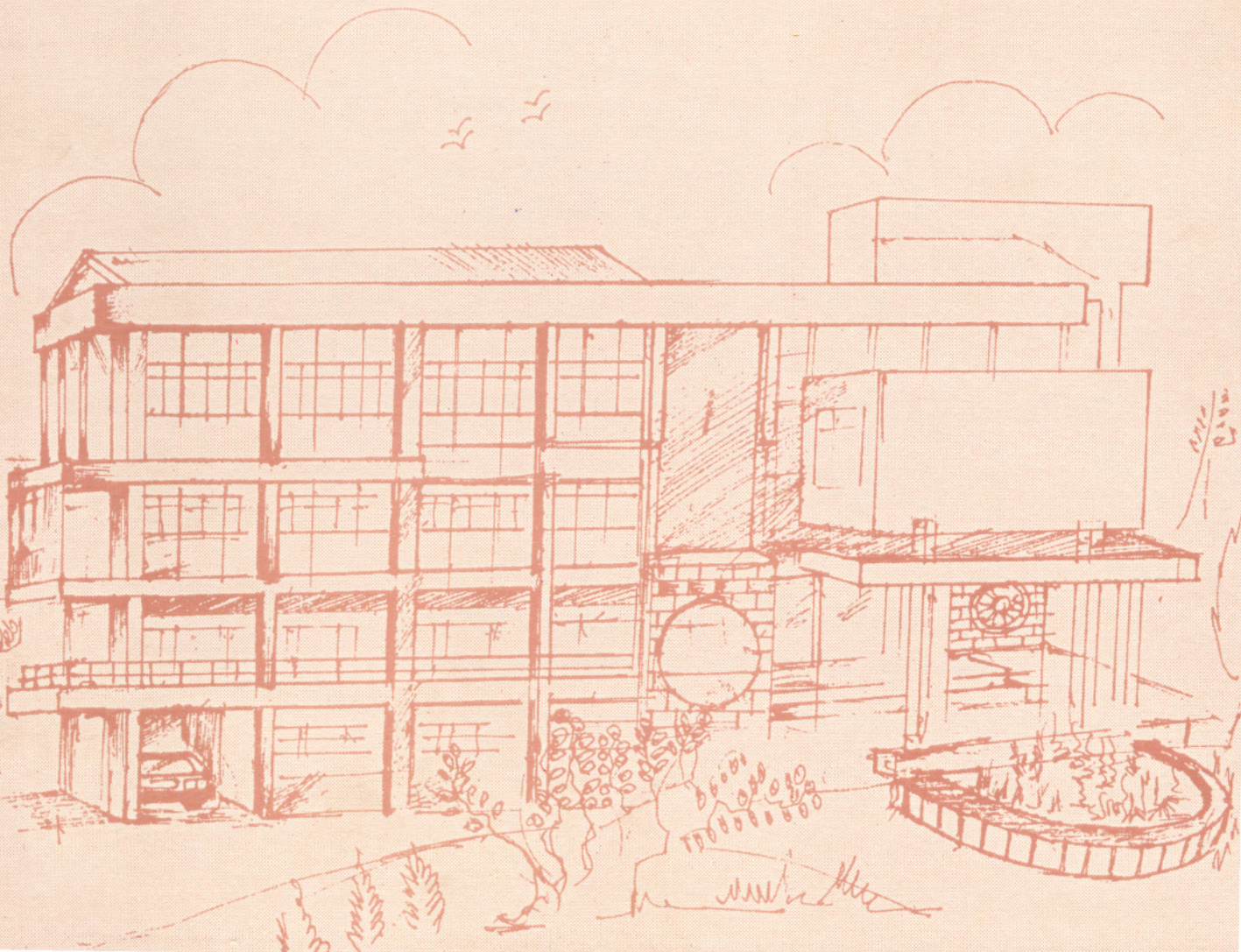


Working Paper Series

Performance Evaluation of the Board for Industrial and Financial Reconstruction



Performance Evaluation of the Board for Industrial and Financial Reconstruction

Dr. M R Sreenath

&

Dr. Lalitha Sreenath

Professors

T. A. Pai Management Institute(TAPMI)

Manipal – 576 104

Email: lalitha@mail.tapmi.org.

sreenath@mail.tapmi.org.

TAPMI WORKING PAPER SERIES NO. 2005/23

The objective of TAPMI working paper series is to help Faculty members of TAPMI to test out their research ideas/findings at the pre-publication stage.



**T. A. Pai Management Institute
Manipal –576 104, Udipi Dist., Karnataka**

*Performance Evaluation of the
Board for Industrial and Financial Reconstruction*

By

Dr. M.R. Sreenath & Dr. Lalitha Sreenath,

Professors,

T.A. Pai Management Institute,

MANIPAL, Karnataka, India. PIN: 576 104.

Phone: *Office:* 0820-2570162 *Extn:* 604/608 **Mobile:** 94484 55303

Email: sreenath@mail.tapmi.org or sreenath_mr@yahoo.com

Performance Evaluation of the Board for Industrial and Financial Reconstruction

ABSTRACT

In market-driven economies, the turnaround or demise of a loss-making company will depend on its management. But in India, during the heydays of socialisation, the Government felt that the efforts of the managements reviving sick industrial companies should be supplanted by statutory measures. This resulted in the enactment of a law called the Sick Industrial Companies (Special Provisions) Act (hereinafter called the Act) in 1985. Under the provisions of this Act, a body of experts called the Board for Industrial and Financial Reconstruction (hereinafter called the Board) was established and became operational in 1987. Thenceforth, the case of any industrial company that became sick within the meaning of the Act was to be compulsorily referred to the Board. Thereafter, following an elaborate procedure, the Board was to be determine whether the sick company can be revived or not and if yes, how.

Since the early Nineties, winds of change have been sweeping over the Indian economy. Socialism, governmental controls and protectionism are out; privatisation, liberalisation and globalisation are in. In this paper, an attempt has been made to evaluate the performance of the Board and to assess the utility or otherwise of the Board in this changed business scenario.

CONTENTS

1. INTRODUCTION

1.1. The Phenomenon of Industrial Sickness

1.1.1. Effects of Industrial Sickness

1.1.2. Causes of Industrial Sickness

1.1.3. Normal Options before a Sick Industry

1.2. Indian Government's Response to Industrial Sickness

1.2.1. Establishment of IRCI

1.2.2. Tiwari Committee

1.2.3. Enactment of SICA

1.2.4. Establishment of BIFR

1.3. Research Design

1.3.1. Objectives of the Study

1.3.2. Methodology

1.3.3. Literature Survey

1.3.4. Plan of the Study

2. ORGANISATIONAL STRUCTURE OF THE BOARD

2.1. Constitution

2.2. Benches

2.3. Jurisdiction of the Board

2.4. Functions of the Board

2.5. Decision Making Process of the Board

- 2.5.1. *Registration of Reference*
- 2.5.2. *Allocation to Bench*
- 2.5.3. *Inquiry for Determining Sickness*
- 2.5.4. *Appointment of Special Director(s)*
- 2.5.5. *Inquiry for Determining Viability*
- 2.5.6. *Preparation and Sanction of Turnaround Scheme*
- 2.5.7. *Preparation of Inventory*
- 2.5.8. *Direction Not to Dispose Assets*
- 2.5.9. *Protection from Legal Proceedings*
- 2.5.10. *Initiation of Misfeasance Proceedings*
- 2.5.11. *Winding Up of the Company*

2.6. Turnaround Strategies of the Board

- 2.6.1. *Revival Measures*
- 2.6.2. *Reliefs, Concessions and Sacrifices*

2.7. Appeals and Writs Against Orders of BIFR

- 2.7.1. *Appeals*
- 2.7.2. *Bar of Jurisdiction of Other Courts*
- 2.7.3. *Writ Jurisdiction*

3. PERFORMANCE OF THE BOARD

3.1. Turnover of Cases in the Board

- 3.1.1. *Cases Registered in the Board*
- 3.1.2. *Cases Disposed by the Board*

3.2. Time Taken for the Disposal of Cases

- 3.2.1. *For Deciding Maintainability*
- 3.2.2. *For Sanctioning Revival Scheme*
- 3.2.3. *For Recommending Winding Up*
- 3.2.4. *Age-wise Analysis of Pending Cases*

4. FACTORS AFFECTING THE PERFORMANCE OF THE BOARD

- 4.1. Vacancies in the Board**
- 4.2. Lack of expertise**
- 4.3. Non-Administration of Emergency Measures**
- 4.4. Convoluted Decision Making Process**

5. SUGGESTIONS

- 5.1. Strengthening the Board's Expertise**
- 5.2. Change in Identification Criteria**
- 5.3. Automatic Change of Management**
- 5.4. Change in 'Revival-At-Any-Cost' Policy**
- 5.5. Reducing Dependence on OA**
- 5.6. Coercive Powers**
- 5.7. Alternative Decision Making Format**

6. CONCLUSION

1. INTRODUCTION

1.1. The Phenomenon of Industrial Sickness

Industrial sickness is a very common phenomenon; it is as much part of business as prosperity. Not all companies flourish at all times. Growth, stagnation, decline and death are as much a part of a corporate organization as they are of an organic entity. But in India, this normal and routine occurrence has become exacerbated because of the post-Independence thrust given to industrialisation.

After Independence, the Indian Government promoted industrialisation in right earnest. The industrial policy statements announced over the years spelt out the desire of the Government to bring the benefits of industrialisation to a predominantly agricultural country. The first post-Independence Industrial Policy was announced in 1948. The transfer of power and the partition of the country in 1947 brought in their wake utter chaos and confusion all round. All sections of the society—including the industrialists—were waiting to know the mind of the new Government on various issues. The Industrial Policy statement announced in 1948 sought to dispel the prevailing confusion by spelling out the intentions of the Government in the sphere of industrialisation. The policy revealed the Government's desire to increase the standard of living of the people through rapid industrialisation which would increase the production of essential goods and services and provide gainful employment to a large number of people. Subsequently, to reflect the changing socio-economic conditions, the Government of the day announced new Industrial Policy statements in 1956, 1977, 1980, 1984 and 1991.

In pursuance of these Industrial Policy resolutions, the Government took a series of steps to promote rapid industrialisation. The Industries (Development and Regulation) Act, 1951 was enacted to provide the necessary means to the Central Government to implement its industrial policy. New development financial institutions like the Industrial Financial Corporation, the Industrial Development Bank of India were set up to provide long-term finance to industry at low rates of interest. Several incentives and concessions, like subsidies, tax deferments, power cut exemptions, import duty cuts, and cheap raw material supplies were allowed to industry.

No doubt, all these measures gave a fillip to industrialisation. But unfortunately, taking advantage of this liberal environment, many industries were started more for social and political reasons than for sound economic considerations. Such industries were either still-born or were dogged with ill-health right from their birth. Over the years, there has been a steady and alarming increase in the incidence of sickness in industrial companies. And very soon this sickness reached pandemic proportions and its effects have truly been calamitous.

In the total twenty-year period (between 1980 and 2000), the number of large and medium scale sick industries has shown a seven-fold increase from 389 to 2742, while their outstanding bank credit has shown a thirteen-fold increase from Rs.12.33 billions to Rs.167.48 billions. Please see Table 1 and Chart 1.

**Table 1: Rate of Growth of Industrial Sickness
(Non-SSI Sector) 1980–2000**

(Amount in Rs. Billions)

Year	Number	Outstanding Bank Credit
1	2	3
1980	3.89	12.3270
1985	5.97	26.5539
1990	14.67	47.3427
1995	19.56	88.2300
2000	27.42	167.4808

NOTE:

(1) Figures for the years 1980 and 1985 refer to the position at the end of June of the corresponding years.

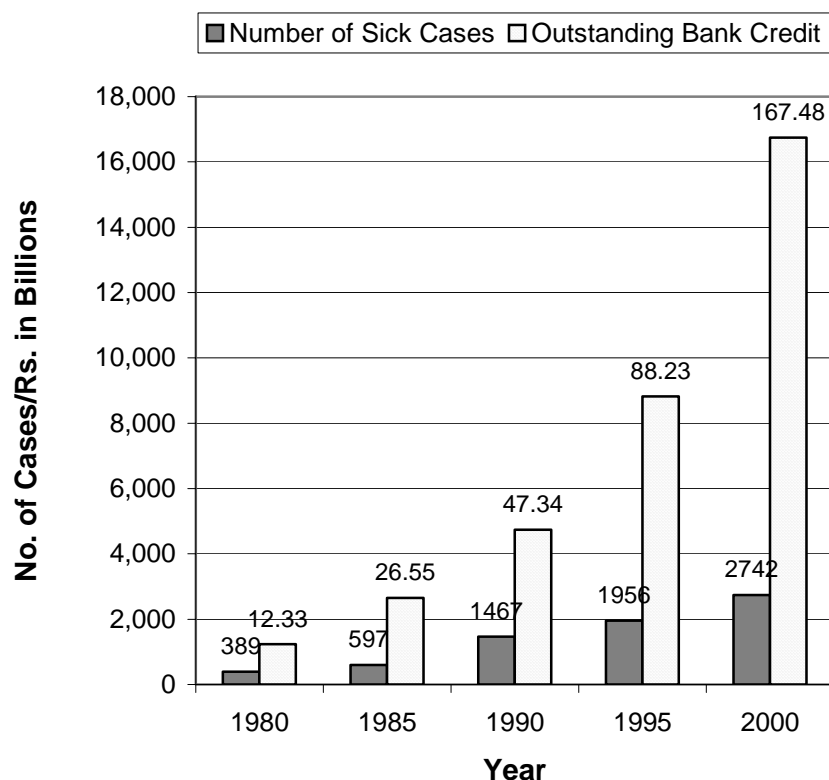
(2) Figures for the year 1990 refer to the position at the end of September of the corresponding year.

(3) Figures for the years 1995 and 2000 refer to the position at the end of March, 1991.

(4) SSI stands for Small Scale Industries.

Source: Reserve Bank of India, *Report on Trend and Progress of Banking in India and Report on Currency and Finance*, various issues.

**Chart 1: Rate of Growth of Industrial Sickness
(Non-SSI Sector)**



1.1.1. Effects of Industrial Sickness

Industrial sickness results in loss of production, loss of employment, loss of revenue (by way of lesser fees, charges, duties and taxes) to the Central and State Governments and locking up of recyclable funds of banks and financial institutions.

In the words of a noted scholar, “A rampaging sickness would play havoc with our economy: it would tie up vast public funds, make financial institutions sick, heighten industrial unrest, slow down the industrial growth rate, and generally dampen the spirit of entrepreneurship.”¹

1.1.2. Causes of Industrial Sickness

There are many causes for industrial sickness. These can be grouped under four heads as follows:

- **Project-related causes** like wrong choice of location, over-optimistic projections, sub-optimal plant capacity, defective project appraisal, unsuitable or defective or obsolete technology;
- **Finance-related causes** like weak equity base, delay in sanction and disbursement of loan amounts, cost escalations and time overruns, inadequate working capital, inadequate provision for market development and product promotion;
- **Promoter/Management-related causes** like incompetent and/or fraudulent management, bad industrial relations;
- **Market-related causes** like raw material shortages, power cuts, lack of infrastructural facilities, cheap imports, technological advances, changes in consumer preferences, opening up or closing down of markets and changes in government policies.

1.1.3. Normal Options Before a Sick Industry

In market-driven economies, the management of a loss-making industry will try its utmost to turn it around towards profitability. Many sick companies, in India and abroad, have been successfully pulled back from the brink² and firmly put on the road to recovery by innovative managements. The spectacular turnarounds of such major companies as SAIL³ in India, British Steel⁴ in the UK and Chrysler Corporation⁵ in the US have hit the headlines.

After making a survey of the many studies of the turnaround phenomenon, both in India and the West, Khandwalla⁶ concludes that these studies suggest ten principal elements of turnaround management as listed below:

1. Change in top management
2. Initial credibility-building actions by the new management
3. Initial control

¹ P.N. Khandwalla, “Humane Turnarounds”, *Vikalpa* 16:2, (1991): 3.

² See Khandwalla, P.N., 2001. *Turnaround Excellence – Insight from 120 Cases*. New Delhi. Sage Publications..

³ See Ninan, T.K., April 30, 1999. “SAIL’s Dramatic Turnaround.” *India Today*, pp.106-107.

⁴ See MacGregor, I., 1982. “Recovery at British Steel.” *Journal of General Management* 7:3, pp.5-16.

⁵ *Business Week*, Nov. 3, 1986. “The Next Act at Chrysler.” pp.48-52.

⁶ Khandwalla, P.N., 1991. “Humane Turnarounds.” *Vikalpa* 16:2, p.10.

4. Negotiation of support of outside stakeholders and neutralization of external pressures
5. Quick pay-off activities
6. Quick cost reduction
7. Revenue generation
8. Asset liquidation for generating cash
9. Mobilization of the organization for turnaround
10. Better internal coordination

According to Khandwalla, these ten elements perform three major functions:

‘(T)hey unfreeze a sick organization from its stage of demoralization; they move the organization in the right direction; and they institutionalize the right sort of organizational culture and management practices.’⁷

But a majority of the sick industrial companies would not be so fortunate as to revive themselves. They just decline, decay and die.

1.2. Indian Government’s Response to Industrial Sickness

India in the Eighties was a mixed economy guided by the ideals of socialism. State intervention in all spheres of activity was routine. “The compulsion for maintaining employment, the scarcity of foreign exchange, the need to restrict imports, the urge for self-reliance based on indigenous capability, inhibited India from taking steps like closing down unviable sick industrial units.”⁸ So the Government was more interested in finding ways and means to revive and rehabilitate the sick industrial units than in closing them down permanently.⁹ Since the Government of the day felt that the voluntary efforts of managements of sick companies to turn around their companies were not yielding the desired results, governmental intervention was considered necessary in this area.

1.2.1. Establishment of IRCI

The first step in this direction was taken by the Government in 1971 with the establishment of the Industrial Reconstruction Corporation of India Ltd (IRCI) with the sole objective of providing reconstruction and rehabilitation assistance to sick and closed units. In 1976, the Reserve Bank of India advised commercial banks to set up cells for rehabilitation of sick industrial units and participate in the revival of viable units. In 1978, the RBI drew the attention of the banks in dealing with sick industrial units in the small scale sector. The "Statement on Policy of Sick Industries" announced by the Government in 1978 aimed at devising suitable means for dealing effectively with sick industrial units and also setting up a mechanism for monitoring and detecting sickness at an early stage.¹⁰ In 1980 state level inter-institutional committees were set up to tackle the problem

⁷ Ibid.

⁸ BIFR, *Guidelines*, New Delhi: Board for Industrial and Financial Reconstruction, (1992).

⁹ Indeed, a number of chronically loss making private sector units were absorbed in the public sector through nationalisation and management takeovers. See Kamal Nayan Kabra, *Nationalisation in India: Political Economy of Policy Options*, New Delhi: Eastern Books, (1992).

¹⁰ Ministry of Industries, Government of India, "Statement on Policy of Sick Industries, 1978", reproduced in Government of India, Ministry of Industries, *Guidelines for Industries, Part-I, Policy and Procedures*, Sec. II-17, (1982).

of sickness. In order to have a coordinated approach at all-India level, the Government decided to refer the sick units receiving rehabilitation assistance from banks to the IRCI and the units receiving assistance from term lending institutions to the Industrial Development Bank of India.¹¹

1.2.2. Tiwari Committee

However the IRCI, financial institutions and the commercial banks had to face a lot of constraints in combating industrial sickness and initiating the process of rehabilitation. The Reserve Bank of India, therefore, constituted a high-powered Committee in May 1981 under the chairmanship of Shri P.Tiwari, Chairman of IRCI to examine the legal and other problems faced by the banks and financial institutions in rehabilitation of sick industrial units and to suggest remedial measures for effectively tackling the problem of sickness. The Tiwari Committee submitted its Report in 1984 wherein it recommended that a quasi-judicial body may be set up under a comprehensive special legislation to deal expeditiously and exclusively with matters relating to rehabilitation of sick industrial units.

It observed that (i) industrial sickness was increasing over the years, (ii) there was multiplicity of conflicting laws, (iii) there was hardly any coordination among the different agencies involved in restructuring, and (iv) the existing institutional framework was inimical to making quick decisions regarding a growing number of sick firms. Accordingly, the Tiwari Committee recommended the need for a new enabling law, and also presented a model bill.

1.2.3. Enactment of SICA

Following the recommendations of the Tiwari Committee, the Government enacted the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA' or 'the Act').¹²

The salient features of the Act are given below.

1. The Act provides for the establishment of the Board for Industrial and Financial Reconstruction (hereinafter called "the Board" or "BIFR"), consisting of experts in various relevant fields with powers to enquire into and determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and for their proper implementation.
2. The Act defines a sick industrial company and requires the Board of Directors of a sick or potentially sick industrial company to make a reference of the said fact to BIFR within the prescribed time for determination of the measures which shall be adopted with respect to the company. The Act also

¹¹ M.R. Murthy, "*Industrial Sickness in Private and Joint Sectors: An Analysis*," Working Paper, Institute for Studies in Industrial Development, (1995). Available at: <http://isidev.nic.in/vsasidev/pdf/wp5.pdf> (25-08-2002).

¹² The Sick Industrial Companies (Special Provisions) Act, 1985 (Act No. 1 of 1986). The Act received the assent of the President on January 8, 1986 *vide* Gazette of India, Extraordinary No.1, dated January 9, 1986, Part II, Section 1. All the provisions of the Act, excepting sections 15 to 34, were made applicable with effect from January 12, 1987 *vide* Notification No. GSR 24(E), dated January 12, 1987 whereas sections 15 to 34 were made applicable with effect from May 15, 1987 *vide* Notification No. SO 444(E), dated April 28, 1987.

provides for a reference by the Central or State Government or the Reserve Bank or a public financial institution or a State level institution or a scheduled bank.

3. The Act lays down the procedure for conducting inquiries, for preparation of rehabilitation schemes and for passing various appropriate orders by BIFR.
4. The Act clothes BIFR with the power to suspend legal proceedings against the sick industrial company and keep in abeyance all contracts to which the sick industrial company is a party.
5. The Act also provides for the constitution of an Appellate Authority consisting of persons who are or have been Supreme Court Judges, senior High Court Judges and Secretaries to the Government of India, etc. for hearing appeals against the order of the Board.

The Central Government has also framed regulations under the Act called the “Board for Industrial and Financial Reconstruction Regulations, 1987”¹³ (hereinafter called the “BIFR Regulations”) to clarify and elaborate on the provisions contained in the Act.

The Act and the Board Regulations together govern the role, organizational structure and the decision making process of the Board.

1.2.4. Establishment of the Board

In pursuance of the provisions of the Act, the Government established the Board for Industrial and Financial Reconstruction (hereinafter referred to as ‘BIFR’ or ‘the Board’), with effect from January 12, 1987. Thenceforth, the case of any industrial company that became sick within the meaning of the Act was to be compulsorily referred to the Board. Thereafter, following an elaborate procedure, the BIFR was to determine whether the sick company can be revived or not and if yes, how.

Ever since the initiation of economic reforms in the early Nineties, there has been a continuous demand from the corporate sector for the abolition of the Board and the repeal of the Act on the ground that the Board has actually become an effective barrier for the easy exit of industries rather than being a facilitator of corporate recovery and rehabilitation.

It is against this backdrop that this study has been undertaken to evaluate the performance of the Board in the first 15 years of its existence.

1.3. Research Design

1.3.1. Objectives of the Study

The objectives of the present study are:

1. To assess the performance of the Board for a period of 15 years right from the date of its inception in 1987 till the end of 2001;
2. To identify the factors having a bearing on the Board’s performance; and
3. To suggest measures for improving the performance of the Board.

¹³ *Vide* Notification No.2(4)/BIFR-86, dated 27th April, 1987 published in Gazette of India, Extraordinary, No.13, Part III, Section 4 dated 27-4-1987.

1.3.2. Methodology

This is an inter-disciplinary diagnostic study encompassing management and law where an analysis of empirical data has gone hand-in-hand with an analysis of statutory provisions and case law.

This study relies mainly on secondary data which have been obtained from the annual reports of the Board, the data published by the Board on its website (www.bifr.nic.in), the reports of the relevant Committees and the publications of the Reserve Bank of India, various Government Ministries and organizations.

In addition, the traditional doctrinal legal research methodology of statute-analysis and decision-analysis has also been extensively used. The provisions of the Sick Industrial Companies (Special Provisions) Act 1985 and the various Rules, Regulations and Notifications made there under, the decisions of the Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction, and the relevant judgments of the various High Courts and the Supreme Court have provided the basis for this analysis.

1.3.3. Literature Survey

There are a number of studies dealing with different dimensions of industrial sickness and turnaround management.

Some studies¹⁴ focus on the definition of sickness and turnaround. By defining these terms, they strive to identify the lead or predictive indicators of corporate sickness. These studies are mainly based on economic and financial ratios. A representative sample of this group is the study of Gupta (1983)¹⁵ which has identified the lead indicators of sickness, applying discriminant analysis to financial indicators. The author analysed the performance of 40 textile companies over a thirteen-year period and concluded that the following earnings ratios gave the best results: earnings before interest, taxes, and depreciation, to sales; and earnings after interest and taxes, but before depreciation, to gross assets. Although balance sheet ratios were not as good a set of predictors as profitability ratios, the two ratios that were found to be useable were net worth to short- and long-term debt, and all outside liabilities to tangible assets. However, the ratios related to net worth and liquidity were found to be not as reliable.

¹⁴ Altman, E.L., 1968. "Financial Ratios, Discriminant Analysis and the Prediction of Corporate Bankruptcy," *Journal of Finance* 22; Gupta, L.C., 1983. *Financial Ratios for Monitoring Corporate Sickness*. Delhi. Oxford University Press; Kaveri, V.S., 1983. *Financial Ratios as Predictors of Borrower's Health*. New Delhi. S.Chand; Kharbanda, O.P. and Stallworthy, E.A., 1985. *Corporate Failure: Prediction, Panacea and Prevention*. London. McGraw Hill; Yadav, R.A., 1986. *Financial Ratios and the Prediction of Corporate Failure*. New Delhi. Concept Publishing; Kumar, Vinod, 1987. *Indian Industries: Predicting Success or Failure*. New Delhi. Commonwealth Publishers; Panigrahy, D. and Mishra, D.P., 1993. "Predicting Corporate Sickness Using Cash Flow Analysis," *Vikalpa* 18:3, pp.13-20; Winn, Joan, 1993. "Performance Measures for Corporate Decline and Turnaround," *Journal of General Management* 19:2, pp.48-63; Misra, D.P. and Biswasroy, P.K., 1997. "Financial Ratios as Forewarning Indicators of Industrial Sickness," *Management Accountant* 32:8, p.576.

¹⁵ Gupta, L.C., 1983. "Financial Ratios for Signalling Corporate Failure," *Chartered Accountant*.

A second group of studies¹⁶ look at successful turnarounds and try to draw lessons from their experiences. For example, Khandwalla¹⁷ describes in detail the turnaround experiences of Steel Authority of India Limited during the stewardship of Mr. Krishnamurthy starting in mid-1985 and that of Travancore Cochin Chemicals under the leadership of Mr. T.N. Menon from 1978. He also gives brief details of the turnarounds in nine public sector enterprises and eleven private sector enterprises both in India and abroad. After analysing these cases and also taking into consideration the various studies on this subject, the author deduces ten principal elements of turnaround management. He also gives a few examples of action-choices available in each element.

A third group of studies¹⁸ deals with the management issues related to industrial sickness while the fourth group of studies looks at industrial sickness from the standpoint of banks and financial institutions—how far banks and term lending institutions are responsible for the failure of companies¹⁹, what effects industrial sickness has on the performance and existence of banks and financial institutions²⁰ and the role that these institutions can play in the revival of sick industries.²¹ Amongst all these, it appears that there are no in-depth studies on the legal aspects relating to corporate recovery except for the Reports of three important Committees.

The Tiwari Committee, which was constituted by the Reserve Bank of India in 1981 to examine the legal and other problems faced by the banks and financial institutions in the rehabilitation of sick industrial units and to

¹⁶ Prahlad, C.K. and Thomas, P.S., 1977. "Turnaround Strategy: Lessons from HPF's Experience," *Vikalpa* 2, pp.99-111; Khandwalla, P.N., 1981. "Strategy for Turning Around Complex Sick Organizations," *Vikalpa* 6, pp.143-166; Potts, M. and Behr, P., 1989. *The Leading Edge*. New Delhi. Tata McGraw-Hill; Slatter, S., 1984. *Corporate Recovery: Successful Turnaround Strategies and their Implementation*. Harmondsworth, Middlesex. Penguin; Khandwalla, P.N., 1989. *Effective Turnaround of Sick Enterprises (Indian Experiences): Text and Cases*. London. Commonwealth Secretariat; Manimala, M.J., 1991. "Turnaround Management: Lessons from Successful Cases," *ASCI Journal of Management* 20:4, pp.234-254; Khandwalla, P.N., 1992. *Innovative Corporate Turnarounds*. New Delhi. Sage Publications; Khandwalla, P.N., 2001. *Turnaround Excellence – Insight from 120 Cases*. New Delhi. Sage Publications.

¹⁷ Khandwalla, P.N., 1991. "Humane Turnarounds", *Vikalpa* 16:2, p.3.

¹⁸ Bibeault, D.B., 1982. *Corporate Turnaround: How Managers Turn Losers into Winners*. New York. McGraw-Hill; Hegde, Manjunath, 1982. "Western and Indian Models of Turnaround Management," *Vikalpa* 7:4, pp.289-304; Joshi, V.K., 1987. *Management of Industrial Sickness*. Jaipur. Kuber Associates & Publishers; Mishra, M.K., 1991. *Industrial Sickness: Role of Entrepreneurs*. New Delhi. Anmol Publications; Srivastava, S.S. and Yadav, R.A., 1986. *A Review of Management and Sickness*. New Delhi. Concept Publishing; Mookherjee, Surya, 1993. "Workers' Cooperatives and Turnaround of a Sick Enterprise: The KTL Experience," *Vikalpa* 18:1, pp.15-21; Kharbanda, O.P. and Stallworthy, E.A., 1987. *Company Rescue: How to Manage a Company Turnaround*. London. Heinemann; Khandwalla, P.N. 1983-84. "Turnaround Management of Mismanaged Complex Organizations," *International Studies of Management and Organization* 13, pp.5-41.

¹⁹ Joshi, N.C., 1979. "Industrial Sickness and Banks," *Journal of Indian Institute of Bankers* 50:3; Vohra, G.S.G., Dec. 24, 1982. "Industrial Sickness: Role of Lending Institutions." *Times of India*; Khandwalla, P.N., 1988. "What Can Financial Institutions do to Prevent Corporate Sickness?" *Vikalpa* 13:2, p.14.

²⁰ Nadkarni, V.N., 1983. "Sickness in Industry and its Effect on Banking." *SBI Monthly Review* 22:6, pp.245-255; Subramanian, B.S., July 5, 1984. "Aid to Sick Units and Banks' Viability." *The Financial Express*; Agarwal, R., 1985. "Effects of Industrial Sickness on Banks' Profitability." *Chartered Accountant* 34:3, p.195.

²¹ Mehra, K.C., Nov. 1980. "Industrial Sickness—Banker's Role." *The Banker*; Sinha, R., Sep. 16, 1984. "Role of Banks in Revival of Sick Industries." *Economic Times*.

suggest remedial measures for effectively tackling the problem of corporate sickness, submitted its Report²² in 1984 wherein it made a detailed analysis of the malady of industrial sickness and concluded that ‘a comprehensive special legislation designed to deal with the problems of sick units is necessary.’ It is in pursuance of these recommendations that the Central Government had enacted the Sick Industrial Companies (Special Provisions) Act, 1985.

In 1993, the Committee on Industrial Sickness and Corporate Restructuring submitted its Report²³ to the Union Finance Ministry of the Government of India. The Committee examined the provisions of the Sick Industrial Companies (Special Provisions) Act and the performance of the Board for Industrial and Financial Reconstruction; analysed how the earlier practices of banks and financial institutions led to bad appraisals, poor rehabilitation packages, and created barriers to industrial restructuring; studied the detection norms and possible remedial measures for incipient sickness; and finally identified the various barriers to effective corporate reorganization.

In August, 2000, the High Level Committee on Law Relating to Insolvency of Companies submitted its Report²⁴ wherein one of the chapters focussed ‘on the linkages that exist between the Sick Industrial Companies (Special Provisions) Act, 1985 and the provisions of the Part-VII Companies Act, 1956 so far as they relate to the winding-up of companies.’ The Committee recommended the establishment of a National Company Law Tribunal which will have the combined jurisdiction and powers presently exercised by the Company Law Board and the High Courts under the Companies Act, 1956 and the Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee also made the consequential recommendation that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed.

From this review of literature, it appears that the legal aspects of corporate turnaround—especially the functioning of the Board for Industrial and Financial Reconstruction—has not received sufficient attention of the researchers.

1.3.4. Plan of the Study

This introductory first section is followed by Section Two which gives an outline of the organizational structure of the Board. In the third section, an attempt has been made to assess the performance of the Board on the basis of available data. The fourth section identifies the factors affecting the performance of the Board. The last two sections contain the suggestions and conclusion.

²² Reserve Bank of India, 1984. *Report of the Committee to Examine the Legal and other Difficulties faced by the Banks and Financial Institutions in Rehabilitation of Sick Industrial Undertakings and Suggest Remedial Measures including Changes in the Law (Chairman: T. Tiwari)*. Bombay. Reserve Bank of India.

²³ Ministry of Finance, Government of India, July, 1993. *Report of the Committee on Industrial Sickness and Corporate Restructuring (Chairman: Omkar Goswami)*. New Delhi. Government of India.

²⁴ Department of Company Affairs, Ministry of Law, Justice & Company Affairs, Government of India, Aug. 2000. *Report of the High Level Committee on Law Relating to Insolvency of Companies (Chairman: Justice V.B. Eradi)*. New Delhi. Government of India.

2. ORGANISATIONAL STRUCTURE OF THE BOARD

2.1. Constitution

The BIFR shall consist of a Chairman and not less than two and not more than fourteen other members, to be appointed by the Central Government.²⁵ The word “Member” means a member of the Board and includes the Chairman.²⁶ The Chairman and other members of the Board shall be persons who are or have been or are qualified to be High Court Judges, or persons of ability, integrity and standing who have special knowledge of, and professional experience of not less than fifteen years in science, technology, economics, banking industry, law, labour matters, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Board.²⁷

The Member of BIFR should not have any such financial or other interest as is likely to affect prejudicially his functions as such Member.²⁸

The Chairman and every other member shall hold office for such period, not exceeding five years, as may be specified by the Central Government in the order of his appointment, but shall be eligible for reappointment. But no person shall hold office as the Chairman or other member after he has attained the age of sixty-five years.²⁹ A member may resign his office at any time or be removed from his office under certain circumstances.³⁰ The Chairman and every other member, shall, before entering upon his office make a declaration of fidelity and secrecy in the form set out in the Schedule.³¹ The Chairman or any other member ceasing to hold office as such shall not hold any appointment or be connected with the management or administration in any company in relation to which any matter has been the subject matter of consideration before BIFR or, as the case may be, the appellate authority, for a period of five years from the date on which he ceases to hold such office.³²

The Chairman and other members and the officers and other employees of BIFR shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.³³

2.2. Benches

The jurisdiction, powers and authority of the Board may be exercised by Benches thereof. The Benches shall be constituted by the Chairman and each Bench shall consist of not less than two members.³⁴

²⁵ Section 4(2) of SICA.

²⁶ Section 3(1)(g) of SICA.

²⁷ Section 4(3) of SICA.

²⁸ Section 6(1) of SICA.

²⁹ Section 6(2) of SICA.

³⁰ Section 6(3) of SICA.

³¹ Section 6(8) of SICA.

³² Section 6(9) of SICA.

³³ Section 11 of SICA.

³⁴ Section 12 of SICA.

The Chairman of the Board shall constitute such number of Benches as he may deem fit. He shall from time to time, assign the cases to be dealt with by the respective Benches provided that he may constitute, as and when deemed fit, a Bench for dealing with a particular case or batch of cases. The Chairman may also transfer a case from one Bench to another. Every order made or act done by a Bench in exercise of its powers shall be deemed to be the order or act, as the case may be, of the Board.³⁵

If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman of the Board who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case including those who first heard it.

2.3. Jurisdiction of the Board

The jurisdiction of the Board gets invoked when it receives--

- reference from the Board of Directors of an industrial company
- reference from the Central/State Government, Reserve Bank of India, public or State-level financial institution or scheduled bank, or
- when it has own knowledge or information

that a scheduled industry (other than the scheduled industry relating to ships and other vessels drawn by power) belonging to an industrial company has become a sick or potentially sick industrial company.

A 'sick industrial company' means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.³⁶

A 'potentially sick' industrial company means an industrial company the accumulated losses of which as at the end of any financial year, have resulted in erosion of fifty per cent or more of its peak net worth during the immediately preceding four financial years.³⁷

The net result of all these provisions is that the Board will get jurisdiction only

- when it has own knowledge or information or when it receives reference from the Central/State Government, Reserve Bank of India, public or State-level financial institution, a scheduled bank or the Board of Directors of

³⁵ Regulation 16 of BIFR Regulations.

³⁶ Section 3(1)(o) of the Act as amended by Act No. 12 of 1994. Prior to this amendment, this clause read as follows: "(o) 'sick industrial company' means an industrial company (being a company registered for not less than seven years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth and has also suffered cash losses in such financial year and the financial year immediately preceding such financial year. Explanation—For the purposes of this clause—(i) 'cash loss' means loss as computed without providing for depreciation; (ii) 'net worth' is the sum total of the paid up capital and free reserves; (iii) 'free reserves' means all reserves credited out of the profits and share premium account but does not include reserves credited out of re-valuation of assets, write back of depreciation provisions and amalgamations;"

³⁷ Section 23 of the Act.

- a company registered under the Companies Act, 1956 or any previous Company Law for not less than five years,
- owning one or more large and medium industries (not being ancillary industries) specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 excepting shipping industry,
- employing at least 50 persons (where power is used) or 100 persons (where power is not used) on any day in the previous 12 months, and
- where the accumulated losses equal or exceed its entire net worth or where the accumulated losses as at the end of any financial year, have resulted in erosion of fifty per cent or more of its peak net worth during the immediately preceding four financial years.

2.4. Functions of the Board

The functions of the Board may be summarised as follows:

1. To determine quickly whether an industrial company has become a sick industrial company;
2. To take expeditious steps for the rehabilitation of a viable sick industrial company by sanctioning an appropriate scheme prepared by the operating agency and approved by all concerned parties;
3. To take necessary steps for safeguarding the interests and assets of the sick industrial company during the pendency of the proceedings before the Board by appointing special director(s), by taking inventories, by staying legal proceedings and contracts and by recovering monies from persons found guilty of misfeasance; and
4. To unlock the monies locked up in non-viable sick industrial companies by recommending winding up in such cases.

2.5. Decision Making Process of the Board

The BIFR has powers to regulate--

- (a) the procedure and conduct of the business before it;
- (b) the procedure of the Benches, including the places at which the sittings of the Benches shall be held;
- (c) the delegation to one or more members of such powers or functions as the Board or, as the case may be, the appellate authority may specify.³⁸

The BIFR shall, for the purposes of any inquiry or for any other purpose under SICA have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying suits in respect of the following matters, namely,--

- (a) the summoning and enforcing the attendance of any witness and examining him on oath;
- (b) the discovery and production of document or other material object producible as evidence;
- (c) the reception of evidence on affidavit;
- (d) the requisitioning of any public record from any court or office;
- (e) the issuing of any commission for the examination of witnesses;
- (f) any other matter which may be prescribed.³⁹

The BIFR shall also be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).⁴⁰

³⁸ Section 13(1) and (2) of SICA.

³⁹ Section 13(3) of SICA.

The decision making process of BIFR can be gleaned from the provisions of the Sick Industrial Companies (Special Provisions) Act 1985, the Board for Industrial and Financial Reconstruction Regulations 1987 and the Guidelines issued by the Board for Industrial and Financial Reconstruction.

2.5.1. Registration of Reference

The decision making process in BIFR commences with the receipt of a reference from the Board of Directors of the concerned company or from the Central or State Government, RBI, public financial institution, State Level financial institution or scheduled bank. The references so received by BIFR are scrutinised by the Registrar or Secretary to find out whether prima facie they conform to the provisions of the Act. Those which conform to the provisions are registered. In cases where registration has been declined by the Registrar or Secretary, appeal lies first to the Secretary and next to the Chairman of BIFR.

2.5.2. Allocation to Bench

Registered cases are placed before the Chairman, BIFR for allocation to one of the Benches for further action under the Act. The jurisdiction, powers and authority of the Board are exercised by Benches, constituted by the Chairman; each Bench having not less than two Members.

2.5.3. Inquiry for Determining Sickness

The concerned Bench of the Board takes up the registered case for inquiry under section 16 of the Act. It may be noted that the Board may also initiate a *suo moto* inquiry upon information received or upon its own knowledge as to the financial condition of the company. The Board notifies the date of hearing of the case to all parties concerned including the representatives of the company, the representatives of the employees in the company, the financial institutions and commercial banks relevant to the company and representatives of departments of Central/State Governments. The Board may, if it deems necessary or expedient so to do for the expeditious disposal of the inquiry, require any Operating Agency to enquire into and make a report with respect to such matters as may be specified in the order.

If in the inquiry conducted by the Board or by the OA, the company is not found to be a sick industrial company, the case is closed and the reference, if any, is dismissed as 'not maintainable.'

On the other hand, if in the inquiry conducted by the Board or by the OA, the company is found to be a sick industrial company, the matter is taken up for further processing.

2.5.4. Appointment of Special Director(s)

Where the Board deems it fit to make an inquiry into any industrial company under section 16(1) and (2), the BIFR has the power to appoint one or more persons to be a special director(s) of the company for safeguarding the financial and other interests of the company or in the public interest. The Board may issue such directions to a special director so appointed as it may deem necessary or expedient for proper discharge of his duties. The

⁴⁰ Section 14 of SICA. Section 195 of the Criminal Procedure Code, 1973 deals with the prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. Chapter XXVI of the Criminal Procedure Code, 1973 deals with the provisions as to offences affecting the administration of justice.

appointment of a special director shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956, or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provisions regarding share, qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the Board.⁴¹

Any special director so appointed shall—

- (a) hold office during the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;
- (b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;
- (c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement; and
- (d) not be liable to be prosecuted under any law for anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.⁴²

2.5.5. Inquiry for Determining Viability

The Board being satisfied on the basis of inquiries under section 16 that the company has become a “sick industrial company” in terms of section 3(1)(o) of the Act, sets forth to examine whether the sick company whose accumulated losses have exceeded the net worth, is capable of making its net worth exceed the accumulated losses within a reasonable time.

If in the process of analysing the nature and causes of sickness and the circumstances available to the company, the Board finds that it is practicable for the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, the Board may give such time to the company as it may deem fit subject to such restrictions or conditions as it may specify to make its net worth exceed the accumulated losses. At this stage, the sick company can submit a rehabilitation proposal for the consideration of the Board. If it is found satisfactory, the Board takes note of the scheme and gives an order in writing under section 17(2) approving the company’s scheme for rehabilitation.

2.5.6. Preparation and Sanction of Turnaround Scheme

On the other hand, if the Board decides that it is not practicable for the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to revive/rehabilitate the sick industrial company, it may direct an operating agency to prepare a draft scheme. The Operating Agency is also given the measures required to be taken for revival of the company and guidelines for preparation of the revival scheme.

After receiving the draft scheme from the OA, the Board calls all the parties concerned for their consensus on the proposal and circulates a draft scheme for their consideration. Short particulars of the scheme are published

⁴¹ Sub-sections (4), (4A) and (5) of section 16 of SICA.

⁴² Section 16(6) of SICA.

in two dailies to give an opportunity to the creditors, employees etc. to send their comments, if any, to the Board. The Board also permits inspection of the records of the Board in respect of the company including the draft scheme by concerned parties to give them access to full information about the case. Interested parties may also seek permission of the Board to appear at the hearing.

If all the persons who are expected to provide financial assistance to the company give their consent to the proposals contained in the draft scheme, the Board sanctions the said scheme for rehabilitation of the company under section 18(4).

The implementation of the scheme is monitored by the Board of Directors of the company, the Special Director(s) appointed by the BIFR and the Operating Agency. The BIFR may also hold review meetings to ascertain the progress of the implementation of the sanctioned scheme and suggest appropriate remedial measures. In the event of BIFR not being satisfied with the implementation of the scheme, the case can be reopened for a *de novo* inquiry.

In case any of the persons who are expected to provide financial assistance to the company refuse to give their consent to the proposals contained in the draft scheme, the Board may (i) consider revival as 'not feasible' and go for winding up of the company under section 20(1) of the Act, or (ii) take up the matter for consideration of other measures set out under sections 18 and 19, or (iii) order the OA to prepare a fresh/modified draft scheme and follow the same course as explained earlier to arrive at the stage of sanctioning a scheme for rehabilitation.⁴³

2.5.7. Preparation of Inventory

For the proper discharge of its functions, the BIFR may ask the operating agency to prepare (a) a complete inventory of (i) all assets and liabilities of whatever nature; and (ii) all books of account, registers, maps, plans, records, documents of title or ownership of property and all other documents of whatever nature relating thereto; (b) a list of shareholders and list of creditors showing separately in the list of creditors, the secured creditors and the unsecured creditors; (c) a valuation report in respect of the shares and assets in order to arrive at the reserve price for the sale of a part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio; (d) an estimate of reserve price, lease rent or share exchange ratio; and (e) pro forma accounts, where no up to date audited accounts are available.⁴⁴,

2.5.8. Direction Not to Dispose Assets

The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets—(a) during the period of preparation or consideration of the scheme under section 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceeding relating to the winding up before the concerned High Court.

⁴³ Section 19(4) of SICA.

⁴⁴ Section 21 of SICA.

2.5.9. Protection from Legal Proceedings

The sick company may need protection from the operation of legal proceedings, contracts etc. during the pendency of the proceedings before the BIFR. Under section 22(1) special permission of the Board is required to initiate any legal proceedings against the sick company if an inquiry is pending or a scheme of revival is under preparation or consideration or a sanctioned scheme is under implementation.

The Board is empowered under section 22(3) during the period of consideration of any scheme or during the implementation of the scheme, to suspend the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force to which such sick company is a party or which may be applicable to such sick industrial company, immediately before such orders.

The Board uses its discretion in insulating the sick company from legal proceedings, enforcement of contracts in order not to frustrate the process of rehabilitation and at the same time not to shelter a sick company undeserved. Consequently, the Board examines the circumstances under which permission to institute legal proceedings is requested and the circumstances under which the sick company seeks such protection.

2.5.10. Initiation of Misfeasance Proceedings

The BIFR may to direct any person who has misapplied or retained, or become liable or accountable for, any money or property of the sick industrial company or who has been guilty of any misfeasance, malfeasance or non-feasance or breach of trust in relation to the sick industrial company, to repay or restore the money or property or any part thereof, with or without interest or to compensate the sick industrial company in such way as may be decided.⁴⁵

2.5.11. Winding up of the Company

On inquiry, if the BIFR is satisfied that it is not feasible to rehabilitate the sick company, it may form the *prima facie* opinion that it is just and equitable that the company be wound up and a show cause notice issued. Copies of this are sent to banks, institutions, governments etc. Brief particulars of the intention to wind up the company is published in newspapers inviting comments/objections from creditors, employees etc. The latter may also seek permission for appearing before the Bench.

The parties are called for a hearing before the Bench wherein a just and equitable opportunity is given to all concerned to state their position, whereafter the Board may confirm its decision that it is just and equitable that the company be wound up and forward the recommendation to the concerned High Court under section 20(1) for further action under the Companies Act.

However, if at the time of the hearing it is considered that the decision to wind up needs to be modified, the BIFR may consider the suggestion for modification and continue the inquiry to prepare a rehabilitation scheme under sections 18 and 19 of the Act.

⁴⁵ Section 24 of SICA.

In appropriate cases where the Board has, on inquiry come to the conclusion that it is not feasible to rehabilitate the company, it may order sale of assets of the company under section 20(4) of SICA and conduct the sale and deposit the proceeds with the concerned High Court.

2.6. Turnaround Strategies of the Board

2.6.1. Revival Measures

A turnaround scheme prepared by the Operating Agency on the directions of the Board may provide for any one or more of the following measures:⁴⁶

- the financial reconstruction of the sick industrial company;
- the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;
- the amalgamation of the sick industrial company with any other company; or any other company with the sick industrial company;
- the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;
- the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;
- such other preventive, ameliorative and remedial measures as may be appropriate; and
- such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purpose of the above-mentioned measures.

2.6.2. Reliefs, Concessions and Sacrifices

The turnaround scheme prepared by the Operating Agency may also provide for guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority to the sick industrial company.⁴⁷ These sacrifices or reliefs may take the form of additional loans, waiver and/or funding of arrears of interest, reduction of interest rates, rescheduling of loan instalments, exemption from or deferment of taxes and exemption from power cuts.⁴⁸

2.7. Appeals and Writs Against Orders of BIFR

2.7.1. Appeals

The Central Government has constituted an appellate authority called the "Appellate Authority for Industrial and Financial Reconstruction"⁴⁹ (hereinafter called the "AAIFR" or the "Appellate Authority") consisting of a Chairman and not more than three other members, to be appointed by that government, for hearing appeals against the orders of the Board under the Act. The Chairman shall be a person who is or has been a Judge of the Supreme Court or who is or has been a Judge of a High Court for not less than five years. A member of the

⁴⁶ Section 18(1) of the Act.

⁴⁷ Section 19(1) of the Act.

⁴⁸ Section 19(1) of the Act.

⁴⁹ With effect from 15th April, 1987.

appellate authority shall be a person who is or has been a Judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government of India or who is or has been a member of the Board for not less than three years.⁵⁰

Any person aggrieved by an order of the Board made under this Act may, within forty-five days (extendable to sixty days for sufficient cause) from the date on which a copy of the order is issued to him, prefer an appeal to the Appellate Authority. On receipt of an appeal, the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against or remand the matter to the Board for fresh consideration.⁵¹ The decision of the AAIFR is final.

2.7.2. Bar of Jurisdiction of Other Courts

The Act makes it abundantly clear⁵² that the order of BIFR or AAIFR is not appealable in civil courts and that no civil court shall have jurisdiction in respect of any matter which the Appellate Authority or the Board is empowered by, or under this Act to determine. No injunction can be granted by any court or other authority in respect of any action taken or to be taken by BIFR or AAIFR in pursuance of any power conferred by or under this Act.

2.7.3. Writ Jurisdiction

Even though the decision of the Appellate Authority is final, the High Court and/or the Supreme Court can always intervene under their writ jurisdiction⁵³ during or at the end of the proceedings before the Board or Appellate Authority.

3. PERFORMANCE OF THE BOARD

An analysis of the performance of the Board from the year of its establishment in 1987 till the end of 2001 reveals the following points.

3.1. Turnover of Cases in the Board

3.1.1. Cases Registered in the Board

Table 2 gives details of cases registered in the Board. In the first fifteen years of its existence, a total of 3759 cases have been registered with the Board. The total net worth of all the 3759 industrial companies registered with the Board till the end of 2001 is a staggering amount of Rs.373.58⁵⁴ billions while their accumulated losses are a mind-boggling Rs.711.82 billions. As many as 2.1 million workers are affected by sickness in these

⁵⁰ Section 5 of SICA.

⁵¹ Section 25 of SICA.

⁵² Section 26 of SICA.

⁵³ Articles 32 and 226 of the Constitution of India.

⁵⁴ A billion is equal to 1000 millions, as in the American system of numeration.

companies. On an average, these figures work out to about Rs.100 millions of net worth, Rs.190 millions of accumulated losses and 560 workers per company.

Table 2: Cases Registered in the Board from 1987 to 31 Dec. 2001			
	Public Sector	Private Sector	TOTAL
Number of Cases Registered	178 (4.74%)	3581 (95.26%)	3759
Total net worth of the registered companies	Rs. 98.42 billions (26.4%)	Rs.275.16 billions (73.6%)	Rs.373.58 billions
Accumulated losses of the registered companies	Rs.226.97 billions (32%)	Rs.484.85 billions (68%)	Rs.711.82 billions
Number of workers in the registered companies	.98 million (47%)	1.12 million (53%)	2.1 million

Coming to sector-wise details, only 178 (4.74%) companies were from the public sector while as many as 3581 (95.26%) companies were from the private sector. But these few public sector companies accounted for as much as one-fourth of the total net worth (Rs.98.42 billions out of Rs.373.58 billions) one-third of the accumulated losses (Rs.226.97 billions out of Rs.711.82 billions) and nearly one-half of the workers (978,383 out of 2,100,781).

3.1.2. Cases Disposed of by the Board

As can be seen from Table 3, the case disposals ranged from a low of 42 in 1988 to a high of 373 in 2000. On an average, the Board disposed of only 167 cases per year during the entire fourteen-year period.

**Table 3: Type-wise Analysis of Cases Disposed of by the Board
as on 31.12.2001**

Year	Total Cases Registered	Type of Disposal				Total Cases Disposed
		Cases Under Revival	Cases Revived	Winding up Recommended Cases	Dismissed as Not Maintainable Cases	
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>
1987	311	0	0	0	8	8
1988	298	0	1	12	29	42
1989	202	2	1	31	78	112
1990	151	3	3	43	44	93
1991	155	10	4	47	28	89
1992	177	10	7	30	42	89
1993	152	13	13	64	59	149
1994	193	17	37	80	48	182
1995	115	34	25	64	29	152
1996	97	40	93	85	25	243
1997	233	17	36	85	23	161
1998	370	17	21	50	36	124
1999	413	20	10	66	70	166
2000	429	14	37	160	162	373
2001	463	57	48	136	123	364
TOTAL	3759	254	336	953	804	2347

Source: The Board, *Annual Reports*.

Of the 2347 disposed cases, 34% have been dismissed in the preliminary stage itself as not maintainable, 41% were recommended for winding up and 25% were either revived or still under revival.

3.2. Time Taken for the Disposal of Cases

The cases disposed by the Board in twenty months between November, 2000 and June, 2002 have been analysed for finding out the time being taken by the Board for disposing cases.

3.2.1. For Deciding Maintainability ('Dismissed as Not Maintainable')

The cases which have been dismissed as not maintainable are those which have been eliminated from the purview of the Board in the first round itself. In these cases, the only issue that needs to be decided is whether the company is a 'sick industrial company' within the meaning of the Sick Industrial Companies (Special Provisions) Act, 1985. The Act itself has provided certain parameters on the basis of which this decision can be made.

Table 4: Time Taken by the Board for Deciding Maintainability	
Months	Frequency
< 6 months	16
6 - 12 months	77
12 - 18 months	95
18 - 24 months	28
24 - 30 months	15
> 30 months	17
Total	248
Mean: 15 months	
Median: 13 months	
Mode: 13 months	
Source: The Board, <i>Annual Reports</i> .	

In all, in these twenty months, the Board has dismissed 248 cases as not maintainable, as can be seen from Table 4. It is shocking that even for making such a simple decision, the Board is taking an **average of 15 months**. In fact, the Board has taken more than 12 months in nearly two-thirds of these cases. And in as many as 32 cases, the disposal time is more than two years.

3.2.2. For Sanctioning Revival Scheme Under Section 18(4) of the Act

As can be seen from Table 5, the **average time taken** for sanctioning revival scheme under section 18(4) of the Act is **more than five years**, with almost half of the 89 cases taking two to four years. As many as 8 cases (9.0%) have dragged on for more than ten years!

Table 5: Time Taken by the Board for Revival u/s 18(4) of the Act	
Months	Frequency
< 24 months	7
24 - 48 months	42
48 - 72 months	18
72 - 96 months	7
96 - 120 months	7
> 120 months	8
Total	89
Mean: 64 months	
Median: 46 months	
Mode: 37 months	
Source: The Board, <i>Annual Reports</i> .	

3.2.3. For Recommending Winding Up

A reading of Table 6 reveals that the **average time taken** by the Board for disposing a 'winding up recommended' case is **nearly six years**, with about 44% of the 237 cases taking two to four years.

Table 6: Time Taken by the Board for Recommending Winding Up	
Months	Frequency
< 24 months	11
24 - 48 months	103
48 - 72 months	45
72 - 96 months	23
96 - 120 months	16
> 120 months	39
Total	237
Mean: 69 months	
Median: 50 months	
Mode: 40 months	
Source: The Board, <i>Annual Reports</i> .	

3.2.4. Age-wise Analysis of Pending Cases

As on 31-12-2000, the Board has disposed off 2169 cases (65.8%) out of the total registered cases of 3296, leaving 1127 cases (34.2%) pending.

From Table 7, it can be seen that of the 1127 cases pending as on 31-12-2000, 13 cases were registered in 1987 which is the very first year of operation of the Board, 11 in 1988, 14 in 1989 and 14 in 1990. As many as 267 cases were pending for more than three years, with 119 of them pending for more than six years.

Table 7: Age-wise Analysis of Cases Pending before the Board as on 31-12-2000		
Age of the Case	Cases Pending	
	Number	%
1	2	3
Less than 1 year	358	31.77
1.1 - 3.0 years	502	44.54
3.1 - 6.0 years	148	13.13
6.1 - 9.0 years	57	5.06
9.1 - 12 years	38	3.37
More than 12 years	24	2.13
TOTAL	1127	100.00
Source: The Board, <i>Annual Reports</i> .		

A look at Table 8 which gives the Board's tentative schedule of hearings in October, 2002 is very revealing. In October, 2002, the Board was scheduled to hear Case Nos. 25/1987, 34/1989, 70/1989, 77/1989, 188/1989 and 30/1990.

Table 8: The Board's Tentative Schedule of Hearings in October, 2002	
Case Registered in	Number of Cases
1987	1
1988	0
1989	4
1990	1
1991	2
1992	3
1993	3
1994	4
1995	1
1996	2
1997	4
1998	12
1999	14
2000	9
2001	29
2002	9
Total	98
Source: The Board's website www.bifr.nic.in (30-09-2002)	

4. FACTORS AFFECTING THE PERFORMANCE OF THE BOARD

4.1. Vacancies in the Board

As already stated, the Act says⁵⁵ that there can be one Chairman and up to fourteen members in the Board who shall be constituted into Benches of at least two members. The jurisdiction, powers and authority of the Board may be exercised by these Benches.

Assuming that each Bench has two members (which normally is the case), the Act authorises the Board to have seven Benches. But in fact, the number of Benches of the Board was never constant; it varied from time to time. At no point of time in its entire existence, the Board had more than four Benches functioning at the same time. On an average, only three Benches functioned throughout this fifteen-year period as against the authorised seven Benches.

⁵⁵ Sections 4(2) and 12(2) of the Act.

4.2. Lack of Expertise

S. No.	Background	Chairmen		Members		TOTAL	
		Number	%	Number	%	Number	%
1	2	3	4	5	6	7	8
1	Ex-IAS officers	5	100	11	52.38	16	61.54
2	Ex-IRS officers		0	2	9.52	2	7.69
3	Bankers		0	5	23.81	5	19.23
4	Labour Union leaders		0	2	9.52	2	7.69
5	Economist		0	1	4.76	1	3.85
	TOTAL	5	100	21	100	26	100

Source: BIFR, *Annual Reports*.

From the date of its inception till last year, the Board had twenty six Members, including five Chairmen. All the five Chairmen were ex-IAS officers. Out of the twenty-one Members, there were eleven ex-IAS officers, two ex-IRS officers, five bankers, two labour union leaders and one economist. It can be seen that the composition of the Board veered heavily in favour of ex-civil servants and bankers, with twenty-three out of the twenty-six Members belonging to these two backgrounds. Surprisingly, till date, not a single person experienced in industrial management or corporate finance or industrial reconstruction or turnaround strategies or law or science and technology has been appointed as a Member of the Board. This deprives the Board of a proper blend of expertise and competence which might have a bearing on its performance.

4.3. Non-Administration of Emergency Measures

The Board does not employ any emergency turnaround strategies like change of management or restoration of cash flow which are essential to stabilise the condition of a sick industrial company.

4.4. Convoluted Decision Making Process

The decision making process of the Board is very complicated and convoluted. In the course of its proceedings, it has to decide a number of issues—both main and ancillary. These issues take up large chunks of the Board's time. It is also noteworthy that most of these issues come up for decision in a sequential, and not concurrent, manner which greatly slows down the whole decision making process.

An analysis of the decision-action matrix of the Board also brings out the extremely dilatory nature of its procedure which provides for a number of decision-loops or re-entry points. This matrix is shown in **Table 9**.

Table 9: The Decision-Action Matrix of the Board	
STEP #1: Whether company is a sick industrial company [s.16]⁵⁶	
<u>DECISION #1.1:</u> NO. Company is not a sick industrial company. <u>ACTION #1.1:</u> Case dismissed as not maintainable. [Exit Point #1]	<u>DECISION #1.2:</u> YES. Company is a sick industrial company. <u>ACTION #1.1:</u> Go to Step #2 to consider viability.
STEP #2: Whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time [s.17(1)].	
<u>DECISION #2.1:</u> YES. It is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time. <u>ACTION #2.1:</u> Grant time for self-revival subject to restrictions and conditions [s.17(2)]. Then go to Step #6.	<u>DECISION #2.2:</u> NO. It is not practicable for the company to make its net worth exceed the accumulated losses within a reasonable time. <u>ACTION #2.2:</u> Go to Step #3 to consider whether it is in public interest to revive the company.
STEP #3: Whether it is necessary or expedient in public interest to revive the company [s.17(3)].	
<u>DECISION #3.1:</u> YES. It is necessary or expedient in public interest to revive the company. <u>ACTION #3.1:</u> Take up Act-revival. Order Operating Agency to prepare scheme [s.17(3)]. Circulate draft scheme, after changes, if any to all concerned parties for their consent [s.18(3)]. Go to Step #4.	<u>DECISION #3.2:</u> NO. It is not necessary or expedient in public interest to revive the company. <u>ACTION #3.2:</u> Go to Step #5 to consider winding up.
STEP #4: Whether ALL persons who are to provide financial assistance or bear sacrifices under the scheme have given their consent [s.19]	
<u>DECISION #4.1:</u> YES. All parties have given consent to draft scheme [s.19(3)]. <u>ACTION #4.1:</u> Sanction the scheme [s.18(4)]. Give time to company to revive. Then go to Step #6.	<u>DECISION #4.2:</u> NO. All or some parties have not given consent to draft scheme. <u>ACTION #4.2:</u> Go to Action #3.1 to consider fresh scheme [Loop #1] Or, go to Step #5 to consider other measures including winding up. [s.19(4)].
STEP #5: Whether it is just and equitable for the company to be wound up [s.20]	
<u>DECISION #5.1:</u> NO. It is not just and equitable to wind up the company. <u>ACTION #5.1:</u> Go to Action #3.1 to attempt Act-revival. [Loop #2]	<u>DECISION #5.2:</u> YES. It is just and equitable to wind up the company. <u>ACTION #5.2:</u> May sell company's assets. Forward opinion & sale proceeds to HC [s.20]. [Exit Point #2]
STEP #6: Whether company has revived either under self-revival [s.17(2) scheme] or Act-revival [s.18(4) scheme].	
<u>DECISION #6.1:</u> YES. Company has revived. <u>ACTION #6.1:</u> Case closed. [Exit Point #3]	<u>DECISION #6.2:</u> NO. Company has failed to revive. <u>ACTION #6.2:</u> Go to Action #3.1 to consider fresh scheme. [Loop #3] Or, go to Step #5 to consider other measures incl. winding up. [ss.17(4)(a) & 19(4)].

⁵⁶ The numbers in the parentheses are section numbers from the Act.

The decision-action matrix, presented above, reveals three points of exit from the ambit of the Board—the first when the case is dismissed as not maintainable, the second when the Board recommends the winding up of the company and the third when the company revives on the successful implementation of the rehabilitation scheme.

The matrix also identifies the following re-entry points:

1. When the concerned parties do not give consent to provide financial assistance as proposed in the draft scheme, the Board, instead of straight-away ordering the winding up of the company, has the option of going for a fresh scheme.
2. Similarly when the revival scheme under s.17(2) or s.18(4) fails, the Board, instead of straight-away ordering the winding up of the company, has the option of going for a fresh scheme.
3. It is provided that the Board, even after coming to the conclusion that it is just and equitable to wind up the company, shall hear the objections of the parties after which it may decide not to wind up the company and instead opt for revival under s.18(4). This is a reversal of the normal procedure. The Board ought to first hear the objections of the parties and then conclude that it is just and equitable to wind up the company. And once this conclusion is reached, it must be final.

The provision of these re-entry points not only makes the entire decision-making process go in circles consuming enormous amounts of time but also places a disproportionate emphasis on revival.

5. SUGGESTIONS

Some suggestions for improving the performance of the Board are given below:

5.1. Strengthening the Board's Expertise

The expertise of the Board must be strengthened (i) by stipulating that each Bench of the Board must have at least one Judicial Member and one Technical Member, and (ii) by selecting as Members of the Board persons with relevant backgrounds like management, law, industrial finance and industrial management.

5.2. Change in Identification Criteria

Experts⁵⁷ are unanimous that the sick industrial company as defined in the Act is one which is on its death-bed. It is rarely possible to turnaround such a terminal case. If revival efforts were to have a fair chance of success, then the sickness must be identified at an earlier stage. It is therefore necessary to amend the definition of sick industrial company to provide for less stringent identification criteria.

5.3. Automatic Change of Management

Since it is under the existing management that the company has become sick, it is necessary to provide for an automatic change of management of the sick industrial company immediately on its registration by the Board. The new management may bring in new ideas, new competence and new integrity. For this purpose, the Board

⁵⁷ See, for example, Ministry of Finance, Government of India, July, 1993. *Report of the Committee on Industrial Sickness and Corporate Restructuring (Chairman: Omkar Goswami)*. New Delhi. Government of India.

may maintain a pool of competent and experienced managers. Or the government may maintain such a pool or Service from which managers may be deputed to the sick company.

5.4. Change in ‘Revival-At-Any-Cost’ Policy

The present policy of the Board placing excessive emphasis on revival-at-any-cost must give way to a stance where the company’s chances of revival are considered dispassionately and realistically and winding up decisions are taken without feelings of guilt or helplessness. It is not necessary to exhaust all measures to revive a company before ordering its winding up. Winding up is not a last-resort option.

Just because an analogy is drawn between a sick person and a sick company, it does not mean that the same analogy should also extend to the way their illnesses are treated. In the case of a human being, the approach is to try all available treatments to cure the patient and if that is not possible, to at least keep him living till death comes in its own course. Only in the rarest of rare cases, euthanasia is resorted to. The same approach cannot be applied to a sick industrial company where a revive-or-keep-alive-at-all-costs policy can be counter-productive. It must be noted that a quick revival is better than a winding-up and a quick winding up is better than a protracted and uncertain revival.

5.5. Reducing Dependence on the Operating Agency

The Board must be provided with its own body of experts to carry out the functions that are presently being entrusted to the Operating Agency. This will enable the Board to have administrative and supervisory control over the functioning of the Operating Agency and also make it more accountable to the Board.

5.6. Coercive Powers

At present, any one of the persons who are to provide financial assistance to the sick industrial company under a draft scheme prepared by the Operating Agency may refuse to do so and there is nothing that the Board can do about it. It is suggested that in such cases, the Board be given limited power to coerce such objectors.

For instance, if the bulk of the institutions and/or persons who are to provide financial assistance to the sick industrial company agree to do so, then the Board may be given the power to override the objections of the remaining few and order them to comply with the provisions of the draft scheme.

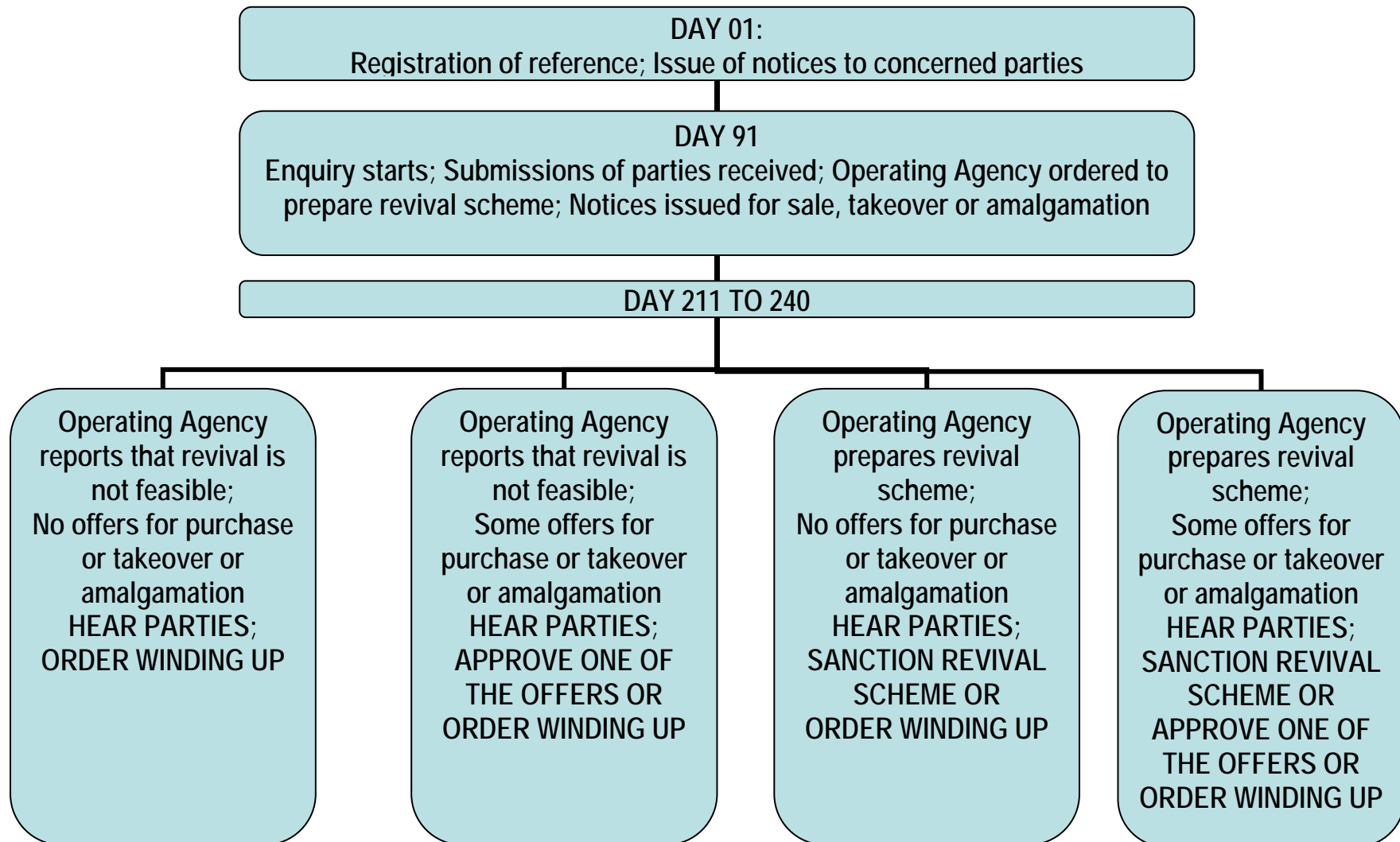
5.7. Alternative Decision Making Format

At present, the Board follows a sequential decision making format, which is extremely time-consuming. Instead, it is suggested that the Board may go for a concurrent decision making format which allows for simultaneous consideration of multiple options. Given below is one such format.

1. **Day 01:** The Board registers the reference of the sick company. Immediately notices must be sent to promoters, workers, creditors, government agencies and all other concerned persons asking them to appear at the enquiry to start 90 days hence. They are required to come with their written opinions on the status and prospects of the sick company. The promoters have to explicitly state whether or not they are willing and capable of pumping in more money into the venture. The creditors, workers and the Government must be asked to clearly specify the nature and extent of the financial assistance, if any, that they are willing to provide; and the sacrifices, if any, that they are willing to bear.

2. **Day 91:** On the first day of the enquiry, the Board will hear the submissions of the various parties. If the promoters show willingness and capacity to inject a reasonable sum of additional money into the company or if the creditors and others show a sufficiently reasonable response to provide financial assistance and/or bear sacrifices, then the Board may order the Operating Agency to prepare, within a specified time (say 4 months), a revival scheme within the parameters of such additional investment, financial assistance and sacrifices. At the same time, the Board may also order that notices be published inviting proposals for the purchase of the company as a going concern or for takeover of its management or for amalgamating it with an existing profitable company.
3. **Days 211-240:** On the next date(s) of hearing, the Board may pass any one of the following orders depending on one of the following likely scenarios:
 - 3.1. If the Operating Agency reports that the revival of the company is not feasible and if no worthwhile offers have come for purchase or takeover or amalgamation of the company, the Board may pass an order of winding up.
 - 3.2. If the Operating Agency expresses its inability to prepare a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if some worthwhile offers have come for purchase or takeover or amalgamation of the company, then the Board may, after hearing all the parties, give its consent to the purchase or takeover or amalgamation, and if such an effort fails, pass an order of winding up.
 - 3.3. If the Operating Agency prepares a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if no worthwhile offers have come for purchase or takeover or amalgamation of the company, then the Board may, after hearing all the parties, sanction the revival scheme prepared by the Operating Agency for implementation, and if such an effort fails, pass an order of winding up.
 - 3.4. If the Operating Agency prepares a viable revival scheme within the parameters of the additional investment, financial assistance and sacrifices, and if worthwhile offers have also come for purchase or takeover or amalgamation of the company, then the Board may, after hearing all the parties, either give its consent to the purchase or takeover or amalgamation, or sanction the revival scheme prepared by the Operating Agency for implementation, and if such an effort fails, pass an order of winding up.

A simplified version of this alternative decision-making format has been depicted as a flow-chart in Chart 2.



6. CONCLUSION

From the above analysis, we can see how counter-productive the functioning of the Board has been. The tragedy is that the Board has not been of help or solace to any of the concerned parties—the promoters, the shareholders, the workmen, the creditors, the government or the economy as a whole. It is therefore not surprising that the Board has also been ridiculed as Bureau for Industrial Funeral Rites!

Depending on market exigencies, industries need to restructure their operations or redeploy their labor and capital. They may even need to close down partly or wholly their operations and wind up the show if and when they incur continuous losses and thus become sick. This is what is meant by exit in the context of industrialization. However, in India, sick industrial companies cannot exit; because the Act and the Board stand in the way.

The economic reforms implemented so far have helped remove most of the entry barriers functioning under the so-called 'licence-permit raj.' But similar action has not been forthcoming from the Government for removing the exit barriers. The Government's steps have been hesitant and half-hearted.

The Government had appointed a High Level Committee on Law Relating to Insolvency of Companies under the chairmanship of Justice V.B. Eradi, former Judge of the Supreme Court of India, which had made far-reaching recommendations including the repeal of the Act and the abolition of the Board, in its report submitted to the Government in August, 2000. In pursuance of these recommendations, the Government had passed in December, 2002, an Amendment to the Companies Act under the provisions of which a new body called the National Company Law Tribunal has to be established which takes over the work hitherto being done by the Company Law Board, the High Court and the Board. However, most of the pernicious provisions of the Act have been retained under the new dispensation.

Interestingly, the Government has developed cold feet even in implementing this half-hearted measure. It has not yet given effect to this Amendment. So, the Sick Industrial Companies (Special Provisions) Act, 1985 continues to be on the statute book and the Board for Industrial and Financial Reconstruction continues to perform diligently its role of a legal barrier to effective exit of non-performing industrial companies.
