held back.⁹³

The industrial and legal framework in the first two decades of the MRTPO reduced its enforcement to virtually nil. During the nationalization spree, the government discouraged the MRTPO's enforcement, as it could dissuade investment. Later the organizational framework under the CLA put it on the backburner. However, in 1994 the government detached the MCA from the CLA and restored its autonomous status.⁹⁴ While the MCA has investigated hundreds of cases since 1994, and has also been after cement, sugar, and other cartels, the MCA has hardly been successful in breaking them.⁹⁵

2. Substantive Provisions of the MRTPO

As seen from the discussion above, there are a few lacunae in the substantive provisions of the MRTPO, which, among others, include:

- i. the Ordinance does not capture single firm monopoly situations;
- ii. the Ordinance specifically excludes from its application government entities;
- iii. the Ordinance does not separate the investigation and prosecution functions of the Authority from that of adjudication;
- iv. the Ordinance does not provide compensatory mechanisms for consumers or undertakings suffering from anti-competitive practices;
- v. the Ordinance seriously limits the ability of the Authority to impose fines by prescribing a maximum penalty that may be awarded;
- vi. the Ordinance does not require pre-merger notification nor provides any guidance to the merging parties as to when they should seek clearance from the MCA.

3. Institutional Capacity of the MCA

Historically, the MCA is a defunct organization.⁹⁶ One main reason for the poor performance of the MCA is that the MRTPO does not require any professional qualifications or expertise for the members of the Authority. The government viewed the MCA as a parking space for government officials who the government wanted to get rid of or punish.⁹⁷

⁹² *Id.*

⁹³ *Id.*

⁹⁴ WAITING FOR A SHAKE-UP, *supra* note 87, § 5.1 (2002).

⁹⁵ See Section I.D.4 below.

⁹⁶ Naween A. Mangi, *Comment: Are Flourishing Cartels Reason Enough to Shut Down the Impotent MCA?*, DAILY TIMES, available at http://www.dailytimes.com.pk/default.asp?page=story_23-12-2004_pg5_10 (Dec. 23, 2004).

⁹⁷ *Id.* The author had a telephone interview with Syed Bilal Ahmad, Chairman, MCA on

Thus, “not only are the most incompetent lot tossed there but the most disgruntled as well. That translates to little or no incentive to act.”⁹⁸

In addition to poor leadership, the MCA is heavily understaffed. To carry out the functions of the Authority the Chairman is supported by two members. One is responsible for legal and administrative issues, while the other heads the research and investigation. There are 22 posts, of which eleven (on the technical side) are lying vacant. The MIS section, which comes under Member, Legal, and Administration, has four posts. However, only one programmer has been employed in the section. Similarly, out of the six posts for the registration wing, four are lying vacant. The posts of Chief of MIS and of Registrar are vacant. Member Research and Investigation has no economist to aid his work.⁹⁹ The understaffing has affected the performance of the Authority. As a result, there is no research, consumer advocacy, monitoring of prices, or initiation of inquiries.¹⁰⁰

4. Enforcement Record

The MCA’s enforcement record is dependent on the government policies and its institutional status. The performance may be divided into three distinct phases of its life so far:

- i. From 1971 to 1980 (the period marked by nationalization and creation of state monopolies);
- ii. From 1981 to 1994 (when MCA was reduced to become a wing of Corporate Law Authority (CLA));
- iii. 1995 to 2005 (MCA divested from CLA and operated as an autonomous quasi judicial body).¹⁰¹

January 26, 2005. Mr. Ahmad stated this as one of the reasons for the poor performance of the MCA.

⁹⁸ Mangi, *supra* note 96.

⁹⁹ *Monopoly Control Authority Needs Restructuring*, BUSINESS RECORDER, Apr. 2, 2005, available at 2005 WLNR 5170989 [hereinafter *MCA Needs Restructuring*].

¹⁰⁰ “Daily Times spent weeks pursuing Dr Safdar Mahmood, the chairman of the MCA in Islamabad for an interview. All we wanted to know was how many decisions the MCA made in the last two, three or five years. After several brush-offs, Dr Mahmood’s office finally refused an interview.” Mangi, *supra* note 96.

¹⁰¹ This information is obtained by the author from the Monopoly Control Authority (file on record with author).

From 1971 to 1980, MCA dealt with the following cases:

Nature of cases	No. of Cases
Conversion of private limited companies into public limited companies	17
Divestiture of excessive shareholdings	4
Registration of prohibited agreements	19
Total order passed	408

From 1980 to 1995 MCA dealt with the following cases:

Nature of cases	No. of Cases
Conversion of private limited companies into public limited companies	7
Divestiture of excessive shareholdings	6
Inter-corporate financing	3
Monopoly power	1
Registration of prohibited agreements	49
Total order passed	193

From 1995 to 2005 MCA dealt with the following cases:

Nature of cases	No. of Cases
Conversion of private limited companies into public limited companies	2
Divestiture of excessive shareholdings	1
Inter-corporate financing	23
Merger	3
Monopoly power	8
Cartels	4
Registration of prohibited agreements	1
False information	3
Non-compliance of Authority's order	1
Non-compliance of request for information	202
Total order passed	450

In recent years, the MCA has taken action against undertakings in various sectors¹⁰² and opened inquiries against cartels in the following

¹⁰² These sectors include

i. Fertilizer (urea) (Fauji Fertilizer Company Ltd).

industries:

- i. Cement;
- ii. Automobiles;
- iii. Polyester staple fiber;
- iv. Sugar;
- v. Ghee/cooking oil; and
- vi. Cigarettes.¹⁰³

The cement cartel is one of the starkest examples of cartels that exist in Pakistan. Below is a brief history of the cartel and the Authority's efforts to break it.

a. The Cement Cartel: Chronology

The cement industry is one of the most vital and rapidly growing industries in Pakistan. At the time of her birth, Pakistan had four cement factories with a total capacity of 0.5 million tons per annum.¹⁰⁴ Prior to nationalization of the industry in 1972, there were fourteen production units both in the public and private sector with a total capacity of 2.5 million tons per annum.¹⁰⁵ In 1972, the State Cement Corporation of Pakistan was formed and charged with the responsibility of producing cement in the country. During the mid-1990's, with the policy of privatization and denationalization, state-owned cement plants were privatized and the private sector was permitted to invest in the cement industry.¹⁰⁶

-
- ii. Tea, toilet soap and ice cream (Lever Brothers Pakistan Ltd).
 - iii. Soda ash and PTA (ICI Pakistan Ltd).
 - iv. Polyester staple fibre (Dewan Salman Fibre Ltd & Ibrahim Fibre Ltd).
 - v. Tractors (Al-Ghazi Tractors Ltd).
 - vi. Automotive batteries (Exide Batteries Ltd).
 - vii. Packetted biscuits (English Biscuits Ltd and Continental Biscuits Ltd).
 - viii. Mineral bottled water (Nestle).
 - ix. Compressors (Pakistan Electronics Ltd).
 - x. Cigarettes (Lakson Tobacco Company Ltd).
 - xi. Septran and Ventoline (Glaxo SmithKline).
 - xii. Jute (Thal Jute).

MCA Needs Restructuring, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ Central Board of Revenue, Govt. of Pakistan, *CBR Quarterly Review*, vol. 3, No. 1, July-Sep., 2003, at 21 (2003), available at http://www.epb.gov.pk/epb/jsp/SRO/2003Review3_pdf.pdf [hereinafter *CBR Quarterly Review*].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

In 1998, a cartel was formed in the cement industry.¹⁰⁷ All members were allowed a certain production limit, and no member could increase production without the prior permission of the cartel members.¹⁰⁸ The cartel set the prices and each member shared the profits peacefully.¹⁰⁹ As a result of this price-fixing, the price of cement rose by 100 rupees per bag and still continues to be higher than the fair market price.¹¹⁰ In the same year, the MCA took cognizance of the cartel's presence, and tried to bust it, but was not successful due to lax enforcement of the law, and partly "due to political pressures."¹¹¹

The cement cartel continued to exist even five years after the MCA's initial judgment in 1998. In 2003, the MCA started a new inquiry into the cement cartel,¹¹² and finally passed orders in late October and early November against "18 cement factories for non-compliance of its orders to reduce the ex-factory cement prices,"¹¹³ to bring down prices to the level as of January–March, 2003.¹¹⁴ Cartel arrangements constitute unreasonably restrictive trade practices and are prosecuted under Section 6(1)(a). Section 12(c) specifies the types of orders which the Authority can make to remedy the offenses that fall under section 6.¹¹⁵ Section 12(c) does not purport to give the Authority the power to require the undertakings to restore prices as of some certain date in the past. The Authority, however, imposed the fine of 100,000 rupees and 10,000 rupees per day, starting November 15, 2005, against the eighteen named cartel members.¹¹⁶

The cartel members subsequently appealed to the Sindh High Court.¹¹⁷ The cartel members contended that the Authority, while issuing this order, did not take into account the prices of the raw materials used in manufacturing of cement, which had increased by fifty percent since early

¹⁰⁷ *Id.* at 28.

¹⁰⁸ See Mangi, *supra* note 96.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *CBR Quarterly Review*, *supra* note 104, at 30; *MCA Needs Restructuring*, *supra* note 99; see also M Israr Khan, *New Law Under to Check Profiteers*, BUSINESS RECORDER, Aug. 8, 2005, available at 2005 WLNR 12475618.

¹¹² *MCA Begins Probe into Formation of Cement Cartel*, THE DAWN, July 16, 2003, available at <http://www.dawn.com/2003/07/16/eb4.htm>.

¹¹³ M. Rafiq Goraya, *18 Cement Units Penalised*, BUSINESS RECORDER, Jan. 10, 2006, available at 2006 WLNR 686850; see *Cement Sales Up 12 Percent in Six Months*, BUSINESS RECORDER, Jan. 4, 2006, available at 2006 WLNR 209141 [hereinafter *Cement Sales Up*]; see also *Pakistan: Competition*, *supra* note 6.

¹¹⁴ *SHC Suspends MCA Order to Cut Cement Prices*, BUSINESS RECORDER, Jan. 7, 2006, available at 2006 WLNR 405743 [hereinafter *SHC Suspends MCA Order*].

¹¹⁵ See *supra* note 52 and accompanying text.

¹¹⁶ See Goraya, *supra* note 113; *Cement Sales Up*, *supra* note 113; *Pakistan: Competition*, *supra* note 6.

¹¹⁷ *SHC Suspends MCA Order*, *supra* note 114.

2003.¹¹⁸ They further argued that the MCA had no power to fix the prices, and its actions were therefore *ultra vires*.¹¹⁹ The Sindh High Court suspended the order of the Authority on January 6, 2006.¹²⁰ In the cement cartel case, the Authority seems to have transcended the powers given to it by the MRTPO.

b. Other Cartels

In addition to the cement cartel, other cartels, such as those of automobile manufacturers and sugar producers, enjoy “an absolute freedom to manipulate their prices to fleece the public through their influence in the relevant ministries.”¹²¹ Political pressures and the influence of MNCs,¹²² coupled with the lack of legal and technical expertise of the Authority, have so far provided an environment conducive to the birth and growth of cartels.

5. Concluding Remarks

The industrial, social, and legal framework surrounding the MRTPO, compounded by its insufficient substantive provisions and the institutional capacity of the MCA together rendered the competition regime in Pakistan totally ineffective. Indeed, there have been proposals in place, from as early as 1993, to strengthen the Pakistani competition regime. The first proposals to discourage the creation of monopolies and to protect consumer welfare intended to achieve their objective by making amendments in: (i) the Companies Ordinance, 1984;¹²³ (ii) the Securities and Exchange Ordinance, 1969;¹²⁴ and (iii) the Modaraba Ordinance, 1980.¹²⁵ In early 2001, the MCA submitted a draft of the Competition Act meant to supersede the MRTPO to the government. The draft was based on the model law offered by the Organization for Economic Cooperation and Development. However, the draft has not been finalized as of the date this paper goes to press. The Government has engaged World Bank consultants to finalize the legislation and it is hoped that the draft will be made

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Kiani, *supra* note 5.

¹²² Muhammad Arsahd Perwaiz, Member, Monopoly Control Auth., Prospects for a Multilateral Framework on Competition Policy and Law § 7(i) (Apr. 29 – May 2, 2003) (presented at the 8th International Workshop on Competition Policy and Law, co-hosted by Korea Fair Trade Commission and OECD at Seoul, Korea) (during discussions with the representative of an MNC, a veiled indication was given that the headquarters may not like the enforcement of a particular provision of the competition law).

¹²³ Companies Ordinance, 1984, No. XLVII (1984) (Pak.).

¹²⁴ Securities and Exchange Ordinance, 1969, No. XVII (1969) (Pak.).

¹²⁵ Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980, No. XXXI (1980) (Pak.); *Pakistan: Competition*, *supra* note 6.

available to the public for comment sometime during the later half of 2006.

III. THE CHALLENGE AHEAD: MAKING A COMPETITION REGIME EFFECTIVE

A. The Proposed Law

Though the draft competition law has not been made available to the public, there are reports in the press that give a bird's eye view of the new Competition Act. It has been reported that the focus of the new Act will be on promoting competition in the private sector, rather than taking measures against the undue concentration of economic power.¹²⁶ The scope of the law will be broadened.¹²⁷ Under the proposed law, the new Competition Authority would be able to take action against a single-firm monopoly. The definition of "undertaking" will be broadened to include "association of undertakings" as well.¹²⁸ Comprehensive merger control laws will be added, and the amount of fines that the new Authority can award will be raised from the present ceiling of 100,000 rupees and an additional 10,000 rupees per day to a maximum of 2 million rupees and 100,000 rupees per day.¹²⁹ To recover the penalties and other dues from the undertakings, the new Authority will be given power to recover under the Income Tax Ordinance, 2001 instead of as an arrear of land revenue.¹³⁰ The new Authority will also be given mandatory access to the databases of the Securities and Exchange Commission of Pakistan and the Central Board of Revenue.¹³¹

The organizational structure of the new Competition Authority will be different from the MCA. There will be a division of the prosecutorial and judicial functions of the new Authority.¹³² The Authority will also be empowered to engage consultants, experts, and advisers as and when needed.¹³³ Under the proposed law, the Ministry of Finance will be required to establish a consultative process among the existing regulatory bodies, and the new Competition Authority will ensure that a uniform

¹²⁶ Sajid Chaudhry, *Competition Law in the Making*, DAILY TIMES, Aug. 12, 2005, available at http://www.dailytimes.com.pk/default.asp?page=story_12-8-2005_pg5_1 [hereinafter *Competition Law in the Making*].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Pakistan: Competition*, *supra* note 6.

¹³⁰ An "arrear of land revenue" is a mode of collecting dues from private parties. Chaudhry, *supra* note 126; see § 19(3) of the MRTPO, *supra* note 9 (providing that penalties imposed under the Act shall be recoverable as arrear of land revenue).

¹³¹ Chaudhry, *supra* note 126; *Pakistan: Competition*, *supra* note 6.

¹³² *Competition Law in the Making*, *supra* note 126.

¹³³ *Id.*

policy will be followed for bringing competition in the market.¹³⁴ The performance of each regulatory body will be assessed by giving it a target for each year and its achievement will be weighed according to international best practices.¹³⁵

From the press reports, it appears that the proposed changes will fill most of the lacunas previously identified. To add to these changes, it is suggested that the proposed law should not exempt government entities from the application of competition law. Furthermore, it should provide a mechanism of redress for consumers or undertakings suffering from anti-competitive practices. The new Authority should be assigned the roles of competition advocacy and consumer protection as well.

B. Determinants of an Effective Competition Authority

It is clear from the discussion above that the primary reason for the ineffectiveness of the Pakistani competition regime is the lack of independence and efficiency of the MCA. Apart from improving the substantive provisions of the Competition Act, an independent and efficacious competition Authority is a *sine qua non* for making a competition regime effective in Pakistan, or for that matter anywhere else. The next section discusses some of the determinants of an effective competition authority.

1. Qualified Leadership

The leadership of the Authority is critical to the “effective performance of its mission.”¹³⁶ The chairman and members of the Authority should have substantial experience and expertise in the areas relevant to the Authority’s mission. “Such expertise is essential if the [Authority] is to devise an enlightened policy agenda, select effective methods for executing the agenda, and persuade outside constituencies that its choices are worthy of deference.”¹³⁷ Members with no expertise are “institutional liabilities” and weaken the Authority’s capacity “to formulate sound policies because it breeds disrespect in the eyes of external observers and weakens acceptance

¹³⁴ Kiani, *supra* note 5.

¹³⁵ *Id.*

¹³⁶ Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, *reprinted in* 58 ANTITRUST L.J. 43, 60 (1989). *See also id.* at 118, n.173 (“It is trite but true that the Commission can be no better than its leaders.”); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, A REPORT WITH RECOMMENDATIONS viii (Jan. 1949) (“The quality of the members is the most vital single factor in the successful operation of these commissions.”).

¹³⁷ William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 927 (1997).

for the [Authority's] views."¹³⁸

If the government really wants to strengthen the competition regime and wants the competition law and policy to be enforced, it should appoint the most qualified people available to the Authority. For the regulatory bodies, statutes drafted in recent years require certain qualifications for the members of the authority.¹³⁹

2. Independence

The Authority should be independent of governmental, political, and external pressures. Qualified appointees and assurance as to their term of appointment will inevitably ensure the independence of the Authority. The government should refrain from meddling with the functioning of the Authority and should discourage the politicians from influencing the Authority through ministries.

3. Transparency

The Authority should develop standards that explain why it chooses to prosecute or not prosecute a certain matter. To achieve such a standard, the Authority should in all cases record rationales for its decision and make them available to the general public on its website.

4. Maintenance of Databases

In line with the above, the Authority should compile a full statistical database of its enforcement activities. The database should provide:

- i. the number of cases initiated under various provisions of the Act;
- ii. provides the subsequent procedural and decisional history of the case; and
- iii. prepare the aggregate statistics for each type of case each year.¹⁴⁰

The MCA used to provide statistical data of its enforcement activities whenever it prepared its annual report. However, the new Authority should maintain this record on a more regular basis. According to one commentator, "a current and historically complete enforcement data base would promote better understanding and analysis, inside and outside the

¹³⁸ *Id.*

¹³⁹ For a precedent of qualification requirement in regulatory agencies in Pakistan, see Pakistan Electronic Media Regulatory Authority Ordinance, 2002, No. XIII § 6 (2002), available at <http://www.pemra.gov.pk/ordinance.htm>.

¹⁴⁰ William E. Kovacic, Gen. Counsel, U.S. Fed. Trade Comm'n., *Achieving Better Practices in the Design of Competition Policy Institutions* 3 (Apr. 20, 2004) (remarks before the Seoul Competition Policy Forum 2004), available at www.ftc.gov/speeches/other/040420compolicyinst.pdf.

agency, of trends in enforcement activity.”¹⁴¹

All developing and transitional economies which are currently developing competition regimes should give high priority to maintaining and sharing its enforcement record. Such access would allow the competition authorities to benchmark their performance with that of other similarly situated authorities.¹⁴²

5. Annual Review of Functioning of the Authority

Every year the Authority should conduct a study to review the past year’s enforcement record. The study should not only focus on what the Authority has achieved over the last year, but should also analyze “selected elements of its enforcement process and the methodology for assessment.”¹⁴³ Commenting on the importance of the review of the Authority, one scholar noted:

We must regard the analysis of past outcomes and practices as a natural and necessary element of responsible public administration. Even if definitive measurements are unattainable, there is considerable room for progress in determining whether actual experience bears out the assumptions that guide our acts.¹⁴⁴

The Authority should consider review of its functioning as a vital tool to improve its efficiency and therefore should allocate funds in its budget for such studies every year.

6. Human Resources Audit

The effectiveness of the Authority will largely depend on its staff. To continuously improve its capacity, the Authority should regularly assess its human resources.¹⁴⁵ The Authority should have power to engage experts and consultants on a contractual basis and the ability to pay them handsomely. The archaic model of manning the Authority with people employed by the government will only result in poor performance of the Authority. Rather than placing government servants at the Authority, the Authority should hire personnel who have expertise relevant to the Authority’s mission and enforcement agenda.

¹⁴¹ *Id.* at 3–4. For a formative treatment of the value of good statistical records and for an analysis of competition policy, see Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 JOURNAL OF LAW & ECONOMICS 365 (1970).

¹⁴² Kovacic, *supra* note 2, at 3–4.

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

7. Comparative Study

In its efforts to continuously improve its performance, the Authority should not shy away from learning from the experiences of other jurisdictions. "It is malpractice for any jurisdiction to consider adjustments in its own institutions without examining experiences abroad."¹⁴⁶ For a nascent competition Authority, it has much to improve, be it merger analysis, investigation techniques, substantive standards, competition advocacy, or personnel policy. Both foreign developed and developing jurisdictions have much to "teach any competition authority,"¹⁴⁷ and the Authority should benefit from those experiences.

8. Competition Advocacy

The advocacy role of a competition authority has two prongs. First, for effective enforcement of competition law, the competition authority should create awareness of the law in the general public and engage in advocacy from the consumer protection perspective. Second, the Authority should actively participate in the "formulation of [the] country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance."¹⁴⁸ Although Pakistan has had a competition regime in place for more than three decades, the law was rarely enforced. The market players are not aware of competition principles, nor has "competition culture" taken root. To this end, the Competition Authority should undertake an active advocacy role for effective implementation of the law.

IV. CONCLUSION

It is time for the MRTPO to be replaced with a new Competition Act and for the MCA to be replaced with an efficacious and independent Competition Authority. However, it would be a mistake to assume that once a new law is drafted and a new Competition Authority is established, the task of reforming the law will be complete. The development of a competition regime is a "work in progress."¹⁴⁹ The new Competition Authority, as the agent for implementing the law, will play a vital role in establishing the regime. To carry out its responsibilities effectively, the

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.*; see, e.g., William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S LAW REVIEW 361, 363-64 (2000).

¹⁴⁸ GOV'T. OF INDIA, REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW § 6.4.7, *quoted in* COMPETITION COMM'N OF INDIA, CONCEPT NOTE ON ADVOCACY ACTIVITIES OF CCI 2 (2003), *available at* http://www.competition-commission-india.nic.in/advocacy/Concept_note_on_Advocacy_Activities_of_CCI.pdf.

¹⁴⁹ Kovacic, *supra* note 2, at 1.

focus of the Authority should be to achieve “better” practices.¹⁵⁰ To that end, the Authority should regularly pose these questions to itself: “Do we have the right statutes? Have we created the best means for implementation? Do our policies achieve good results?”¹⁵¹ The answer to these questions would require the Authority to periodically undertake a comprehensive review of its functioning. In its earliest stages of development, it is suggested that the new Competition Authority should review its functioning at short intervals. Through the mechanism suggested above, it is hoped that the new competition regime in Pakistan will be more efficient and effective.

¹⁵⁰ “To speak of ‘best’ practices may suggest the existence of fixed objectives that, once attained, mark the end of the task. It might be more accurate and informative to say we are seeking ‘better’ practices.” *Id.* at 1.

¹⁵¹ *Id.* at 2.

