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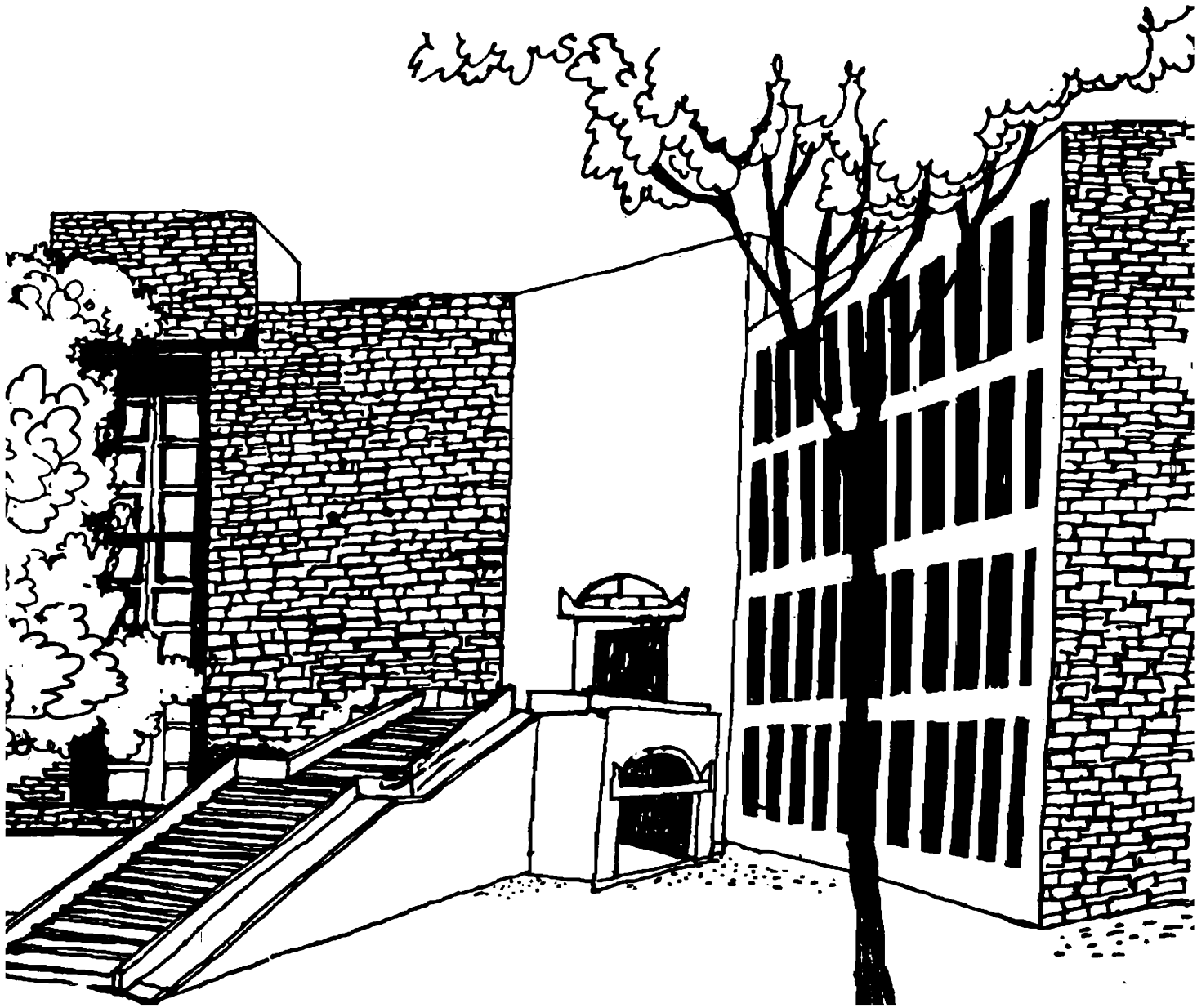

RESTRICTIVE TRADE PRACTICES IN INDIA, 1969-91: EXPERIENCE OF CONTROL AND AGENDA FOR FURTHER WORK

By

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ABSTRACT

This paper purports to apprise principally the experience of control of Restrictive Trade Practices (RTP) in India by the Monopolies and Restrictive Trade Practices (MRTP) Commission under the MRTP Act, 1969. This experience is examined by a statistical analysis of RTP inquiries instituted and disposed of by the Commission since the enactment of this legislation till 1991 to which the latest published information relates.

Among the major findings are:

(1) Of the 3,474 RTP inquiries instituted during 1972-91, only 2 (0.05 per cent) were instituted upon reference from government, and 171 (5 per cent) from trade/consumer associations, etc. The principal burden of initiating inquiries has fallen on the Director-General and the Commission with 2,186 and 1,115 inquiries (63 and 32 per cent) respectively to their credit.

(2) Of the 3,033 inquiries disposed of during 1972-91, 1,125 (37 per cent) were found by the Commission to be prejudicial to public interest and subjected to cease/desist or consent order, and 1,908 (63 per cent) were disposed of otherwise.

(3) Of the different types of RTP in the inquiries disposed of during 1982-91, 1,328 out of a total of 3,415 (39 per cent) were found by the Commission to be prejudicial to public interest, and subjected to cease/desist or consent order, and 2,087 (61 per cent) were disposed of otherwise.

(4) Thus, the number of inquiries in, and of RTP against, which prejudice to public interest was found were each small, nearly two-fifths of the respective totals.

Based on this experience, as a second objective, this paper also presents an agenda for further work in this area. The major points which emerge in that context are:

(1) The 1984 and the 1991 amendments to the MRTP Act necessitate a new preamble or a major change in the existing preamble. Two alternative draft preambles are suggested in the paper.

(2) For further and better particulars on the inquiries disposed of, the present pro-forma in which the information is given needs to be modified as per the details given in the paper.

(3) Specific studies relating to the composition of RTP inquiries disposed of, the efficacy of RTP control, and the general effects on the public interest of certain RTP as such as also with reference to some products/services are called for to increase our knowledge on this subject and also for their possible policy value.

(4) The evidence on and the arguments for a change in favour of per se approach are not yet sufficiently pursuasive, so it is as well that the present rule-of-reason approach continues.

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I INTRODUCTION

This paper purports to appraise principally the experience of control of Restrictive Trade Practices (RTP) in India by the Monopolies and Restrictive Trade Practices (MRTP) Commission under the MRTP Act, 1969. This experience is examined by a statistical analysis of the RTP inquiries instituted and disposed of by the MRTP Commission since the enactment of this legislation in 1969 till 1991 to which the latest published information relates. Based on this experience, as a second objective, this paper also presents an agenda for further work in this area.

There are, to be sure, a number of books dealing, exclusively or importantly, with RTP in India.[1] Generally speaking, this literature covers this subject by reproducing orders/ judgements of the MRTP Commission/Supreme Court/High Courts, fully or in a summary form, or by giving the provisions of the MRTP Act and the rules framed thereunder, and explaining and elaborating the same with notes and the case-laws. While useful in its own way, this material is not a substitute for the statistical analysis of the kind referred to in the above para. None of the books which we perused before we embarked upon this study, dealt with such an analysis. There, thus, existed a gap that needed to be filled in for an assessment of the efficacy of control of RTP. This paper is a modest attempt in that direction.

Secondly, this subject is topical. Following the New Industrial Policy of 1991, the MRTP Act was amended in 1991. This amendment has removed the threshold limits of assets in respect of MRTP companies and dominant undertaking and the related provisions on their expansion, etc. The policy also announced that emphasis will now be placed on controlling and regulating monopolistic, restrictive and unfair trade practices. Earlier, some economists had advocated a basic change in the approach to the control of RTP in the MRTP Act from the rule-of-reason to the per se.[2] Recently a group of experts have also advocated such a change.[3] In the context of this debate, our views on this subject, based on the above analysis and a scrutiny of the arguments advanced in this behalf, given at the end of this paper, would, we hope, be of some value in the discussion.

This paper is presented in five parts. The following part gives the background of the MRTP Act, and outlines the scope of this study. The third part presents an account of this legislation, and describes the nature of statistics. The fourth part deals with the statistics relating to RTP. The final part lists the agenda for further work. An outline of the subtopics dealt with in these parts will be found at the beginning of each part.

II BACKGROUND AND SCOPE

We first trace the developments leading to the enactment of the MRTP legislation in 1969. This is followed by a discussion on the question of priority of the basic objective of the Act, namely prevention of concentration of economic power, and the specifics of concentration covered under the Act. Finally, we delineate the scope of this study.

Background:

The constitution of India says, "The State shall, in particular, direct its policy towards securing" (and then continues in parts (b) and (c) respectively) "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".[4]

These concerns for a fair distribution of income and wealth and prevention of undue concentration of economic power have always figured prominently in the official policy documents of the Government of India since then. Thus, for example, the Industrial Policy Resolution of 1956, the Industrial Policy Statements of 1977 and 1980, and the Five-Year Plans all list these as major objectives of Government of India's policy and plans.

Further, the question regarding whether the operation of the economic system has resulted towards progress on these objectives

or their retardation, and the extent of change thereon has been investigated by a number of official committees/commissions and researchers, and based on the suggestions/recommendations of these bodies, government have taken a number of legislative and other remedial measures as a follow-up.

To refer to some major and influential works on this subject: In 1964, the P.C. Mahalanobis Committee[5] reported that the working of the economic system has resulted in an excessive (in the sense of more than what can be justified or considered necessary) concentration of wealth and income in private hands, and pleaded for more comprehensive inquiries into the questions and issues related to such concentration. In 1965, the K.C. Das Gupta Commission,[6] appointed as a follow-up of this plea, reported that in a large number of industries, markets were monopolistic/ oligopolistic, that monopolistic/restrictive trade practices were not rare/prevailed on a large scale, and that concentration at the aggregate level was substantial. To prohibit such practices and to control monopolies/oligopolies and aggregate concentration, the Commission recommended a number of non-legislative measures, and also an enactment for which it gave a draft of "The Monopolies and Restrictive Trade Practices Bill, 1965".

The draft Bill was based on two principles : one that the country "needed highest production possible" and two that "it is achieved with the least damage to the people and secures to them the maximum benefit".[7] The bill was widely discussed and debated

both in Parliament and outside for long, and finally became an Act in 1969. The Act became operational from the next year.

Of the several noteworthy developments which propelled the enactment, three were perhaps very influential. The first was R.K. Hazari's report[8] submitted in 1967 and the second was S. Dutt Committee's report[9] submitted in 1969. These reports highlighted how the working of the licensing system had helped increase concentration of economic power in private hands, especially of established business houses, partly by deterring/restricting entry of new groups. This development, in those days was popularly regarded as concentration working to the common detriment. The third development was political when the Congress party was split in 1969 on the ground of reorienting economic policies, radically to the left. This was perhaps the most influential event. This act, and other measures such as nationalisation of banks in 1969 were considered as providing convincing evidence that the government would keep the promises given at the party platform while announcing the split.

The Question of Priority:

Although prevention of undue concentration has been one of the major objectives, there have been other objectives also in India's economic policy and planning. So the two questions in this context are : What are these objectives? And how high is the prevention of concentration objective vis-a-vis these other objectives?

We may deal with these questions, beginning with the position as given in the Constitution itself. At the outset, reference was made to Article 39(c) from whence it must have been noted that the article does not attack concentration per se; what it attacks is only that concentration which produces or leads to common detriment, or is likely to do so.

The phrase common detriment is wide open, and it is not easy to grasp it unambiguously. Thus, for example, Article 39(a) of the Constitution directs the State towards securing "that the citizens, men and women equally, have the right to an adequate means of livelihood", and Article 43 asks the State to endeavour to secure "to all workers .... a living wage", and in particular "to promote cottage industries."[10]

It does not require an in-depth examination to conclude that these objectives conflict in practice, at least in the short-run. Thus, for example, high concentration resultant from technological and pecuniary economies of scale, and X- and allocative efficiencies promote in the short-run rapid growth and a living wage to those employed. This is common good. But it also promotes in that period only a low employment growth. This is common detriment. Or to put the matter differently, by taking another example, promotion of cottage industries leads to faster employment growth in the short-run, but such industries have only low-efficiency and are poor pay-masters. The first is common good; the second is common detriment.

Since the objective of prevention of concentration of economic power in private hands has been largely discussed in the context of industrial policy and planning, it is worthwhile to examine this question elaborately in that context. In industry, we have been having a number of objectives, in particular rapid growth, reduction in regional imbalances, protection/promotion of small industry, besides of course the objective on concentration. Take, for example, the case of establishment of a large plant in an industrially underdeveloped area by a large private company/ business house. On the regional balance objective, this establishment subserves common good. On the other hand, on the concentration objective it produces common detriment. Also, in view of pre-emption of some resources for the needed infrastructural investments in the underdeveloped area when bereft of it, fewer resources are available for investment directly in industrial/manufacturing activity. Thus, industrial/manufacturing growth will only be small in the short-run. So this also is common detriment on the growth objective.

As a final illustration on this point, we refer to the Das Gupta Commission's report. While much concerned with the undesirable consequences of excessive concentration it has documented, and for which it has suggested remedial measures, the report has also recorded the achievements of concentration. Of the several passages on the latter, the following three seem to be the most telling: (1) "Big business has done much for the country's economic betterment and as a consequence for the alleviation of the poor men's misery." (2) ".... what little

development there is owes much to the adventure and skill of a few men who have in the process succeeded also in becoming 'big business',thus concentrating in their hands a great portion of the economic power controlling and directing the production and distribution of national wealth and income. It is fair also to state that after concentrating power in their hands these men have gone on often to push forward development of further industries, which has been to the advantage of the country." (3)
".... economic power may be relied upon to make important contribution to industrial development in the years to come." [11]

A close reading of the above as also of several other passages on the objectives of industrial policy and planning leaves two things reasonably clear. We have been having several, mutually conflicting objectives, and that there is no clue on the question of priority among these objectives, nor a suggestion as to the method that could be deployed to settle this question. To put it differently, on paper all objectives seem to enjoy or suffer from equality in priority.

If, however, one looks at and observes closely what the government have been doing in practice, rather than what they have been speaking or writing, one gets some inkling on this question. It seems that almost throughout the last four and a half decades since independence, but especially since the beginning of the Second Plan in 1956, the objective of rapid industrial growth has been pursued more vigorously than the other objectives of industrial policy and planning, including the

objective of prevention of concentration of economic power. We have argued in detail for this conclusion elsewhere,[12] on the basis of relative allocations of outlay to the small and the large industrial sectors and on a chronological listing of policies/measures adopted to subserve these various objectives. So here only references to the points relevant to the concentration question should suffice.

First, whereas industrial growth objective has been pursued vigorously at least since 1956, the legislation to control concentration was enacted in 1969, nearly twenty years after the launching of the planned economic development. Second, the enthusiasm of the government to control concentration, with the help of the MRTP Commission seems to have diluted within three-four years of the enactment, as is seen from a limited number of references for inquiries government began making to the Commission relating to the MRTP companies in respect of their application for expansion of their business in various ways. In fact, this has been a major point of tension between the Commission and the government as can be seen from their respective reports of the earlier years.[13] Third, from time to time government have been making relaxations for expansions and growth of large companies/ business houses on a variety of grounds such as priority industries, location in backward areas, exports, etc. The most significant and widely noticed relaxation relates to the raising of the asset limit of the MRTP company from the original limit of Rs.20 crore to Rs.100 crore in 1987 and the abandonment of the very concept of the MRTP company

itself in 1991. Fourth, the new industrial policy of July 1991 has thrown open a large number of areas earlier reserved for public sector for the private sector, including multinationals. Finally, government have commenced disinvestment from the public sector. The areas vacated by the public sector are expected to be filled in by the private sector, in some of which large companies/business houses will, therefore, play a more prominent role now.

This review highlights the point that since around mid-seventies the government have seen more clearly the conflict between the objectives of rapid growth and prevention of concentration of economic power in private hands, and have been moving, especially since 1991, more openly and more boldly to settle the question of priority, in favour of the growth objective. Thus, the objective of prevention of concentration of economic power in private hands has now become an objective of lower priority than before.

Specifics of Concentration:

The foregoing discussion on the antecedents and the priority of the concentration objective has been in general terms. It is time to be specific.

One may distinguish between concentration at the macro-level and concentration at the micro-level. At the former, it relates to the share of a certain specified number of large (generally private) companies/business houses in the total of the corporate sector or the national economy. The share is measured on the

criterion of assets, sales, employees, etc. The larger the share of that number, greater the concentration. The concern for high concentration of this kind arises principally on the ground that, coupled with wide distribution of political power as is the case in well-functioning democracies, it may rob political democracy of its good meaning, and may also produce adverse social consequences.

Concentration at the micro-level relates to the share of a certain specified number of large private companies/business houses in the total sales/production in the industry/market in which the companies operate. The larger the share of that number, greater the concentration in the industry/market. The concern for high concentration of this kind arises out of the fear associated with monopolistic/oligopolistic markets which it creates. Firms in such markets are known to suffer from various kinds of static and dynamic inefficiencies - allocative, X- and technological. And that is common detriment.

A third type of situation which may result in the outcome being prejudicial to public interest or producing common detriment relates to the adoption by firms of different types of anti-competitive practices such as monopolistic and restrictive trade practices, or misleading practices such as unfair trade practices. While it is easy and common for firms working in monopolistic/oligopolistic markets to adopt such practices, it is not difficult nor uncommon for firms working in other markets also to do so. Examples of such practices are: limiting

technical development, collective price fixation, tie-up sales, exclusive dealings, misleading advertisements, etc.

It is for these reasons that anti-trust legislations of the capitalist countries have provisions to control situations of concentrations and anti-competitive and misleading trade practices, though, as one would expect there are significant differences in their respective legislations.

Scope of the Study:

The Preamble of the MRTP Act reads as under: "An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto".

Interpreted specifically as per the outline given under the previous heading, the broad objectives of the Act, as translated from the Preamble, may be given as under:

i) At the Macro-level: Avoidance and prevention of concentration of economic power that is or that may lead to the common detriment;

ii) At the Micro-level: (a) Control of monopolies, (b) Prohibition of monopolistic and restrictive trade practices.

The Act has been amended several times since 1969, in 1980, 1982, 1984, 1985, 1986, 1988 and 1991. Besides, from time to time, rules have been framed to carry out the objectives of the Act. Of the amendments referred to, those of 1984 and 1991 are

comprehensive and far-reaching relative to others, as they were based, respectively, on the recommendations of the Rajindar Sacher Committee made in 1978[14] and on the recent path-breaking liberalisation policies, in particular of the New Industrial Policy of 1991. To refer to some of these provisions : The 1984 amendment brought into the Act the provisions for the regulation of unfair trade practices, and created a new authority of the Director-General of Investigation and Registration, replacing the twin authorities of the Director of Investigations and the Registrar of Restrictive Trade Agreements. The 1991 amendment deleted the concept of the MRTP company, and repealed, as a follow-up, almost all provisions relating to their expansion. It also withdrew generally the exemption of the public sector from the provisions of the Act. In brief, the amendments have enlarged the scope of the Act by bringing into fold of control unfair trade practices and public sector and reduced its scope by removing from control the situations of aggregate concentration.

The scope of this study is restricted to the working of the Act in regard to RTP. The reasons for excluding the working of the Act in other areas and limiting it to RTP are spelt out below.

(1) A study of the working of the aggregate concentration under the Act has now become only of historical value. As mentioned above, the 1991 amendment has deleted the concept of the MRTP company, and as a follow-up, repealed the provisions regarding their expansion, etc. Secondly, even

before that, the Commission was asked to inquire into the situations of aggregate concentration in a limited number of cases, and that too during the first three-four years of the Act. Almost all cases of the later years were disposed of by the Government directly. Thirdly, although the provisions relating to division of undertaking and severance of inter-connections of undertakings remain, though in a modified form, the work in these areas has been either nil or negligible. Thus, for example, there has so far been no inquiry into the severance; and as regards division, only two inquiries have been instituted of which one reference was withdrawn, and the other is in appeal before the Supreme Court.

(2) The other two exclusions relate to monopolistic trade practices and unfair trade practices. As to the former, between 1973 when the first inquiry was instituted and 1991 for which the latest report is available, only 16 inquiries were instituted. Of these, as at the end of 1991, 6 were pending before the Commission on account of stay granted by Supreme Court/High Court or other reasons. The remaining 10 inquiries were dropped, withdrawn, or had become infructious. So in the monopolistic trade practice area, there is precious little available for assessment.

(3) For two compelling reasons, we have excluded unfair trade practices also from this study. First, though they do have economic significance and affect compeittion, they are more in the nature of unethical practices such as false/

misleading advertisement, deceptive bargain sales, sale of unsafe goods, etc. A study of such practices is not particularly relevant from the industrial organization perspective in which the focus is, among others, on other restrictive trade practices such as collective price fixation, tie-up sales, resale prices maintenance, etc. which, while restrictive of competition, are not unethical. The study was initially designed to focus on such practices. The inclusion of unfair trade practices would have altered the basic thrust of this research. Second, even though the provisions regarding unfair trade practices were inserted only in 1984, the MRTP Commission has done substantial work since then in this area. Between 1984 and 1991, nearly 1900 inquires were instituted for disposal before the Commission, of which about 1400 have been disposed of. Additionally, a lot of work in controlling these practices has been done under the legislations of Central and State Governments, such as Consumer Protection Act, Food and Drug Adulteration Acts etc. In fact, in certain areas, unfair trade practices are controlled more expeditiously and more effectively under these legislations than under the MRTP Act. The idea of overlap between the MRTP Act and the Consumer Protection (CP) Act, 1986 can be had from the fact that the two acts have the same meaning of Unfair Trade Practices. In fact, the entire Section 36A of the MRTP Act on the definition is reproduced as clause (r) of Section 2(1) of the CP Act. These practices relate broadly to

unfair/deceptive/unethical methods/practices adopted in promoting the sale, use or supply of goods or provision of services. It may also be mentioned that in regard to RTP, whereas the MRTP Act deals with all RTP, the CP Act can deal only with the tie-up sales/services. In order to have a fair idea on the efficacy of control of unfair trade practices, it would be necessary to assess the work under all related legislations, including the one under the MRTP Act. This is a huge task, and was ruled out as being out of bounds of the time and the funds available to us for this study.

(4) On the other hand, a study in the area of RTP under the Act commends itself for various reasons. First, unlike in the area of unfair trade practices, the provisions in this area have been in the Act from the very beginning since 1969. Also, unlike in the area of aggregate concentration, the inquiries into RTP can be instituted from a number of quarters - consumers/trade or consumer association, central/state governments, Director-General and the Commission itself. As a result, and as would be seen from Part IV, the Commission has done a substantial amount of work in this area relative to other areas and as such. Second, unlike in case of monopolistic trade practices/aggregate concentration, the Commission's orders in RTP inquiries are mandatory, subject to appeal only to the Supreme Court on a substantive point of law. This provision gives generally a measure of finality to the Commission's orders. Third, in view of the recent liberalisation and pro-competition

policies of the government, a study of RTP assumes special significance, and following what is stated in the New Industrial Policy of July, 1991 one may expect the law to control such practices more vigorously than before.

Finally, while the anti-trust policies of a number of countries such as the U.S., the U.K. and other EEC countries have been examined by members of varied professionals like lawyers, accountants and economists and a lot of literature has been produced by them, to the best of our knowledge the literature on the Indian legislation is largely by students of commerce and law.[15] Students of economics in India seem to have kept a safe distance from this legislation. This work is a modest attempt in that direction, which, for reasons given above, is limited to the working of the RTP under the MRTP Act.

III THE ACT AND THE STATISTICS

In this part, we first give and explain the main provisions of the MRTP Act in regard to RTP, and then describe the nature of statistics available under different heads, noting alongwith their limitations also.

Provisions on RTP:

The principal provisions in regard to RTP in the MRTP Act are described below. They are presented under the three heads of Definitions, Registration and Inquiries and Orders.

A couple of clarifications are in order here before we go to the description. First, as noted in Part II, the MRTP Act has

undergone several amendments since 1969 when the Act was promulgated. This description, however, is restricted to presenting the latest position. No references are made to the earlier provisions that may have been there differently. Secondly, the Act is a legal document, and the legal language often perplexes or confuses the reader not familiar with that language. This is largely because the law has to be as precise as possible, and in being so the main thrust of the provisions is often accompanied by explanations, qualifications, modifications and exceptions to the thrust - all of which often make it difficult for the ordinary reader to get the essence of the provisions. The description that follows is in simple, non-legal language to facilitate the reader to grasp the main points of the provisions quickly. Such a description can clearly not do full justice to the provisions of the Act, but here it is preferred for its simplicity.

Definitions:

The phrase in RTP is comprised of three words, and it is well to begin with the meaning of each.

Trade is defined widely, to include, besides trade, business, industry, profession or occupation, and relates to production, supply, distribution or control of goods, and includes the provision of services [Section 2-(s)].

Trade Practice is any practice relating to the carrying of trade. The practice relates to anything in regard to the price and related matters involved in trade and includes a single or

isolated action [Section 2-(u)]. Central to the definition of RTP is the concept of restriction on competition by trade practice. RTP must have, presently or potentially, the effect of restricting competition, by preventing, distorting or limiting it in any manner. The particulars thereof as specified are: by obstructing the flow of resources into the stream of production or bringing about the manipulation of prices and other terms to effect the flow of supplies in the market in such manner as to impose unjustified costs or restrictions on the consumer [Section 2(o)].

Is the intent of the legislation to promote competition? The answer seems to be both: Yes and No. Yes, in the sense that the law frowns upon prevention, distortion or limitation of competition, which otherwise exists or might exist. It thus promotes competition passively or negatively. And no, in the sense that it does not otherwise actively or positively promote, i.e., encourage competition. To put it differently, competition is viewed as a 'natural order' or natural course of events. It should be allowed to move on its own momentum. It is only the obstructions in that order/movement which must be removed.

Registration:

All agreements relating to RTP have to be registered with the Director-General of Investigation and Registration. Agreement includes arrangement or understanding, and may or may not be intended to be enforced [Section 2-(a)]. Further, all agreements of the type relating to practices specified separately

[Section 33(1)] are deemed to be RTP agreements and therefore have to be registered. The agreements specified relate to (i) restrictions on persons, (ii) tie-up sales/full line forcing, (iii) exclusive dealing, (iv) collective price-fixation. (v) discretionary benefits/price discrimination, (vi) resale price maintenance, (vii) withholding supply/territorial restrictions, (viii) res-triction on employment of methods of production, (ix) collective boycott, (x) predatory pricing, (xi) refusal to deal, (xii) collusive bidding, (xiii) agreements notified by central government, and (xiv) enforcement-related practices [Section 33 (1)(a)to(l)]. However, agreements to which the Central Government is a party or which are authorised/approved by the Central Government are exempt from registration [Section 33(2)].

One may distinguish between horizontal, vertical and unilateral RTP. Horizontal practices relate to restrictions between competing suppliers in the same market (e.g. collective price fixation or collective boycott). Vertical practices relate to the restrictions between non-competing parties, say, in a seller-buyer relationship (e.g., resale price maintenance or tie-up sales). Unilateral practices relate to a single or isolated action of a supplier (e.g. anything done by a supplier to control or affect price or other terms of sale).

Inquiries and Orders:

The inquiries into RTP are made by the MRTP Commission. The Commission can initiate an inquiry even without the existence of or the restrictive nature of the practice.

The inquiry may be initiated at the instance of (i) a trade association, a consumer or a registered consumers' association, (ii) Central government or a State government, (iii) Director-General, or (iv) the Commission itself [Section 10(a)(i) to (iv)]. In case of inquiries originating from the parties other than (iii) listed above, the Commission may ask the Director-General to prepare a preliminary investigation report for the Commission to satisfy the latter on whether the matter should be formally inquired into or not [Section 11(1)]. Besides, the Director-General may also prepare such a preliminary report on his own [Section 11(2)].

If after the inquiry, the Commission comes to the conclusion that the practice is prejudicial to public interest, it may pass a cease and desist order, or pass an order declaring agreement/ parts thereof relating to restrictions void or asking suitable modifications thereon [Section 37(1)(a) and (b)]. Or instead of passing an order, at the request of the party, give a 'consent order' permitting the party to modify the practice in a manner whereby it ceases to be prejudicial to public interest [Section 37(2)].

There is a presumption in the Act that RTP are prejudicial to public interest. If, however, in the inquiry, the practice passes through one or more 'gateways', and further if advantages thereof outweigh the detriment to the public, that presumption is withdrawn. Thus, the passing through the gateway is a necessary, but not a sufficient condition; sufficiency requires the passing of the balancing test also [Sections 38(1)].

The burden of establishing the fact as to the existence of RTP is on the complaining party; the burden of proving the advantage in terms of gateways is on the respondent; and the burden of pleading on detriment in the final balancing stage is again on the complaining party.

As to the 'gateways' or the points on which the advantages of retaining the RTP are to be claimed, the Act mentions the following: (i) Protection against inquiry, (ii) Denial of specific/substantial benefits, (iii) Counteracting other competition-restricting practices/measures, (iv) Countervailing RTP, (v) Prevention of unemployment, (vi) Reduction in export earnings, (vii) Counteracting other approved RTPs, (viii) Minor effect on competition, (ix) Authorisation/approval of the Central Government, (x) Defence/Security requirements, (xi) Maintenance of supply of essential goods and services [Section 38 (1) (a) to (k)].

The above list is a mix of four types of gateways. First, some gateways (1 and 2) relate to specific trades. For example, trade may have fixed certain practices such as standards/quality of goods (as in electric installation to protect against injury) or to provide for after-sales service (as in some consumer durables, mechines, etc.) to give reliable/dependable benefits. Second, some gateways (3,4,7) relate to the advantages which the practitioner of restriction may get to offset their relative handicap vis-a-vis others who derive special advantages because of their approved RTP. Third, some other gateways (5,6,9,10,11)

permit retention on the ground that the practice subserves the general social objectives of the government, such as on employment, exports, defence, etc. Finally, one gateway (8) relates to the degree of competition. Here, the pleading has to be in terms of negligible adverse effect of RTP on competition.

The Act provides for an appeal against the Commission's orders to the Supreme Court on a substantive point of law.

Finally, we refer to the special provisions on resale price maintenance (RPM). Generally, RPM is prohibited per se [Section 39 (1)]. Also, the measures/practices related to enforcements for non-compliance with RPM, such as refusal to deal and withdrawal of supply are also void, per se [Section 39(2)]. The only exception permitted is in regard to 'a loss leader', i.e. when a wholesaler/retailer is selling a product at a low (below cost) price [Section 40]. The loss leader may do so either to attract custom for other products sold by him, or to damage the reputation of the product or its supplier.

Thus, 'no gateways' are available for RPM. But the agreements thereon have to be registered.

The Commission may, however, exempt goods from these special provisions on the ground of adverse effect of the prohibition of RPM on quality, variety, price, after-sales service, etc. of the product [Section 41]. The orders of the Commission on the exemption application are final.

Rule-of-Reason and Per-se Approaches:

The legislations to control monopolies and the conduct of firms are viewed as following, generally, either the rule of reason approach or the per se approach. The former recognises that certain kinds of situations or conduct/practices may be conducive to the promotion of consumers' welfare or of certain social objectives, such as on exports, employment, regional balance, etc. and that the gains on one or more of these considerations may offset the harm to competition that they cause. Under this approach, the prosecution is on a case-by-case basis. On the other hand, the per se approach does not recognise the compensating circumstances or gateways. All that is required there is to establish the facts, and once that is done, RTP are declared to be illegal.

Inasmuch as the point in the dispute under the per se approach is limited to the establishment of fact, the prosecution is less expensive and less time-consuming. Also, this approach defines legality of RTP more closely and may better deter abuse. Its limitation arises out of its rigidity, as it does not allow a consideration of possible gains that may arise on efficiency-improving ground or on the ground of promoting social objectives. Here, the rule of reason approach scores over the per se approach. Its relative disadvantages, however, are that it is expensive and time-consuming, and its power to deter attempts to bad conduct are limited.

Finally, we may draw attention to a potential danger that lies in adjudication proceedings under the per se approach. As this approach provides for dogmatic, immutable rules, rhetoric may get mixed up with thought and information in interpreting the complex, changing real world situations and practices against these rules. Such a possibility is clearly less under the rule-of-reason approach which demands more of information and thought, and so it leaves little room for rhetoric.

It may have been noted that the provisions on the control of RTP in the MRTP Act (and in general indeed for other anti-competitive practices and situations) are based on the rule-of-reason approach. The exception case in RTP is RPM which is sought to be controlled, by and large, under the per se approach.

Statistics and their Limitations:

Our statistics relate to four items: the number of agreements, the number of inquiries instituted, the number of inquiries disposed of by order, and the number of inquiries in which different types of RTP were investigated in the inquiries disposed of by order. While we deal with these statistics in the next part, here we describe their nature and note their limitations.

These statistics are taken almost wholly from the annual administrative reports pertaining to the execution of the provisions of the MRTP Act, 1969 issued by the Ministry of Law, Justice and Company Affairs, Department of Company Affairs, Government of India, New Delhi. These reports are in two parts.

The first part of the annual report is of the Department of Company Affairs, and the second of the MRTP Commission. While we have examined both of these parts, for a large part of the statistics we have gone by the second part, especially its Appendices.

Registration of Agreements

All RTP agreements have to be registered with the Director-General. The agreements must include the particulars regarding the names of the parties to the agreement and the terms of agreement [Section 33(1)]. Certain agreements (specified under 33(1) (a) to (l), summarised earlier in this Part, are deemed to be registrable and hence are to be registered. The Director-General is required to maintain a register of these agreements [Section 36].

Our statistics relate to the number of agreements filed and registered during, and at the end, of the year for the years 1973 through 1989. In addition, we have statistics on the number of agreements in force at the end of the year for the period 1979-1984. These are the only years for which these statistics are available.

Inquiries Instituted

Here, as also under the following heading on Inquiries Disposed of, the statistics relate to the period 1972-1991. 1972 was the year when the first inquiry was instituted and also disposed of, and the latest published report relates to 1991.

As noted earlier in this Part, the inquiries can be instituted at the instance of (i) a trade association, a consumer or a registered consumers' association, (ii) Central Government or a State Government, (iii) Director-General, or (iv) The Commission itself [Section 10(a)(i) to (iv)].

It must be remembered that the statistics relate to the number of inquiries. In an inquiry, there may be more than one party, and against a party there may be an allegation of more than one RTP. Thus, for example, in the RTP inquiry No.25 of 1979 instituted by the Commission, there were nine parties. Or, to take another example in the RTP No.17 of 1981 instituted by the Director-General, five different types of RTP were alleged, namely resale price maintenance, differential dealing, restriction on persons and on methods of trading, tie-up sales and territorial restriction.

Inquiries Disposed of by Order

Here we give two types of statistics. The first type relates to the number of inquiries disposed of by cease and desist order and consent order [Section 37 (1) and (2)], and otherwise. Since these statistics are a follow-up of the statistics on the inquiries instituted, the possibilities of more than one party and of more than one RTP being in the inquiry exist here also.

Whether the inquiry is disposed of by cease and desist or consent order is of no substantive significance since in either case the Commission's order is based on its opinion that the RTP

is prejudicial to public interest. We have therefore, grouped these two types of order.

The group of inquiries disposed of otherwise is a coat of many colours. Against such inquiries, our source mentions various words or phrases the distinction among which, to us, is not quite clear, such as closed, terminated, withdrawn, dropped, notice of inquiry discharged, no order under 37(1), etc. It is, therefore, difficult to be specific, and we were compelled to group these cases under the head 'otherwise'. One thing, however, is clear, namely that cease and desist or consent order [Section 37(1) or 37(2)] was not passed in these inquiries. To offer some speculations of a positive kind: The otherwise inquiries include RTP not established, RTP not found prejudicial to public interest, RTP approved/authorised by Government, and Governemnt being/becoming a party in the inquiry. These and possibly some other reasons could be unearthed only if one has an access to the complete proceedings of these inquiries. But even if one is able to trace the records of over 3,000 inquiries disposed of by the Commission, it is a huge task, involving a lot of more time, more funds and more manpower assistance than what could be mustered for this study. We have, therefore, to rest content here with only a two-fold division of the disposed of inquiries - those found prejudicial to public interest with cease and desist or consent order, and others.

A point was mentioned earlier that there could be more than one party and more than one RTP in an inquiry. It is not clear how in such cases 'the nature of order' is recorded in the

source. We understand that in multi-RTP inquiries even if there is a finding of prejudice against even one, but no such finding on other RTP in that inquiry and the cease and desist or consent order passed only for that, it will be recorded as that order for the inquiry. Similarly, of the several parties in the inquiry, if RTP of only one party are found to be prejudicial to public interest, and cease and desist or consent order passed on that party, it will be recorded as that order for the inquiry. If our understanding is correct, then these statistics do not reflect properly the types of RTP found prejudicial to public interest, and the number of parties involved in such practices. Relative to the realities on this score, our statistics, therefore, overstate the number of RTP found prejudicial to public interest, and the number of parties involved in such practices.

Types of RTP in the Inquiries Disposed of by Order

While the appendices on inquiries instituted and those pending disposal given in our source, mention the type of RTP alleged, the appendix on inquiries disposed of does not mention the same. However, on the basis of the inquiry number given there, one can trace the type of RTP inquiried into and against which order is passed by referring to the appendix on the inquiries instituted or on the inquiries pending disposal given in reports of the related years. Such a tracing, as we have done, proved to be a time-consuming exercise, as it involved going back in several cases to the reports of up to the previous four/five years.

We have classified RTP in eleven categories listed in Table-VI. Alongwith the RTP, we have also mentioned the section of the Act under which the agreement on that practice is classified. The information on the type of RTP given in the source is not always uniformly reported either in the same annual report or in the reports of different years. In such cases, we had to use our judgement in classifying these practices in terms of Table-VI. Further, some of the seemingly same or similar RTP have been put under one head. Finally, to highlight the widely known and the widely adopted practices, the less known and scantily practiced RTP were grouped under the category of 'others', alongwith such other practices which for various reasons could not be properly labelled.

A point was made earlier that an inquiry may be related to more than one RTP, and that in such cases even if there is a cease and desist or a consent order against that practice, but no such other order against other RTP, it will be recorded as that order against the inquiry. This limitation is with us here also. Thus, even when one or more of the many practices have been subject to cease and desist or consent order, other practices also in that inquiry against which no such orders have been passed are classified as under such orders. Thus, here also, our statistics tend to overstate the magnitude of RTP found prejudicial to public interest.

Reference was made earlier to the manner in which the statistics on RTP in the cases disposed of have been culled to form Table-VI. In view of large efforts involved in such to and

fro exercises, we have restricted the statistical analysis of practices in the inquiries disposed to the last 10 years, 1982-91. Among the other reasons for not covering the earlier period are the following. First, of the 3033 inquiries disposed of by the Commission during 1972-91, as many as 2707 or about 90 per cent were disposed of during 1982-91. The balance of 10 per cent left out is thus small. Second, the tracting of RTP from the previous reports for the inquiries disposed of during the earlier years is a far more difficult task, as the reports for the years 1972 through 1977 do not mention the inquiry numbers for the inquiries disposed of, as is done in the later reports.

Finally, the statistics of inquiries disposed of during 1972-76 by the type of RTP and the order thereon for the period 1972-1976 which cover six of the ten years left out by us are readily available in a tabular form elsewhere.[17] We have, however, not used these statistics as they seem to be based on the full proceedings before the Commission, whereas our statistics are based on just the orders as recorded in the annual reports. So a mix-up of those relatively good statistics with our statistics in a comparative form would not have been consistent, and therefore, improper from that angle.

It is against these limitations that the statistics of the next part have to be appreciated.

IV STATISTICAL ANALYSIS

We now go to the statistics proper. As noted in the previous part, they relate to agreements, inquiries instituted and inquiries disposed of, all related to RTP, and cover the period from the commencement of the Act to 1991.

Registration of Agreement:

Table-I gives the number of agreements registered and filed during and at the end of the year for the years 1973-1989.

The number of agreements filed during the year varied from the lowest of 111 in 1989 to the highest of 7310 in 1985. The number filed as at the end of year increased from 13969 in 1973 to 38985 in 1989 showing an increase of 2.8 times. The yearwise increase in the number at the end of the year varied from -0.1 per cent in 1989 to 24 per cent in 1974.

The number of agreements registered during the year varied from the lowest of 107 in 1988 to the highet of 7129 in 1985. The number registered as at the end of the year increased from 12926 in 1973 to 37788 in 1989 showing an increase of 2.9 times. The yearwise increase in the number at the end of the year varied from 0.3 per cent in 1989 to 20.4 per cent in 1974.

Thus, the trends and the magnitudes in the numbers filed and registered are broadly similar.

It is difficult to account for satisfactorily all of the yearwise changes. However, for some groups of nearby years, some explanations can be offered. First, the large increases of the

early years (1974 to 1977) are due to the large response one generally gets in such matters after the act becomes operational when the parties rush to register the existing agreements. Similarly, the small increases of the later years (1986-89) could be partly because most of the agreements that needed to be registered may already have been registered earlier, and also because having seen the working of the Act generally against such agreements, only a few agreements would be entered into by the parties

The reason for changes for intermediate years is of a different kind. The rates of increase are small for the period 1978-83 but are substantial for the years 1984 and 1985.

Earlier, before the judgement of the Supreme Court in the TELCO case[16], the MRTP Commission's view on registrable agreements was that all agreements specified in Section 33(1)(a) to (l) are statutory illustrations of RTP and, therefore, to be registered <u>per se</u>. In that case, the Supreme Court took the view, that this was not a correct interpretation of the law. The correct interpretation was to put the agreement under the test of Section 2(o) which was couched in terms of restriction on competition. The implication of this judgement was that sufficiency test of restriction of competition was to be applied to every agreement for registration purpose, including the agreements specified under Section 33(1). Following this judgement, several parties seem to have taken the view that in the light of this judgement, their agreements were not

registrable and, therefore, they may not have filed their agreements for registration. In fact, in several inquiries that followed this judgement, the Commission had to ask the complainants to provide further and better particulars to establish the existence of RTP.

The poor filing/registration of agreements continued upto 1983. By the 1984 amendment, all agreements falling within the categories specified under Section 33(1) were deemed to be restrictive of competition and therefore to be registered per se.[19] As a result, there was a big jump in the number of agreements filed/registered in 1984 and 1985.

(Table-I, Here or around)

Agreements in Force

These agreements are supposed to be determined one way or the other in response to the inquiries based on them. With the passage of time, some of them get determined and some may become infructious. So the more important thing is to know the number of agreements in force at a point of time. Here, the available statistics are limited to the period 1979 to 1984. It will be seen from Table-II that the number of agreements in force increased from 6289 in 1984 to 11678 in 1989. Relative to the number of agreements registered, the number in force increased continuously from 28 per cent in 1979 to 42 per cent in 1984.

(Table-II, Here or around)

Inquiries Instituted

We now examine the statistics on the number of RTP instituted by different parties under the relevant sections. Table-IV gives the number of inquiries initiated year-wise from 1972 to 1991, and Table-III summarises these statistics aggregately and by the two ten-year periods.

During the twenty-year period, only 2 inquiries were instituted upon references from government [10(a)(ii)], and both by the Central Government. The inquiries initiated on the basis of a complaint from trade/consumer associations or consumers [10(a)(i)] while more numerous than in the previous case were only a few. Of the total of 3474 inquiries instituted, this source accounted for 171 or 5 per cent of the total. The principal burden of instituting inquiries has fallen on the Director-General [10(a)(iii)] who had initiated 2186 or 63 per cent of the total inquiries. The Commission [10(a)(iv)] was a distant second, with 1115 or 32 per cent of the total.

As between the Director-General and the Commission, the latter's role was substantially more than the former's during 1972-81 with 57 and 39 per cent of the total inquiries instituted during this period. The position during 1982-91 was otherwise with their percentages of 29 and 66 in that order.

The year-wise details of Table-IV show clearly the impact of the Supreme Court judgement in the TELCO case, 1977 referred to earlier in this part. Following that judgment, the complainants were expected to give better and further particulars as evidence

on the existence of RTP. As a result, more time was needed for preparing the case. So, the total number of inquiries instituted between 1977 and 1984 when the Act was amended in the relevant portions, fell drastically from 97 and 90 in 1975 and 1976 to betwen 20 to 52 during 1977-1983. But after the 1984 amendment, the number increased again. The total number was 155, 133, 229, 154 and 131 in 1984, 1985, 1986, 1989 and 1990 respectively.

We are unable to account for the small number of 55 in 1991. But the very large number of the total of 1666 inquiries in 1987 and to a less extent of 477 in 1988 is principally due to an unusually large number of inquiries instituted by the Director-General. These numbers increased from a low of 63 in 1986, and their shares in the total number of inquiries in 1987 and 1988 were 92 and 62 per cent respectively.

Of the 1531 inquiries instituted by the Director-General in 1987, nearly 850 were against parties in two groups of products, namely (i) Drugs and pharmaceuticals, and (ii) Vanaspati, bakery products, refined oil and soap, with roughly an equal number in each. The RTP alleged in the former was full-line forcing and in the latter resale price maintenance. The other three product groups to which a substantial number of inquiries related were (i) LPG, (ii) V-Belts and engineering products, and (iii) Automobiles and spare parts, though the numbers in each case here were much less than in the two previous groups. The allegations in the inquiries in the first of these three groups related to tie-up sales, in the second to discriminating dealings/resale

price maintenance, and in the third to restriction on persons/territorial restrictions and discriminatory dealings.

Of the 295 inquiries in 1988, 60 related to V-belts and to discriminatory dealings in them. The other activities which accounted for a substantial number of inquiries were, (i) Automobiles and spare parts, and (ii) Drugs and Pharmaceuticals. The RTPs in the inquiries of the former activity were, in general, territorial restriction, tie-up sales and exclusive dealings, and in the latter, resale price maintenance, discriminatory dealings, and territorial restrictions.

[Tables III and IV, Here or Around]

Inquiries Disposed of by Order

We now take up the statistics on the number of inquiries disposed of. Here, we give a two-fold group: (i) inquiries found prejudicial to public interest, and therefore under cease and desist or consent order [37(1)(2)]; and, (ii) other inquiries. Of the total 3033 inquiries disposed of during 1972-91, as is seen from Table-V, 1125 or 37 per cent were in the first group, and 1908 or 63 per cent in the second. Relative to these percentages, the first decade had a higher percentage in the first group (79 per cent), and the second decade had a higher percentage in the second group (68 per cent).

Of the two inquiries originating from government [10(a)(ii)] during the twenty-year period, one each was disposed of under consent order and otherwise. A majority of inquiries under the other three sources were disposed of otherwise - forming 81, 61

and 64 per cent of the total number of inquiries instituted upon references from the trade/consumer association, etc., the Director-General and the Commission [10(a)(i), (iii)] and (iv)] respectively. In each of these three cases, the proportion of inquiries disposed of under cease/desit or consent order was higher during the first decade than during the second - 69 and 13 per cent, 79 and 36 per cent and 79 and 24 per cent. To put it differently, the percentage of inquiries disposed of otherwise was higher during the second decade than during the first in each of these cases - 87 and 31 per cent, 64 and 21 per cent and 76 and 21 per cent. Both of the inquiries sponsored by government were in the second decade.[20]

[Tables V, Here or Around]

Inquiries Disposed of by Type of RTP AND Order

For reasons discussed in Part-III, this discussion is restricted to the inquiries disposed of during 1980-91. The number of such inquiries as noted from Table V was 2707. The RTP alleged in these inquiries have been grouped, as explained in Part-III, in eleven categories listed in Table-VI.

Tie-up/full-line forcing was found in the largest number of inquiries, 820 or 24 per cent of the total. Resale price maintenance was a close second, found in 767 or 23 per cent of the total. Next in strength were discriminatory dealings, territorial restrictions/withholding supply and manipulation of prices/of conditions of delivery, occurring in 408, 408 and 358 or 12, 12 and 11 per cent of the total inquiries. Thus, the

first two practices were found in a little under one-half of the total inquiries, and these five in a little over four-fifths of the total inquiries. The percentage in the remaining RTPs varied from 0.5 in predatory pricing to 6.6 in exclusive dealing.

RTP-wise, the analysis by order shows significant differences. Thus, for example, discriminatory dealing was found in the largest number in the inquiries disposed of under cease/desist or consent order [Section 37(1)(2)], in 304 or 23 per cent of the total of 1,328 such inquiries, whereas in the inquiries disposed of otherwise, its number was 104 or 5 per cent of the total of such inquiries. Resale price maintenance is the other case of such a difference, being found in 14 per cent of the inquiries disposed of under the cease and desist order or consent order and in 28 per cent in other inquiries. Two other such practices were territorial restriction/withholding of supplies with 19 and 7 per cent, and tie-up/full-line forcing with 12 and 32 per cent of the total inquiries in the respective groups.

These statistics permit us to answer another question also. How do the proportions of inquiries disposed of under cease and desist and consent orders on the one hand and other inquiries vary by practice? Of the eleven categories of RTP listed in Table VI, in seven, inquiries disposed of otherwise form a majority in the respective totals of inquiries in these practices, varying from 54 per cent in collective price fixation to 89 per cent in predatory pricing. The other five practices in

this company are collective bidding/tendering (79 per cent), manipulation of prices/of conditions of delivery (71 per cent), resale price maintenance (77 per cent), tie-up/full-line forcing (80 per cent) and others (70 per cent).

In the remaining four RTP, the inquiries disposed of under cease and desist order and consent order are in the majority - with 75 per cent in discriminatory dealing, 58 per cent in exclusive dealing, 55 per cent in restrictions on persons, etc. and 63 per cent in territorial restrictions/withholding of supply.

It should be further observed that in three of the above four practices, excepting discriminatory dealing, the difference in favour of cease and desist and consent orders is small, within 13 per cent. On the other hand, such a small difference in favour of other inquiries is found only in one of seven RTP where they had a majority, namely collective price fixation.

The number of inquiries in which prejudice to public interest was found in their RTP during 1972-91, and the number of RTP against which such prejudice was found in the inquiries during 1982-91 were each relatively small, nearly two-fifths of the respective totals. The large balance of over three-fifths in each leaves in one's mind a feeling of unease, and provokes a number of questions whose answers have to be sought from further investigations. These questions and related issues are taken up in the next part.

[Tables VI, Here or Around]

V AGENDA FOR FURTHER WORK

This final part is comprised of five different types of item. The first suggests a change in the preamble of the MRTP Act, and the second a change in the proforma for presenting the information on the inquiries disposed of. The third item draws attention to the long time taken in the disposal of the inquiries since their institution in a large number of inquiries, and suggests a probe into the reasons thereof. The fourth item lists the specific studies for improving our knowledge on this subject. They relate to the composition of inquiries disposed of, impact of control, and general effect on the public interest of certain RTP as such as also in relation to some products/services. This part is concluded with a comment on the switchover to the per se approach from the rule-of-reason approach advocated by some authors on this subject.

(1) Preamble:

The Preamble to the MRTP Act has become dated because of two major developments since the enactment in 1969. It suffers from one ommission and one commission. The 1984 amendment has incorporated the provisions on Unfair Trade Practices, and the reference to the same does not figure in the Preamble. The 1991 amendment has repealed almost all the provisions on the (aggregate) concentration, and yet the reference to the same continues in it. A change of, or in, the Preamble is, therefore, due. Hereiwth is a draft for consideration: "An Act to provide for the control of monopolies and for the prohibition of monopolistic, restrictive and unfair trade practices which are or

which may be prejudicial to public interest (or which have or may have the affect of producing common detriment), and for matters connected therewith and incidental thereto.

If, however, for some reason such as that by virtue of it being specifically mentioned in the Constitution (in Article 39-C), the word 'concentration' ought to be there in the preamble of the MRTP Act, we suggest that it be properly specified in the preamble to reflect the spirit of recent changes in policy, and this can be done by specifying that 'concentration' is in the 'product-wise concentration' context. Accordingly, the alternative draft of the preamble would be as under: "An Act to provide for the control of product-wise concentration and of monopolies and for the prohibition of monopolistic, restrictive and unfair trade practices which are or which may be prejudicial to public interest (or which have or may have the effect of producing common detriment), and for matters connected therewith and incidental thereto".

(2) **Proforma for the Inquiries Disposed of:**

As we have described in detail earlier (in Part III, under the heading Statistics and their Limitations) the nature of statistics used in this study, that description will not bear repetition here. We, therefore, restrict in what follows to offering suggestions for improvement in the presentation of statistics with further and better particulars on this topic. Also, since our principal concern has been with the statistics on the inquiries disposed of, the suggestions are by and large limited to the related proforma.

The statistics on the inquiries disposed of are presented in four appendices, one on each: inquiries instituted under section 10(a)(i), 10(a)(ii), 10(a)(iii) and 10(a)(iv) i.e. at the instance of consumers, etc. Central/State government, Director-General and the Commission itself. The statistics may continue to be presented seperately for each category as done presently.

The information given in these appendices relates to six items: (i) name of the party, (ii) inquiry number, (iii) date of institution of inquiry, (iv) product covered, (v) date of disposal, and (vi) nature of order. Presentation of information on items (ii), (iii), (iv) and (v) is by and large all right. Our suggestions relate to item (i), item (vi) the insertion of two new columns on RTP alleged and Gateways pleaded, and to presenting the related information in a manner which makes it more meaningful than what it is at present. We believe that this can be done without much extra effort, as the information is already available.

Although the name of the respondents in the inquiry is given, it is not clear whether it is the sole or the first named party. It is suggested that the names of all the respondents should be given in the proforma.

Second, the information on the nature of order as presently given leaves a lot to be desired. It is presented under varying degrees of specificity, and even when the contents of the order are the same, different nomenclatures are used. Thus, for example, the order may be listed as under 37(1), without

specifying whether it is under 37(1)(a) or 37(1)(b) or under 37(1)(a) and (b). Or the order may be listed as order 37(2) or consent order. The position in regard to the inquiries disposed of otherwise is worse. They are reported as closed, withdrawn, terminated, notice of inquiry disposed and the like. One would like to know the details on the orders on these inquiries. Why that particular outcome: Was RTP not established? If established, was it not found prejudicial to public interest? If so, through which gateway/s did RTP pass? Other reasons in this category include: stay order by Supreme Court/High Courts, government becoming a party, agreement approved/authorised by government, agreement/practice, expired/abandoned, subsequently, etc. It is, therefore, suggested that for the inquiries found prejudicial to public interest, nature of order should be specifically indicated and the same nomenclature may be used for conveying the same contents. For the other inquiries disposed of, the reasons for the absence of such an order should be specified in the terms listed above and as illustrated in Table-VII.

Our third suggestion relates to the insertion of two new columns in the present forms: one on the RTP inquired into, and the other on Gateways pleaded.

As mentioned earlier (in Part III, under the heading Statistics and Their Limitations), the appendix on inquiries disposed of does not give information on RTP inquired into. If, therefore, one wants to know the nature of order against RTP

indulged in, one has to trace them from the appendices on the inquiries instituted/pending disposal. Our Table-VI is the outcome of that effort.

If, therefore, the appendix on the inquiries disposed of has an additional column on RTP alleged, it would enable one to know from the same appendix RTP inquired into and the order thereon.

The listing of RTP as presently done under the other two appendices on the inquiries instituted and the inquires pending disposal leaves much to be desired. It is not clear whether the list relates to all or to a limited number of RTP, as at some places the word, etc. is given after the last-named party. Also, some times RTP are listed generally such as "Acting in Concert". One cannot be sure whether this practice relates to price-fixation or output restriction or to any other specific practice, singly or jointly. Further, different nomenclatures are used to denote what seem to be the same RTP, for example, fixing prices in concert, price-fixation in concert, joint-price fixation, etc. The listing of RTP in the appendix on the inquiries disposed of, as also in the other two appendices on the inquiries instituted and the inquiries pending disposal, should therefore list all RTP, list them specifically and use the same nomenclature for the same RTP.

In early part under this heading, we have given the suggestion on giving further and better particulars on the nature of order, on the lines indicated therein. Related to that suggestion is the suggestion of inserting a column on 'gateways'

pleaded for the RTP under inquiry. This would enable us to know the outcome on that pleading from one place. Here again, the same nomenclature should be used to denote the pleading on the same/similar ground.

As to the terminology of the nomenclature, one could use either brief headings or indicate the same in terms of the relevant sections/sub-sections of the MRTP Act. We prefer the latter for two reasons: they label the same/similar situations without ambiguity; they make for saving of space in presentation. The broad contents of the sections/sub-sections may be explained briefly in a footnote to the appendix.

To sum up: the statistics on the inquiries disposed of as they are presented in the related appendix have a limited value for a variety of reasons given above. All they convey clearly is whether there was a finding of prejudice to public interest against the sole/the first-named party engaged in the supply of products/service specified. The presentation of statistics in as manner suggested above would enable one to know from that appendix the details on the categories of RTP inquired into, on the nature of order and on the names of all parties as such and in relation to one another of these items. A draft of the proforma based on these suggestions is given in Table-VII. A study based on this information could yield useful lessons for changes in the MRTP Act.

[Table VII, Here or Around]

(3) **Time Taken:**

While some inquiries have been disposed of expeditiously by the Commission, time taken in the disposal of a large number has been truly long. We illustrate this point by giving statistics of time taken in the inquiries disposed of in 1982 and 1991 since their institution. Table-VIII gives these data. Of the 296 inquiries disposed of in 1991, time taken in 224 or 76 per cent was two years or more. The numbers and percentages in 2-3, 3-4, 4-5 and 5 years or more were: 60, 71, 82 and 11 or 20, 24, 28 and 4 per cent respectively. The longest time recorded in case of one inquiry was 7 years, 2 months and 3 days.

The situation seems to have deteriorated over time. Of the 42 inquiries disposed of in 1982, time taken in 12 or 29 per cent of the total was 2 years or more as against the corresponding percentage of 76 in 1991 as noted above.

Why such a long time in a such a large number later? And how can it be reduced to a reasonable limit? There is clearly a need for a diagnostic and prescriptive study.

[Table VIII, Here or Around]

(4) **Studies**

(a) Composition of Inquiries Disposed of:

The statistics of Tables V and VI leave one with a feeling of much unease. The number of inquiries and the number of RTP therein found prejudicial to public interest are each small relative to the respective numbers in the inquiries and the RTPs

found otherwise. This is more true for the second decade than for the first one.

There is no doubt that this group of inquiries/practices includes numbers in which there was good evidence, and yet the Commission concluded contrarily in the sense that there were no RTP, or when they were, they were not prejudicial to public interest. But the total numbers of inquiries and practices in these 'otherwise' cases are truly large, and even when these numbers are discounted by deducting the above-mentioned numbers, the balance is likely to remain substantial, so that there is no room for complacency. It is, therefore, essential to know the break-up of the inquiries/practices disposed of otherwise in a more meaningful way, such as RTP not found, RTP not found prejudicial to public interest, having passed through the specified gateways and also the balancing test, inquiry withdrawn because of change in circumstances such as expiry of agreement, agreement approved by government, government take-over of the company, etc. If the information on the inquiries disposed of is presented in the proforma suggested in Table-VII, it would be possible to know meaningfully the composition of inquiries disposed of.

In the context of the relatively large numbers in the inquiries/practices disposed of otherwise, we raise a number of questions. Is the law as it is, so very rigid that the required evidence to prove the allegation is not capable of being put together? Is the material in evidence put up before the Commission so weak that it does not pass the muster? Do the

authorities have adequate and competent staff to collect the needed material and prepare a good case? These questions are important not merely because the relative numbers here are large, but especially because they are so in seven of the eleven RTP categories, as noted from Table-VI.

We need detailed studies to answer these questions. These studies will have to be based on the proceedings of the inquiries disposed of. The studies should first sort out the nature of findings/orders of these inquiries by the Commission, and then examine critically the reasons thereof as given in the proceedings, supplemented by the inquiries from other quarters, namely legal profession, business circles, etc.

(b) Impact of Control:

The legality of RTP is determined with the touchstone of public interest defined broadly as consumers' welfare. Competition is a means to that end. So if a RTP has or may have the effect of reducing competition, it is presumed to be illegal. It may, however, be permitted if on balance the harm caused by reduction of competition is outweighed by the advantages gained in terms specified under the gateways (38(1)).

In general, when the Commission declares RTP to be illegal, the implication is that the discontinuance of the RTP promotes or may promote competition in the trade/industry concerned. Has this really happened?

This is a question which has to be examined with reference to the companies/trades/industries, comparing the conditions when restrictions were practised and when they were given up. Has the abandonment of RTP improved the efficiency of the companies/trades/industries affected by the change? The differential performance in efficiency may be measured on various well-known financial, economic and technical measures. To put the point specifically in terms of consumers' welfare: Have the prices of affected products/services fallen or their quality improved, or have the new products been put in the market afterwards, following the abandonment of RTP? How much of these improvements can be attributed to the abandonment of RTP, and how much to other favourable factors? If inspite of abandonments, efficiency has not improved or consumers' welfare not increased, what are the factors that counteracted that tendency?

If on the other hand, the Commission has not found RTP to be prejudicial to public interest on one or more gateways and also on a balancing test, their continuance serves one or the other purposes specified in 'gateways' (38(1)). So here, the questions to be addressed are: Have these purposes been subserved by RTP afterwords? To illustrate with reference to some gateways: Have the exports increased? Has employment grown? Have the consumers' benefited substantially in specific ways?

It is really from the answers to these and related questions that one can form a more informed judgement on the efficacy of control on RTP under the MRTP Act, and can get clues on the lines of change in the legislation.

(c) General Effects on the Public Interest:

It was noted from Table-VI that of the 11 categories of RTP, a majority of RTP in 4 categories (namely discriminating dealings, exclusive dealings, restrictions on persons, etc. and territorial restrictions/withholding of supplies) in the inquiries disposed of were found to be prejudicial to public interest. It may therefore be worthwhile to investigate whether these RTP in general are or may be prejudicial to public interest. And if the investigation yields a positive answer, it may be considered whether the law on these RTP should be tilted towards a per se approach, permitting a limited number of exemptions/exceptions, as is presently the case with respect of RPM. Later, on availability of further and better evidence, other RTP may be similarly investigated.

A cursory examination of RTP declared illegal by type of product/service shows that certain types of RTP may be found more frequently in some products/services than others. Thus, for example, sale of a machine or a consumer durable like refrigerator is often tied up with the condition of installation and the demonstration of its operation at the purchaser's place, and the price of the product is inclusive of the cost of these services. Or as was the case earlier before the MRTP Commission's orders, LPG dealers used to give the gas connection to the customers on the condition of purchase of stove from them. A third example relates to the supply of consumer products by a manufacturer to the dealer on the condition that the latter will resell them only at a price stipulated by the former.

Such product-wise investigations may help spot out product-RTP links. They may examine whether such specific product-RTP attachments in general are or may be prejudicial to public interest. In the light of these studies, it may be considered whether there is a case for tilting the law in favour of per se approach to such RTP when found prevailing in certain products/services as suggested above.

Such studies would be of great value in forming judgments on the question of change in the MRTP Act. The issues on which judgments need to be formed are: Are the present provisions in respect of various RTP all right? If a change is needed, should it be selective or all-embracing? If selective, in which RTP and in which products/services and in what direction? If all embracing, should there be a basic change in the approach from the rule-of-reason to the per se - to the MRTP Act?

The British Monopolies Commission has carried out a number of investigations on the general effect on the public interest of a number of RTP, and also in so far as they prevail in relation to the supply of goods/services.[21] No such study has been carried out by the Indian MRTP Commission. Attention may be drawn here to Section 61 of the MRTP Act under which the Central Government is empowered to ask the Commission to submit such reports. This power has not yet been exercised. It is time to exercise it.

(5) **Per se Approach:**

As we have discussed generally the relative merits and disadvantages of the rule-of-reason and the per se approaches at the end of Part III, we discuss here only the particular arguments made by the advocates of change in the basic approach - from the rule-of-reason to the per se in the MRTP Act, the reference to which was made in Part I.

In brief, these arguments are two-fold: (a) The British and the Indian experiences show a very large proportion of RTP found prejudicial to public interest. (b) The rule-of-reason approach is unfair. It is only when the Commission has inquired into RTP and declared them to be illegal that they are abandoned. RTP not enquired into even when they are alike the former, may continue to be practised. Why, therefore, continue with a time-consuming, expensive and unfair (rule-of-reason) approach, and not change to the other approach (per se)?

On a close examination, we find these arguments not appealing. As to the first point, the British experience may or may not be relevant. This experience has to be examined in detail, and its relevance to the Indian conditions has to be shown for a serious consideration of this argument. To the best of our knowledge, there is no such study, and views and opinions based on impressions or cursory studies should not be regarded seriously, especially when one is considering a fundamental change of the approach itself.

As regards Indian evidence, A.N. Oza's data of the 275 inquiries disposed by the Commission during 1970-79, show that 200 or 73 per cent were found to be (wholly) prejudicial to public interest with the follow-up of cease and desist or consent order, and 75 or 27 per cent were disposed of otherwise[22]. This evidence must be juxtaposed against the other evidence presented in this paper, and when done so, the picture looks considerably less favourable. As Table V has shown, in only a third of the total inquiries disposed of during 1982-91 there was a finding of prejudice to public interest; and in view of the preponderance of the number of inquiries disposed of during this period relative to the earlier period (1972-81, which is also covered in that table), the percentage for the entire period is pretty close to that for the earlier period, 37 and 32 per cent respectively. The finding by RTP in the inquiries disposed of during 1982-91 tells a similar tale. A finding of prejudice was only against 39 per cent of RTP in these inquiries. All-in-all, the Indian evidence cannot be taken as supporting satisfactorily the proposal of such a major change in the approach.

The second point on fairness has no doubt some merit. But it must be put in a proper perspective. The case for change must be based on a balance of net advantage arrived at on a full consideration of relative merits/disadvantages of the two approaches - the felt ones under the rule-of-reason approach and the expected ones under the per se approach, and not just on the ground of unfairness patent in the former. But until this is done, the rule-of-reason approach should continue, and steps

should be taken to mitigate the unfairness. Here, the remedy lies in preparing the cases to be put before the Commission well and early, and the Commission disposing them of expeditiously. It is perhaps not possible to do so under the present set-up. So the set-up must be strengthened and enlarged. The Director-General and the MRTP Commission should be equipped with more staff, with better expertise and experience in the branches of knowledge required for their work. The number of members of the MRTP Commission should be suitably increased, the Commission should sit in benches, and these benches should be located at three/four places. So far the Commission has been having only 3/4 members and has been sitting as a whole and only in Delhi. The strengthening proposed here is all the more necessary now, as since the early eighties the work-load has increased due to increase in the number of RTP inquiries and also due to the inquiries into the Unfair Trade Practices which have been brought within the purview of the Act. So, if such a strengthening is not done, the number of agreements and inquiries of agreements and inquiries pending disposal will increase, and the feeling of unfairness will not only persist, but will get accentuated.

All-in-all, the available evidence on, and the known arguments for a change in favour of, the <u>per se</u> approach at present are not sufficiently pursuasive. Knowledge of the Indian conditions in this area is limited and tentative. A well-informed judgment on the question of change in the approach to the MRTP legislation will, therefore, have to be formed later after we get the light from the studies referred to above.

Table-I : Restrictive Trade Practices Agreements : Filed and Registered : 1973-1989 (year-wise)

Year (January-December)	Filed			Registered		
	Number during the year	Number at the end of the year	Percentage increase in column (3) over the previous year	Number during the year	Number at the end of the year	Percentage increase in column (6) over the previous year
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1973	2823	13969	-	2065	12926	-
1974	3343	17312	24.4	2643	15569	20.4
1975	2398	19710	13.9	2363	17932	15.2
1976	2079	21789	10.5	1787	19719	10.0
1977	1439	23288	6.8	1354	21073	6.9
1978	887	24115	3.4	501	21574	2.4
1979	623	24738	2.6	578	22152	2.7
1980	610	25348	2.5	585	22737	2.6
1981	616	25964	2.4	520	23257	2.3
1982	527	26491	2.0	478	23735	2.0
1983	1157	27648	4.4	1019	24754	4.3
1984	2895	30543	10.5	2787	27541	10.9
1985	7310	37853	23.1	7129	34670	26.3
1986	503	38356	1.3	2645	37315	7.6
1987	310	38666	0.8	236	37551	0.5
1988	208	38874	0.5	107	37658	0.4
1989	111	38985	0.1	128	37788	0.3

For explanations on statistics, refer to the text under the heading Registration of Agreements in Part-III.

Source: Government of India, Ministry of Law, Justice and Company Affairs, Department of Company Affairs : Annual Reports Pertaining to the Execution of the Provisions of the Monopolies and Restrictive Trade Practices Act, 1969, New Delhi.

Table-II : Restrictive Trade Practices Agreements in Force, 1979-84 (year-wise)

Year	Number of Agreements		(2) as percentage of (3)
	In Force	Registered	
(1)	(2)	(3)	(4)
1979	6289	22152	28.4
1980	6874	22737	30.2
1981	7394	23257	31.8
1982	7872	23735	33.2
1983	8891	24754	35.9
1984	11678	27541	42.4

Source: Same as under Table-I.

Table-III : Restrictive Trade Practices Inquiries Instituted 1972-91

Year/ Section	Number				
	10(a)(i)	10(a)(ii)	10(a)(iii)	10(a)(iv)	Total
(1)	(2)	(3)	(4)	(5)	(6)
1972-81	15	2	154	222	393
	(4)	(0.5)	(39)	(57)	(100)
1982-91	156	-	2032	893	3081
	(5)	-	(66)	(29)	(100)
1972-91	171	2	2186	1115	3474
	(5)	(0.05)	(63)	(32)	(100)

1. Figures in brackets are percentages.
2. For explanations on statistics, refer to the text under heading Inquiries Instituted in Part-III.

Source: Same as under Table-I.

Table-IV : Restrictive Trade Practices - Inquiries Instituted 1972-1991 (year-wise)

Year/ Section	Number				
	10(a)(i)	10(a)(ii)	10(a)(iii)	10(a)(iv)	Total
(1)	(2)	(3)	(4)	(5)	(6)
1972	-	-	10	-	10
1973	1	-	2	3	6
1974	2	-	19	13	34
1975	1	-	30	66	97
1976	4	-	41	45	90
1977	3	-	3	40	46
1978	2	1	4	28	35
1979	-	-	19	8	27
1980	1	1	12	6	20
1981	1	-	14	13	28
1982	1	-	9	19	29
1983	2	-	12	38	52
1984	8	-	38	109	155
1985	4	-	16	113	133
1986	33	-	63	133	229
1987	12	-	1531	123	1666
1988	41	-	296	140	477
1989	22	-	31	101	154
1990	23	-	22	86	131
1991	10	-	14	31	55

For explanations on statistics, refer to the text under the heading Inquiries Instituted in Part-III.

Source: Same as under Table-1.

Table-V : Number of Restrictive Trade Practices Inquiries Disposed of, 1972-91

Inquiries/Years	1972-81		1982-91		1972-1991	
(1)	(2)		(3)		(4)	
A. Instituted Under Section 10(a)(i) and Disposed of -						
1. Under Section 37(1) or 37(2)	9	(69)	14	(13)	23	(19)
2. Otherwise	4	(31)	91	(87)	95	(81)
3. Total	13	(100)	105	(100)	118	(100)
B. Instituted Under Section 10(a)(ii) and Disposed of -						
1. Under Section 37(1) or 37(2)	-		1	(50)	1	(50)
2. Otherwise	-		1	(50)	1	(50)
3. Total	-		2	(100)	2	(50)
C. Instituted Under Section 10(a)(iii) and Disposed of -						
1. Under Section 37(1) or 37(2)	98	(79)	681	(36)	779	(39)
2. Otherwise	26	(21)	1209	(64)	1235	(61)
3. Total	124	(100)	1890	(100)	2014	(100)
D. Instituted Under Section 10(a)(iv) and Disposed of						
1. Under Section 37(1) or 37(2)	150	(79)	172	(24)	322	(36)
2. Otherwise	39	(21)	538	(76)	577	(64)
3. Total	189	(100)	710	(100)	899	(100)
E. All: Instituted Under Section 10(a) & Disposed of -						
1. Under Section 37(1) or 37(2)	257	(79)	868	(32)	1125	(37)
2. Otherwise	69	(21)	1839	(68)	1908	(63)
3. Total	326	(100)	2707	(100)	3033	(100)

1. Figures in brackets are percentages.

2. For explanations on statistics, refer to the text under heading Inquiries Disposed of by Order in Part-III.

Source: Same as under Table-I.

Table-VI : Type of Restrictive Trade Practices in the Inquiries Disposed of by Order, 1982-1991

Restrictive Trade Practices/Section	Number of Inquiries					
	U/S 37(1)(2)		Otherwise		Total	
(1)	(2)		(3)		(4.	
1. Collective Price Fixation/Parallel Pricing etc. [33(1)(d)]	36 (46)	(2.7)	43 (54)	(2.1)	79 (100)	(2.3)
2. Collective Bidding/Tendering [33(1)(b)]	4 (21)	(0.3)	15 (79)	(0.7)	19 (100)	(0.6)
3. Discriminatory Dealings [33(1)(e)]	304 (75)	(22.9)	104 (25)	(5.0)	408 (100)	(11.9)
4. Exclusive Dealings [33(1)(c)]	132 (58)	(9.9)	95 (42)	(4.6)	227 (100)	(6.6)
5. Manipulation of Price/Conditions of Delivery, etc. [2(o)(ii)]	105 (29)	(7.9)	253 (71)	(12.1)	358 (100)	(10.5)
6. Predatory Pricing [33(1)(j)]	2 (11)	(0.2)	16 (89)	(0.8)	18 (100)	(0.5)
7. Resale Price Maintenance [33(1)(f)]	179 (23)	(13.5)	588 (77)	(28.2)	767 (100)	(22.5)
8. Restrictions on Persons/ Boycott, Refusal to Deal/Supply [33(1)(a)(i)(ja)]	116 (55)	(8.7)	95 (45)	(4.6)	211 (100)	(6.2)
9. Territorial Restrictions/Withholding of Supply [33(1)(g)]	258 (63)	(19.4)	150 (37)	(7.2)	408 (100)	(11.9)
10. Tie-up/Full-line Forcing [33(1)(b)]	162 (20)	(12.2)	658 (80)	(31.5)	820 (100)	(24.0)
11. Others (33(1)(b)(k)(l), 2(o), 2(4), Vague, general, no information, etc.	30 (30)	(2.6)	70 (70)	(3.4)	100 (100)	(2.9)
12. Total	1328 (39)	(100)	2087 (61)	(100)	3415 (100)	(100)

1. Figures in brackets to the right of the numbers are percentages to the total against item 12, and those under the numbers are percentages to the total in column (4).
2. For explanations on statistics, refer to the text under the heading Types of RTP in the Inquiries Disposed of by Order in Part-III.

Source: Same as under Table-I.

Table-VII : Draft Proforma for the Inquiries Disposed of under the MRTP Act, for the period 1-1-93 to 31-12-1993.

Inquiry No.	Name of the Respondent	Date of Institution of Inquiry	Product	RTP Alleged	Gateways pleaded	Date of Disposal	Disposed of under 37(1)(a)(b)/ 37(2)	Otherwise	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
1. 5/90	ABC	3-9-90	P1	33(1)(e)	-	10-6-93	37(2)	-	
2. 31/91	1. MNP) 2. RST)	5-2-91	P2	1.33(1)(f) 2.i) 33(1)(f) ii) 33(1)(l)	38(1)(a) 38(1)(a) -	18-7-93	- - -	1. 38(1)(a) passed 2. i) 38(1)(a) passed ii) RTP not found	
3. 14/92	XYZ	6-6-92	P3	1.Manipulation of Prices 2.33(1)(b) 3.33(1)(d) 4.33(1)(e)	- 38(1)(f) 38(1)(h)	9-9-93	2. 37(1)(a) 4. 37(2)	1. RTP not found 3. 38(1)(h) passed	

Footnotes:

1. The details under the columns are for illustrative purposes only. They are not related to the actual inquiries.

2. As mentioned in the text, the information under columns (5),(6),(8) and (9) may be given in terms of section numbers. The contents of these sections may be briefly specified in the footnote to the table. Thus, for example, 33(1)(e) column (5) - is RTP of discriminatory dealing; 38(1)(a) - column (6) - is gateway of injury to the public; and 37(2) - column (8) - is consent order. Information that cannot be classified in terms of sections can be described in words, such as RTP of manipulation of prices in inquiry no. 14/92, column (5).

3. The advantage of this proforma is that it relates the nature of order, to the parties and to the RTPs. Thus, for example, in inquiry 31/91, there were two parties: MNP and RST. The RTP alleged against MNP was that covered under 33(1)(f); the party pleaded the gateway covered under 38(1)(a); the Commission accepted the pleading - it did not found that RTP prejudicial to public interest, and therefore did not declare the same to be illegal. The RTP alleged against RST were those covered under 33(1)(f) and 33(1)(l); the party pleaded the gateway covered under 38(1)(a) for 33(1)(f) and pleaded that 33(1)(l) was not RTP; the Commission accepted both the pleadings, and therefore did not pass orders under 37(1) or 37(2).

Table-VIII : Inquiries Disposed of by Time Taken since their Institution, 1992 and 1991.

Number of Months	1982		1991	
	Number	Percentage	Number	Percentage
(1)	(2)	(3)	(4)	(5)
Less than 3	12	28.6	8	2.7
3 - 6	4	9.5	8	2.7
6 - 12	6	14.3	27	9.1
12 - 24	8	19.0	29	9.8
24 - 36	5	11.9	60	20.3
36 - 48	5	11.9	71	24.0
48 - 60	1	2.4	82	27.7
60 and above	1	2.4	11	3.7
Total	42	100.0	296	100.0

Source: Same as under Table-I, 1982 and 1991 reports.

Footnotes

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1. (1) S.M. Dugar : Law of Restrictive Trade Practices, A Taxman's Publication, Delhi, 1976; (2) B.B.L. Mittal : Restrictive Trade Practices in India, Vol.I,II, III, Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, 1978; (3) Rajendra : Case Book of MRTP Cases, A Taxman Publication, Delhi, 1981; (4) Rakesh Khurana : Growth of Large Business, Wiley Eastern Ltd., New Delhi, 1981; (5) S. Krishnamurthy : Principles of Law Relating to MRTP, Orient Law House, New Delhi, 1989; (6) K.K. Mitra : Commentaries on the Monopolies and Restrictive Trade Practices Act, 1969, Book-in-Trade, Calcutta, 1990; (7) D.P.S. Verma : MRTP Law, Principles, Provisions and Cases, Manas Publications, Delhi, 1992, and (8) Avtar Singh : Law of Monopolies, Restrictive and Unfair Trade Practices, Eastern Book Company, Lucknow, 1993.

   Dugar (1976) has given/explained the MRTP Act/Rules, the cases decided and summarised the anti-trust legislation of a number of advanced countries. Mittal has reproduced in full orders/judgements of the MRTP Commission and of the judgements of the Supreme Court/High Courts. Rajendra has given a summary of cases decided. Other authors have given/

explained the provisions of the MRTP Act/Rules, together with the notes thereon and the case-laws under the important provisions of the Act. In general, these books cover the developments upto the close of the date of their publications. Some of the above books had earlier and some may have later editions also than those referred to above.

2. See, for example, A.N. Oza : Anti-Trust Policy in India (Unpublished) Ph.D. Thesis, University of Bombay, Bombay, 1985, especially p.963 and 987-8; and N.K. Chandra : The Retarded Economies, Oxford University Press, Bombay, 1988, p.323.

3. Making Liberalisation Work : Suggested Administrative Innovations : Issues for Submission to the Prime Minister (Mimeo), Indian Institute of Management, Ahmedabad, 1992, p.15-16.

4. Government of India : The Constitution of India, Ch.IV, The Directive Principles of State Policy, New Delhi, 1983, p.25.

5. Government of India : Report of the Committee on Distribution of Income and Levels of Living, Part-I, New Delhi, 1964.

6. Government of India : Report of the Monopolies Inquiry Commission, New Delhi, 1965.

7. Ibid, p.159.

8. R.K. Hazari : Industrial Planning and Licensing Policy, Government of India, New Delhi, 1967.

9. Government of India : Report of the Industrial Licensing Policy Inquiry Committee, New Delhi, 1969.

10. Same as in Fn.4, p.25 and p.26.

11. Same as in Fn.6, p.135, p.136 and p.137.

12. J.C. Sandesara : Industrial Policy and Planning, 1947-91, Tendencies, Interpretations and Issues, Sage, New Delhi, 1992, pp. 109-115.

13. The following quotations bear this out. The first and the third quotations are from administrative reports of the Monopolies and Restrictive Trade Practices Commission for the years 1973 and 1975 and the second is from the report of its administration department, Department of Company Affairs of the Government of India for the year 1974.

(i) "The Commission has drawn the attention of Government in its last Annual Report to the declining number of references received by the Commission under Chapter III..... It appears that about 10 per cent of the applications received under Chapter III of the MRTP Act have been referred to the Commission upto now..... The Commission has .... observed that a number of cases of large magnitude and importance to the economy were decided by the Central Government without reference to the Commission..... The Commission is not able to understand the policy which is being pursued in this respect. The Commission cannot help feeling that there is some incongruity in that some times cases not involving any major issues are referred to the Commission while others, which would prima facie involve important considerations, are not so referred" (Part II, Chapter V, p.87).

(ii) "In order to remove certain misconceptions about the objectives of this important legislation (MRTP Act) in certain quarters, it is necessary to reiterate what the then Minister had stated (Lok Sabha Debates, 17-9-1969, p.415), while piloting the Monopolies and Restrictive Trade Practices Bill in Parliament with regard to the purpose sought to be achieved by the legislation.

"I would like to reiterate once again that as far as the basic goal of the industrial policy of the Government is concerned and which goal this government wishes to pursue, it is the goal that we must work for achieving an accelerated growth both of industry and economy. While this shall be our pursuit, at the same time, one cannot be oblivious to the socio-economic objectives..... I must emphasise that the aim of this legislation is certainly not to inhibit industrial growth in any manner, but only to ensure that such growth, that does and must take place, is chanellised for the common good and is not used to increase and perpetuate concentration of wealth and economic power in the hands of a few business groups or those who are enjoying privileged positions arising out of product monopolies and semi-monopolies" (Part I, Chapter I, p.2).

(iii) "The observations of the Department of Company Affairs in the 4th Annual Report on the working of the Monopolies and Restrictive Trade Practices Act, 1969 for the year, 1974 (a sample of which is given above) indicate that the number of references under Chapter III is going to be very few in future.... it appears that the Commission will have little role to play in the matter of checking of the concentration of economic power ...." (Part II, Chapter V, pp.73-74).

14. Government of India, Ministry of Law, Justice and Company Affairs, Department of Company Affairs : Report of the High-Powered Expert Committee on Companies and MRTP Acts, New Delhi, 1978.

15. A shortlist of such books will be found in Fn.1.

16. For want of space, we do not give here the meanings and explanations, and advantages and detriment to the consumers' welfare of these and other restrictive trade practices, and rest content by drawing attention of the reader to the references. See, among others, Russell, G. Warren : Anti-Trust in Theory and Practice, Grid, Inc., 1975 (Sections IV and V); Roger Alan Boner and Reinald Krueger : The basics of Anti-Trust Policy, The World Bank, Washington, D.C. 1991 (Ch.IV); Verma (Ch.VI) and Singh (Ch.V, Pt.A), both cited in Footnote 1. The last-two references will be of particular value for understanding these practices in the Indian context.

17. S.M. Dugar (1976), cited in Footnote 1, pp.lii-lxiv.

18. In the Supreme Court of India, Civil Appeal No.1147 (NCM) of 1975, Tata Engineering and Locomotive Company Ltd. (TELCO) v/s The Registrar of Restrictive Trade Agreement, New Delhi: Decision, 21st January 1977, quoted in Mittal, cited in footnote 1, Vol.III, pp.449-59. In fact, in several inquiries that followed this judgement, the Commission had to ask the complainants to provide further and better particulars to establish the existence of RTP.

19. Section 33(1) as per the 1984 amendment reads as under: "Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act to be an agreement relating to restrictive trade practices, and shall be subject to registration in accordance with the provisions of this chapter, namely_____".

The earlier version of 33(1) was: "Any agreement relating to a restrictive trade practice falling within one or more of the following categories shall be subject to registration in accordance with the provisions of this chapter, namely_____".

20. The feature of a small percentage of inquiries disposed of under cease and desist or consent order relative to the inquiries disposed of otherwise seems to be common to other types of similar legislations also. For example, of the total 10,359 cases disposed of during 1991-92 (Nov.-Oct.) by 14 Consumer Dispute Redressal Forums of Kerala, 4713 or 45 per cent went in favour of consumers and 5646 or 55 per cent were rejected or otherwise disposed of. Vide, Lizzy, E.A.: "Consumer Redressal Agencies : How Effective? Kerala Experience", Economic and Political Weekly, Bombay, August 7-14, 1993, p.1637, Table-2.

21. See, for example, The Monopolies and Restrictive Trade Practices Commission : Collective Discrimination (1955, reprinted 1972); and The Monopolies Commission : Recommended Resale Prices (1959); Refusal to Supply (1970); A Report on the general effect on the public interest of certain restrictive practice so far they prevail in relation to the supply of professional services, Part I : The Report (1970), Cross-channel Car Ferry Services : A report on the supply of certain cross-channel car ferry services (1974), all by Her Majesty's Stationery Office, London.

22. A.N. Oza, cited in Footnote 3, pp.912-993, Table 24.I. The breakdown of 75 inquiries disposed of otherwise was: not prejudicial, wholly or partly to public interest (10), no RTP (2), withdrawn (12), orders contested (25) and no data (26).

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