

# THE TEETER-TOTTER OF REGULATION AND COMPETITION: BALANCING THE INDIAN COMPETITION COMMISSION WITH SECTORAL REGULATORS

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#### ABSTRACT

*A plethora of regulatory authorities overseeing economic regulation has recently emerged in India. Unlike sector-specific regulators, the Indian competition authority, the Competition Commission of India ("Commission"), is of recent vintage. In fact, although the Indian Parliament enacted competition legislation in 2002, the substantive provisions of this law are not yet in force.*

*Pursuant to the legislative framework, the duty of the Commission is to "prevent practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India." This mandate is extraordinarily wide and overlaps with the jurisdiction of sector-specific regulators such as the petroleum regulator, electricity regulator, insurance regulator, telecom regulator and securities market regulator.*

*This Article deals with the above interface. It analyzes the genesis of regulatory jurisprudence in the Indian context, and compares and contrasts it with the inception of competition law. After using a case study to map the regulation/competition dichotomy, this Article delineates the overlapping jurisdictions manifested in the multiplicity of regulators and their legislative design.*

*The Article has both an exploratory and normative aim. It takes into account international experiences and closely analyzes the framework of competition law as juxtaposed with sector-specific regulators.*

*In keeping with its exploratory goal, this Article critically surveys relevant legislation and finds that, unlike sector-specific regulatory authorities, the Commission combines the twin powers of private enforcement and the ability to pursue claims for damages. It is, therefore, uniquely situated to ensure a robust level of consumer welfare.*

*Normatively, the Article utilizes the methodological tools of law and economics and suggests that the enforcement of competition policy is a*

*sophisticated and specialized field. Accordingly, the Article suggests that in order to reduce transaction costs and efficiently enhance legal certainty and predictability, the realm of competition law enforcement ought to be left in the hands of the Commission. This strategy is in the best interest of both consumers and business entities.*

## I. INTRODUCTION

Following a structural adjustment program in 1991, India embarked on the path of market liberalization.<sup>1</sup> As a result, it increasingly relies upon market rivalry as the organizing principle for economic activity. Markets have generally been understood to ensure efficient allocation of resources. Nevertheless, considering that markets are imperfect, and often prone to failure, the role of competition law and policy can hardly be overemphasized.

The Indian competition law framework, through the Competition Act of 2002 (“Competition Act”),<sup>2</sup> envisages the Competition Commission of India (“Commission”) as a competition authority. In the aftermath of a 1992 securities scam, several sector-specific regulators have emerged on the Indian regulatory horizon.<sup>3</sup> Ostensibly, the multitude of regulators may frequently regulate similar aspects of corporate behavior.

Sector-specific regulation presents distinct challenges in competition law and policy. The roles of the competition authority and sector-specific regulators can be complimentary. However, at times, the interface between the two can also be a source of tension. While sector-specific regulation seeks to identify a problem *ex ante* and creates administrative machinery to address behavioral issues before the problem arises, competition policy generally addresses the problem *ex post*, in the backdrop of market conditions.

Section 18 of the Competition Act states that “it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.” This mandate is extraordinarily broad, yet it remains agnostic about sector-specific regulators. The wide scope of section 18 is echoed in

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1. See generally AMIT BHADURI & DEEPAK NAYYAR, THE INTELLIGENT PERSON’S GUIDE TO LIBERALIZATION (1996).

2. The Competition Act, 2002, No. 12 of 2003, available at <http://indiacode.nic.in/>.

3. See Shri P. Chidambaram, Indian Fin. Minister, Address at the Fourteenth Annual Convocation of the National Law School of India University, Bangalore (Aug. 27, 2006), available at <http://tradeandcompetition.blogspot.com/>.

the preamble of the enactment as well, where similar language has been used.<sup>4</sup>

Specific provisions contained within the legislation exemplify the possible tension. Section 60 of the Competition Act is the usual *non obstante* provision asserting the supremacy of competition legislation within the domain of competition enforcement,<sup>5</sup> and both sections 60 and 62 are couched in mandatory language, yet, ironically, section 62 hortatorily declares that competition legislation ought to work along with other enactments.<sup>6</sup>

If the triumvirate of sections 18, 60, and 62 were not sufficiently puzzling, section 21 of the Competition Act suggests that in any proceeding before a statutory authority,<sup>7</sup> if such a need arises, the statutory authority may refer an issue to the Commission.<sup>8</sup> The Commission is then bound to deliver its opinion to the statutory authority within a stipulated period of two months.<sup>9</sup> Incidentally, however, this opinion is not binding upon the statutory authority.<sup>10</sup> Moreover, an amendment to the

4. The preamble of the Competition Act, 2002 reads:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

Competition Act, 2002, pmbl.

5. Section 60 reads: “The provisions of this Act *shall* have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.” *Id.* § 60 (emphasis added).

6. Section 62 reads: “The provisions of this Act *shall* be in addition to, not in derogation of, the provisions of any other law for the time being in force.” *Id.* § 62 (emphasis added).

7. Section 2(w) of the Competition Act defines “statutory authority” as “any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto.” *Id.* § 2(w).

8. Section 21(1) states:

Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

*Id.* § 21(1).

9. Section 21(2) provides that “the Commission shall give its opinion, within sixty days of receipt of such reference . . . .” The Competition (Amendment) Act, 2007, No. 70 of 2007, sec. 15, § 21(2), available at [http://www.cuts-ccier.org/pdf/IndianCompetitionAmendmentBill\\_2007.pdf](http://www.cuts-ccier.org/pdf/IndianCompetitionAmendmentBill_2007.pdf).

10. Section 21(2) states: “On receipt of a reference under sub-section (1), the Commission shall give its opinion . . . to such statutory authority which shall *consider* the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.” *Id.* sec. 15, § 21(2) (emphasis added).

Competition Act of 2002, passed in late 2007 envisages the possibility of the Commission making a reference to a statutory authority.<sup>11</sup>

The essence of the interface between the Commission and sector-specific regulators in India lies within sections 18, 21, 60, and 62 of the Competition Act. The Commission could potentially have to deal with challenges posed by interfaces with sector-specific regulators, including the Securities Exchange Board of India (“SEBI”), the Telecom Regulatory Authority of India (“TRAI”), the Central Electricity Regulatory Commission (“CERC”), the Insurance Regulatory Development Authority (“IRDA”), and the Petroleum and Natural Gas Regulatory Board (“PNGRB”).

This Article addresses such possible interfaces. Its main argument is that, unlike sector-specific regulatory authorities, the Commission combines the twin powers of private enforcement and the ability to pursue claims for damages. Hence, the Commission is uniquely situated to ensure a robust level of consumer welfare. Further, the Article utilizes the methodological tool of an economic analysis of law and posits that the enforcement of competition law is a sophisticated, specialized field. Thus, in order to reduce transaction costs and enhance efficiency, it ought to be left in the hands of the Commission in India.

Structurally, this Article is divided into several parts. Part II deals with the juxtaposition of regulation and competition. It discusses the development of the idea of regulation in India and the emergence of competition law as a form of regulation. This Part also explains the emerging dichotomy between competition and regulation through an example in the port sector. Part III builds upon Part II and provides a synoptic perspective on several sector-specific regulators and their potential interface with the Commission. Part IV analyzes a range of possibilities between sector-specific regulators and the Commission. It

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11. Section 21A states:

(1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, *suo motu*, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

*Id.* sec. 16, § 21A.

further puts forth descriptive and normative justifications behind granting the Commission primacy over sectoral regulators. Part V argues that the Commission has the most robust legislative mechanism to ensure the original goal of competition policy—consumer welfare.

## II. THE SEE-SAW OF REGULATION AND COMPETITION: SECTORAL REGULATORS & THE COMMISSION

The interface between sector-specific regulation and competition law in India is unique. In the immediate past, the Indian economy has witnessed a massive growth spurt.<sup>12</sup> While the fast-paced development has lifted millions of people up from poverty levels, it has also led to concomitant challenges.<sup>13</sup> India has seen several economic scandals and other crises during the period of economic boom.<sup>14</sup> A significant feature of the Indian economic and legal regime during this period has been a mushrooming of innumerable regulatory authorities. With several regulatory authorities cropping up simultaneously, it is natural that they might end up having overlapping jurisdictions. Therefore, it is critical to appreciate the genesis of the Indian strand of regulatory jurisprudence.

### A. *Genesis of the Indian Strand of Regulation*

The history behind the Indian strand of regulation has a close relationship to the advent of the process of Liberalization, Privatization, and Globalization in 1991.<sup>15</sup> In spite of more than a decade and a half of commitment to economic reforms, there is no consensus amongst the political parties regarding the rationale behind the reforms.<sup>16</sup> Arguably,

12. See generally INDIA MINISTRY OF FINANCE, ECONOMIC SURVEY, 2006–2007 (2007), available at <http://indiabudget.nic.in/es2006-07/esmain.htm>.

13. Post-1991, with the ushering in of an era of liberalization in India, the percentage of poor people in India has been the subject of intense debate. Approximately twenty-six percent of India's population is poor. The figures released by the government are allegedly based upon a severely flawed methodology and accordingly have attracted scathing criticism from economists. See generally Angus Deaton & Jean Drèze, *Poverty and Inequality in India: A Re-examination*, ECON. & POL. WKLY., Sept. 7, 2002, at 3729.

14. See generally Sucheta Dalal, *Scam 2001: 10 Years of Financial Scams*, <http://www.suchetadala.com/articles/display/9/490.article> (last visited Nov. 13, 2008).

15. Indeed, while post-1991 India is characterized by Liberalization, Privatization, and Globalization (“LPG”), pre-1991 India was characterized by another variant of LPG: Licensing, Planning, and Government. See S. Chakravarthy, *From MRTPL to the Competition Act*, in Round Table, *Competition Policy and Law: Discussion*, 19 INDIAN INST. MGMT. BANGALORE MGMT. REV. 432, 438 (2007).

16. India has seen governments run by two different political parties in the seventeen years since the reform. While both the National Democratic Alliance (“NDA”) government (led by the right

there has been an increasing realization that the government ought to focus only upon its core activity—governance—instead of manufacturing, for instance, hair oil or bread.<sup>17</sup>

Along with this realization, the Indian legal system has been characterized by a sudden proliferation of regulatory authorities.<sup>18</sup> Literally, “regulation” means “influencing the flow of events.”<sup>19</sup> Under this broad definition, regulation has been in existence since time immemorial all around the world.<sup>20</sup> Nonetheless, in its recent avatar, regulation has primarily meant economic regulation that consists of government rules or market incentives designed to control the price, sale, entry, exit, or production decisions of firms.<sup>21</sup>

There are several reasons why economic regulation emerged along with the process of liberalization in India. The significant arguments for economic regulation revolve around: (a) the remediation of information failures (e.g., SEBI regulations for initial public offerings of corporations and stock exchange listing agreements); (b) the prevention of abuse of market power (e.g., TRAI for telecom companies and cable television service providers); and (c) the correction of externalities like pollution (e.g., pollution control boards) and market failure (e.g., the Monopoly Cotton Procurement Scheme).<sup>22</sup>

wing, conservative Bharatiya Janata Party (“BJP”)) and the United Progressive Alliance (“UPA”) government (led by the centrist, liberal Congress) have carried on the process of economic reforms, left-leaning political parties such as the Communist Party of India (Marxist) (“CPI(M)”), however, oppose the process of economic reforms. *See NDA Committed to Making India an Economic Superpower*, THE HINDU, Sept. 4, 2004; GOVERNMENT OF INDIA, NATIONAL COMMON MINIMUM PROGRAMME OF THE GOVERNMENT OF INDIA (2004), available at <http://www.pmindia.nic.in/cmp.pdf> (Common Minimum Program of the UPA coalition government); COMMUNIST PARTY OF INDIA (MARXIST), PROGRAMME (2000), available at <http://www.cpim.org/> (follow “Programme” hyperlink).

17. The government of India used to manufacture bread through Modern Foods Limited which has been sold to Hindustan Lever Limited. *See Hoover’s Profile: Hindustan Unilever Limited*, <http://www.answers.com/topic/hindustan-lever-limited> (last visited Nov. 11, 2008).

18. One of the first regulatory authorities in India, consequent to the securities scandal was the SEBI, created by the Securities and Exchange Board of India Act, 1992 (“SEBI Act”). Modeled upon the Securities and Exchange Commission of the United States, as per section 11 and the Preamble of the SEBI Act, the purpose of the SEBI is to “protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto.” The Securities and Exchange Board of India Act, No. 15 of 1992, pmb., § 11, available at <http://indiacode.nic.in/> (search Act Year “1992”).

19. Christine Parker & John Braithwaite, *Regulation*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 119, 119 (Peter Cane & Mark Tushnet eds., 2003).

20. Long ago, civilization realized that the regulation of incest was fundamental to the survival of the gene pool. Further, the emergence of the “state,” the imposition of taxes, and the use of currency for legal exchange are all instances of “regulation” that existed very early on. *Id.* at 120.

21. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 345 (17th ed. 2001).

22. *Id.* at 345–47.

Globally, it is understood that a new regulatory state has arisen pursuant to the emergence of a “risk society.”<sup>23</sup> India is no exception. Its fast-paced, robust growth has invariably been accompanied by unpredictable scandals. These scandals have rendered the government’s approach to regulation ostensibly paradoxical. While the government’s liberalization process meant cutting through red tape and making industrialization more entrepreneur-friendly, independent regulatory authorities for several sectors of the economy have emerged in response to the scandals.<sup>24</sup> Indeed, economic reforms have led the government to reinvent itself by doing less “rowing” and more “steering.”<sup>25</sup>

Veering away from the socialist hue that pervaded governance until 1991, India increasingly relies upon market rivalry for allocation as well as distribution of resources.<sup>26</sup> Nonetheless, there is also a realization that the textbook model of perfect competition does not exist in reality. Competition law and policy comprise just one of the intervention strategies employed to address market imperfections which may induce welfare-reducing monopolies.<sup>27</sup>

23. The term “risk society” does not mean that the society *per se* has become riskier. It means that as a modern society, we spend an increasingly enormous amount of time managing the society’s response to emerging risks. For instance, ubiquitous plastic money is supposed to make life simpler by decreasing the necessity of carrying cash. Nonetheless, any holder of a credit card in India must spend time at the end of the month meticulously going through each transaction, as credit card companies are known for their obscure trade practices, which usually prompt consumers to cough up more money. Indeed, the Reserve Bank of India recently came up with a set of guidelines to address the practices of credit card companies. See generally Parker & Braithwaite, *supra* note 19, at 122.

24. See, for instance, *Monnet Sugar Ltd. v. Union of India*, in which the Allahabad High Court dealt with the Industrial Development and Regulation Act, 1951, which, prior to the process of liberalization, was the epitome of license and permit controls. MANU/UP/0823/2005 (Manupatra), also available without subscription at <http://indiankanoon.org/doc/1303224/>.

25. For instance, when the government thought it unfit for the Department of Telecom to be a regulator as well as a player in the telecom sector, the Indian government replaced the Department of Telecom with the TRAI. See also *Reliance Airport Developers Pvt. Ltd. v. Airports Auth. of India*, in which the Supreme Court of India endorsed the public-private partnership approach to development. 2006 (11) SCALE 208.

26. The latest step in India’s increasing reliance upon the market is the freeing up of the oil and gas sector for private players. See, e.g., Raghuvir Srinivasan, *Well of Paradoxes*, HINDU BUS. LINE, Jan. 28, 2004, available at <http://www.blonnet.com/bl10/stories/2004012800732300.htm>.

27. SAMUELSON & NORDHAUS, *supra* note 21, at 353–60.

### B. *The Inception of Indian Competition Law*

The prevailing wisdom in competition law literature acknowledges only two dominant paradigms—the U.S. antitrust model, and the European Union competition law model. Until 1975, many believed that these were the only two competition law models available.<sup>28</sup> Contrary to this belief, India had a *sui generis* model of competition law as early as 1969 in the form of the Monopolies and Restrictive Trade Practices Act (“MRTP Act”).<sup>29</sup>

Immediately after the first, broader pan-India economic plan period initiated by the Union, the government was increasingly concerned about the uneven impact of growth upon poor people. There was an evident anxiousness that a disproportionate amount of economic power had been vested in a privileged few. Accordingly, the MRTP Act was enacted in part “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.”<sup>30</sup>

The influence of the Constitution of India is eminently clear in this passage. The Indian Constitution contains directive principles that guide state policymaking and include the concept that the economic system should function in a manner that does not lead to the concentration of wealth in the hands of the few.<sup>31</sup> Further, the constitutional mandate is also clearly in favor of serving the common good of the society.<sup>32</sup>

While the MRTP Act embodied this constitutional mandate, it exempted governmental companies from its purview and focused only upon private entities.<sup>33</sup> Perhaps the philosophy underlying the MRTP Act

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28. Rahul Singh, *Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India*, 8 J. CORP. L. STUD. 143, 144 (2008).

29. The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, available at <http://indiacode.nic.in/>.

30. *Id.* pmbl.

31. Article 39(c) of the Constitution states, “The State shall, in particular, direct its policy towards securing . . . (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment . . .” INDIA CONST. art. 39.

32. Article 39(b) of the Constitution states, “The State shall, in particular, direct its policy towards securing . . . (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good . . .” *Id.* art. 39(b).

33. Section 3 of the MRTP Act, *inter alia*, states:

Unless the Central Government, by notification, otherwise directs, this Act shall not apply to—(a) any undertaking owned or controlled by a Government company, (b) any undertaking owned or controlled by the Government, (c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central Provincial or State Act

was that governmental companies were the champion of the public interest, and that private companies were the only entities for which regulation is necessary to promote the public interest.<sup>34</sup> However, after the liberalization of the economy in 1991, the MRTP Act was found to inadequately address the needs of the new, globalized economy.<sup>35</sup> It would have been a monumental task to amend the MRTP Act to address the needs of the economy.<sup>36</sup> Hence, India opted for modern competition legislation that would enhance consumer welfare through sustaining competition in the market.<sup>37</sup>

Section 18 of the Competition Act entrusts the Commission with an overarching duty of sustaining competition in the market. The magnitude of this duty, as a corollary, entails that the Commission is vested with a comprehensive, overall perspective on the economy. Such a broad, sweeping vantage point is unavailable to any sector-specific regulator. This approach is in keeping with the goals of competition law in advanced jurisdictions such as the United States and European Union. American antitrust law frowns upon unfair transfers of wealth between consumers and powerful firms.<sup>38</sup> European Union competition law intends to promote market integration and protect competition.<sup>39</sup>

### C. *The Regulation/Competition Dichotomy*

Business regulation is perhaps as old as business itself. While modern, liberalized economies have increasingly relied upon markets for allocation of resources, markets can also fail and lead to undesirable results.<sup>40</sup> These

....  
MRTP Act, § 3.

34. The term “public interest” in law has attracted interesting comments. *See, e.g.*, Baldev Raj v. State of Punjab, A.I.R. 1984 S.C. 987 (Desai, J.) (noting that “[p]ublic interest is an unruly horse”).

35. *See generally* DEP’T OF COMPANY AFFAIRS, GOV’T OF INDIA REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (2000) [hereinafter REPORT OF THE HIGH LEVEL COMMITTEE].

36. *See generally* Singh, *supra* note 28.

37. The preamble of the Competition Act, 2002, lays down that the Act is meant to “prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”

38. *See generally* Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982).

39. David J. Gerber, *Competition*, in THE OXFORD HANDBOOK OF LEGAL STUDIES, *supra* note 19, at 522–26.

40. *See generally* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 3 (1997) (examining free market and free trade as not only the engine of growth and productivity, but also as the engine of social justice and equity).

extreme possibilities have ensured that governments oscillate between the poles of regulation and competition in order to ensure that when the market fails, it does not crash land, but is instead provided with a suitable parachute. In India, regulation managing competition is implemented through sector-specific regulators and through the Commission. These actors differ in their approaches to regulating business in the market. Table 1 summarizes these differences in approach.

TABLE 1: APPROACHES TO REGULATING BUSINESS

<b>Sector-Specific Regulator</b>	<b>Commission</b>
Tells businesses “what to do” and “how to price products”	Tells businesses “what not to do”
Focuses upon specific sectors of the economy	Focuses upon the entire economy and functioning of the market
<i>Ex ante</i> —addresses behavioral issues before problems arise	<i>Ex post</i> (except for merger review)
Focuses upon orderly development of a sector that would presumably trickle down through that sector, ensuring consumer welfare	Focuses upon consumer welfare and unfair transfer of wealth from consumers to firms with market power
Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry, and opening up the market to effective competition.	Competition legislation is usually more appropriate for affecting conduct and maintaining competition.

From Table 1, it is evident that the roles of sector-specific regulators and the Commission overlap but remain quite distinct. Unlike the sector-specific regulators, the Commission has a holistic perspective on the economy and addresses behavioral issues after problems arise.<sup>41</sup> As per its legal mandate, the Commission also addresses the unfair transfer of wealth that may take place between consumers and firms wielding market power.

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41. Merger review provisions are an exception under competition law.

Since the substantive aspects of Indian competition law are not yet in force, there is a dearth of instances illustrating the dichotomy between sector-specific regulation and competition authority in India. This Article now takes an example from the port sector as a case study of how an interface can lead to regulatory muddle in a sector.

### 1. *The Port of Confusion: The JNPT Case*

The case of *P&O Australia Ports Pty Ltd. v. Board of Trustees of Jawaharlal Nehru Port Trust*<sup>42</sup> (“*JNPT Case*”) is the epitome of a sector-specific authority’s obfuscated comprehension of a competition issue. The *JNPT Case* concerns the Jawaharlal Nehru Port in Mumbai, India, which had two terminals—a container terminal and bulk terminal.<sup>43</sup> The port’s Board of Trustees disqualified P&O Australia Pty Limited (“P&O Australia”) at the bidding stage of a project to convert the bulk terminal into a container terminal.<sup>44</sup>

The Board of Trustees was anxious about P&O Australia, which had already been operating a container terminal at Jawaharlal Nehru Port since 1995.<sup>45</sup> The Board was keen “to avoid concentration of control with one private party and to increase competition and efficiency and to prevent monopoly in public interest.”<sup>46</sup>

Notwithstanding the Board of Trustees’ desire to prevent a monopoly, it permitted P&O Australia to bid for another port based in Mumbai, the Mumbai Port, but disqualified it from bidding for the second terminal at Jawaharlal Nehru Port.<sup>47</sup> Further, there is an independent authority, the Tariff Authority for Major Ports, that determines the ceiling for the tariffs on the private players’ services.<sup>48</sup>

One of the foremost concerns of the Board of Trustees was that P&O Australia already controlled the Chennai Container Terminal and one of the Jawaharlal Nehru Port terminals; adding a second terminal at Jawaharlal Nehru Port would mean that P&O Australia would control over thirty percent of the total container traffic to and from India.<sup>49</sup> The

42. MANU/MH/1121/2003 (Manupatra), also available without subscription at <http://Indian.kanoon.org/doc/1705117/> [hereinafter *JNPT*].

43. *Id.* ¶ 2.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* ¶ 5.

48. The Major Port Trusts Act, No. 38 of 1963, § 48, available at <http://www.indiacode.nic.in/>.

49. *JNPT*, MANU/MH/1121/2003, ¶ 5.

Bombay High Court agreed with the Board's position and failed to appreciate the boundaries of the "market" that it ought to be concerned with.

The Competition Act describes the "relevant market" as an amalgamation of the "relevant product market" and the "relevant geographic market."<sup>50</sup> Further, the "relevant product market" is dependent upon all interchangeable or substitutable goods and services,<sup>51</sup> and the "relevant geographic market" is dependent upon the homogeneity of the conditions of competition and whether these conditions are distinguishable from those found in neighboring areas.<sup>52</sup> An application of SSNIP test (i.e., whether a monopolist could impose a small but significant non-transitory increase in prices without affecting demand for access to the port), as reflected in the legislative provisions, indicates that the relevant market is not the entirety of India, as a ship entering a port situated in Mumbai does not have a realistic chance of entering through, for example, Chennai.<sup>53</sup>

The problem with the *JNPT* Case is not the outcome, but the reasoning behind the judgment. Neither the Board of Trustees nor the Bombay High Court appears to have appreciated the nuances of competition law and policy. The court in the *JNPT* Case did not even explore an alternative possibility—a standard clause in the bid stating that the contract can be revoked if parties are found to have contravened the conditions of competition. Indeed, the *JNPT* Case could have explored a stricter version of such a clause—it could have suggested that in case P&O Australia is

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50. Section 2(r) of the Competition Act states that the "‘relevant market’ means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets."

51. Section 2(t) of the Competition Act states that "‘relevant product market’ means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by the reason of characteristics of the products or services, their prices and intended use."

52. Section 2(s) of the Competition Act states that "‘relevant geographic market’ means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas."

53. Indeed, an application of SSNIP test indicates that Jawaharlal Nehru Port and Mumbai Port are interchangeable or substitutable. Therefore, if the government had truly been worried about an emerging monopoly, it should not have permitted P&O Australia to bid for Mumbai Port while still operating the container terminal at Jawaharlal Nehru Port. This is an interesting question that *JNPT* leaves unanswered. At Jawaharlal Nehru Port, considerations of efficiency are significant. If the same company manages two terminals at the same port, one may see efficiency gains. However, control of a substitute port would definitely have an impact upon conditions of competition, perhaps without concomitant efficiency gains.

found to have adversely affected the “conditions of competition,” then its licenses across India would be revoked.<sup>54</sup>

Additionally, by excluding P&O Australia at the bid stage, perhaps the Board of Trustees unwittingly affected conditions of competition at that stage. Presumably, the existence of a player like P&O Australia at the bidding stage would have goaded other competitors to come up with their best possible bids. If other potential players were aware of the absence of competition from P&O Australia, they would likely lower their guard regarding their bids. Therefore, it would have been in the self-interest of the Board of Trustees to let P&O Australia place its bid and only later decide to deny its application.<sup>55</sup>

## 2. *Judicial Review & the JNPT Case*

Independent regulatory authorities have emerged all over the world because of the need for expert bodies to address intricate issues arising in the field of competition.<sup>56</sup> In the United States, such independent, expert regulatory authorities have led to the development of new doctrines of judicial review, such as deference to an agency’s interpretation of a statute.<sup>57</sup> There are two different forms of judicial review—a *de novo* review or a deferential review.<sup>58</sup> American courts, usually faced with a decision rendered by a specialized body, tend to lean upon a deferential standard of review rather than taking a fresh look at the case.

The *JNPT Case* is an example *par excellence* of an application of a deferential standard of judicial review. However, the application of the deferential standard in the *JNPT Case* is wholly misplaced. *Delhi Science Forum v. Union of India*<sup>59</sup> and *Tata Cellular v. Union of India*<sup>60</sup> clearly establish that judicial review can be used for resolving questions of illegality, because it allows courts to inquire into whether or not the

54. Given India’s stature as a major emerging economy, such a clause would have definitely acted as a great deterrent for P&O Australia.

55. Interestingly, this argument was not taken up by counsel, underscoring the need for competition advocacy for lawyers. This is not to suggest that the Board should have invited the bid merely for the sake of it. However, it appears that the Board did not consider this as an option at all.

56. See generally SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 3–19 (9th ed. 2004).

57. See RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMANN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 167–93 (3d ed. 1998); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

58. See generally Mark Tushnet, *Judicial Review of Legislation*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES*, *supra* note 19, at 164.

59. *Delhi Science Forum v. Union of India*, A.I.R. 1996 S.C. 1356.

60. *Tata Cellular v. Union of India*, A.I.R. 1996 S.C. 11.

decision-making authority correctly understood the applicable law. In the *JNPT* Case, failure to appreciate the nuances of competition law and policy by both the Board of Trustees and the Bombay High Court is evident.

The *JNPT* Case underscores the significance of understanding the nuances of competition law and policy. Ultimately, irrespective of whether the Bombay High Court arrived at the correct conclusion, its reasoning is not based upon sound foundations.<sup>61</sup> This highlights the importance of an independent, specialized expert competition authority that is knowledgeable enough to warrant a deferential standard of judicial review. Unfortunately, drafters of Indian legislation have not been particularly cautious about formulating clear, unambiguous law on the jurisdiction of regulators to deal with questions relating to competition.

### III. OVERLAPPING JURISDICTIONS: TOO MANY COOKS IN THE REGULATION/COMPETITION KITCHEN?

There are innumerable instances of ostensibly overlapping jurisdictions on questions of competition. Legislators have not been very careful in allocating specific areas of work for economic regulators. Their muddled understanding of competition policy is evident in both their recent and past work. This awkward body of legislation also reflects a lack of comprehension of regulatory jurisprudence.

#### A. *The Petroleum Regulator*

In spite of the Competition Act, one of the objectives behind the recently drafted Petroleum and Natural Gas Regulatory Board Act, 2006, (“PNGRB Act”) is “to promote competitive markets”<sup>62</sup> and “protect the

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61. See, e.g., SHRI P. CHIDAMBARAM, A VIEW FROM THE OUTSIDE: WHY GOOD ECONOMICS WORKS FOR EVERYONE (2007) (claiming that the Bombay High Court did not commit any illegal act). This perhaps signifies the importance of “competition advocacy” in section 49 of the Competition Act. Section 49(1) of the Competition Act states:

In formulating a policy on competition (including review of laws related to competition), the Central Government may make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit.

The Competition Act, 2002, No. 12 of 2003, § 49(1), available at <http://indiacode.nic.in/>. Section 49(3) of the Act states that “The Commission shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

62. The preamble to the Petroleum and Natural Gas Regulatory Board Act, 2006 states that it is:

interest of consumers by fostering fair trade and competition amongst the entities.”<sup>63</sup>

Under the PNGRB Act, the PNGRB must be mindful of competition concerns when dealing with access to common carriers or contract carriers<sup>64</sup> as well as distribution networks.<sup>65</sup> Specifically, if the PNGRB is interested in declaring an existing pipeline or distribution network to be a common carrier, it still needs to follow the principles of competition policy.<sup>66</sup> Subject to an entity’s right of first use, the entity’s excess capacity is to be distributed by the PNGRB in accordance with “fair competition.”<sup>67</sup> Further, while determining transportation tariffs,<sup>68</sup> the PNGRB is expected to keep considerations of competition and efficiency in mind.<sup>69</sup>

An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to *promote competitive markets* and for matters connected therewith or incidental thereto.

The Petroleum and Natural Gas Regulatory Board Act, No. 19 of 2006, *available at* <http://india.code.nic.in/> (search Act Year “2006”) (emphasis added).

63. Section 11(a) of the PNGRB Act states: “The Board shall protect the interest of consumers by *fostering fair trade and competition* amongst the entities.” (emphasis added).

64. “The Board shall . . . regulate, by regulations, access to common carrier or contract carrier so as to ensure *fair trade and competition* amongst entities and for that purpose specify pipeline access code.” *Id.* (emphasis added).

65. “The Board shall . . . regulate, by regulations, . . . access to city or local natural gas distribution network so as to ensure *fair trade and competition* amongst entities as per pipeline access code.” *Id.* § 11(e)(iii) (emphasis added).

66.

For the purposes of this section, the Board shall be guided by the objectives of *promoting competition* among entities, avoiding infructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas throughout the country and follow such principles as the Board may, by regulations, determine in carrying out its functions under this section.

*Id.* § 11(e)(i) (emphasis added).

67.

The entity laying, building, operating or expanding a pipeline for transportation of petroleum products or laying, building, operating or expanding a city or local natural gas distribution network shall have right of first use for its own requirement and the remaining capacity shall be used amongst entities as the Board may, after issuing a declaration under section 20, determine having regard to the needs of *fair competition* in marketing and availability of petroleum and petroleum products throughout the country.

*Id.* § 21(1) (emphasis added).

68. “Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.” *Id.* § 22(1).

69. “For the purposes of subsection (1), the Board shall be guided by the following, namely:—(a)

Interestingly, the PNGRB Act borrows the concept of “restrictive trade practices”<sup>70</sup> from the MRTP Act<sup>71</sup>—a concept that the Competition Act sought to repeal.<sup>72</sup> After four years of drafting the Competition Act, the framers appear to have either forgotten about the earlier act or developed cold feet about the need for modern competition legislation.<sup>73</sup>

In order to deter violations, the PNGRB can impose civil penalties on those failing to abide by its orders.<sup>74</sup> Penalties for complaints based on a

the factors which may *encourage competition, efficiency*, economic use of the resources; good performance and optimum investments . . . [; and] (c) the principles rewarding *efficiency* in performance . . .” *Id.* § 22(2) (emphasis added).

70. As per section 2(z) of the PNGRB Act:

“restrictive trade practice” means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,—(i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such a manner as to impose on the consumers unjustified costs or restrictions.

*Id.* § 2(z).

71. As per section 2(o) of the MRTP Act:

“restrictive trade practice” means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,—(i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 2(o), *available at* <http://indiacode.nic.in/>.

72. Section 66(1) of the Competition Act, 2002, states: “The Monopolies and Restrictive Trade Practices Act, 1969 is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act . . . shall stand dissolved.” The Competition Act, 2002, No. 12 of 2003, § 66(1), *available at* <http://indiacode.nic.in/>.

73. *See* REPORT OF THE HIGH LEVEL COMMITTEE, *supra* note 35 (emphasizing the need for a new framework for competition law).

74. Section 28 of the PNGRB Act states:

In case any complaint is filed before the Board by any person or if the Board is satisfied that any person has contravened a direction issued by the Board under this Act to provide access to, or to adhere to the transportation rate in respect of a common carrier, or to display maximum retail price at retail outlets, or violates the terms and conditions subject to which registration or authorization has been granted under section 15 or section 19 or the retail service obligations or marketing service obligations, or does not furnish information, document, return of report required by the Board, it may, after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of civil penalty an amount which shall not exceed one crore rupees for each contravention and in case of a continuing failure with additional penalty which may extend to ten lakh rupees for every day during which the failure continues after contravention of the first such direction.

The Petroleum and Natural Gas Regulatory Board Act, § 28.

“restrictive trade practice” are enhanced by five times.<sup>75</sup> However, unlike the Electricity (Amendment) Act, 2003 (“Electricity Act”),<sup>76</sup> the PNGRB Act does have any overriding *non obstante* provision.

### B. The Electricity Regulator

The Electricity Act is another example of the conundrum caused by overlapping jurisdictions of regulatory authorities in India. Though the Electricity Act was passed by the Parliament on May 26, 2003—a good four and a half months after the Competition Act was passed on January 13, 2003—one of its objectives is the promotion of competition.<sup>77</sup> Indeed, the framers of the legislation ignored the competition legislation and conferred power upon the electricity regulator, the CERC, to deal with anti-competitive agreements, abuse of a dominant position, and mergers impeding competition in electricity markets.<sup>78</sup> Thus, while fixing tariff levels, the CERC is to be guided by the principles of competition and efficiency.<sup>79</sup> In order to promote competition, it may issue directions to licensees engaged in transmitting, distributing, or trading in electricity.<sup>80</sup>

75. The proviso to section 28 states that “in the case of a complaint on restrictive trade practice, the amount of civil penalty may extend to five times the unfair gains made by the entity or ten crore rupees, whichever is higher.” *Id.*

76. No. 57 of 2003, available at <http://indiacode.nic.in/>.

77. The preamble of the Electricity Act states that it is:

An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, *promoting competition therein*, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

*Id.* pmb1. (emphasis added).

78. Section 60 of the Electricity Act states: “The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is *likely to cause or causes an adverse effect on competition* in electricity industry.” *Id.* § 60 (emphasis added).

79. Section 61, in relevant part states:

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:— . . . (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; . . . [and] (e) the principles rewarding efficiency in performance . . .

*Id.* § 61. Further, the second proviso to section 62(1) states that “in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.” *Id.* § 62(1).

80. Section 23 of the Electricity Act states, “If the Appropriate Commission is of the opinion that

The CERC has also been entrusted with the task of advising the government on competition within the electricity sector.<sup>81</sup> It must therefore follow the lodestar of competition when reorganizing provincial electricity boards under financial distress.<sup>82</sup>

To add insult to the injury inflicted upon the competition legislation, the CERC, too, has been armored with *non obstante* powers stipulating that the electricity legislation trumps other enactments.<sup>83</sup> Like the Commission, the CERC also finds itself hamstrung by a duty to act in aid of other regulators.<sup>84</sup>

### C. The Insurance Regulator

Perhaps to mitigate this assault on the Commission, the insurance regulator, the IRDA, has a duty to augment the efforts of other regulators.<sup>85</sup> Though the IRDA has been entrusted with the task of regulating and promoting orderly growth of the insurance industry,<sup>86</sup>

it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and *promoting competition*, it may, by order, provide for regulating supply, distribution, consumption or use thereof." *Id.* § 23 (emphasis added).

81. "The Central Commission shall advise the Central Government on all or any of the following matters, namely . . . *promotion of competition*, efficiency and economy in activities of the electricity industry . . ." *Id.* § 79(2) (emphasis added). See also *id.* § 86(2)(i), which stipulates for the counterpart provincial regulator that "[t]he State Commission shall advise the State Government on all or any of the following matters, namely . . . *promotion of competition*, efficiency and economy in activities of the electricity industry . . ." (emphasis added).

82. "A transfer scheme under this section may . . . provide for the formation of subsidiaries, joint venture companies or other schemes of division, amalgamation, merger, reconstruction or arrangements which shall promote the profitability and viability of the resulting entity, ensure economic efficiency, *encourage competition* and protect consumer interests . . ." *Id.* § 131(s)(a) (emphasis added).

83. "Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act." *Id.* § 174. This is similar to the mandate of the competition authority under section 60 of the Competition Act. The Competition Act, 2002, No. 12 of 2003, § 60, *available at* <http://indiacode.nic.in/>.

84. "The provisions of this Act are in addition to and not in derogation of any other law for the time being in force." The Electricity (Amendment) Act, § 175.

85. The Insurance Regulatory and Development Authority Act, No. 41 of 1999, *available at* <http://indiacode.nic.in/> (search Act Year "1999"). "The provisions of this Act shall be in addition to, and not in derogation of, the provision of any other law for the time being in force." *Id.* § 28.

86. The preamble of the Insurance Regulatory and Development Authority Act that states that it is

[a]n Act to provide for the establishment of an Authority to protect the interests of holders of insurance policies, to *regulate, promote and ensure orderly growth of the insurance industry* and for matters connected therewith or incidental thereto and further to amend the Insurance Act, 1938, the Life Insurance Corporation Act, 1956 and the General Insurance Business (Nationalisation) Act, 1972.

*Id.* pmb1. (emphasis added). "Subject to the provisions of this Act and any other law for the time being

including promoting efficiency in the insurance sector,<sup>87</sup> it is devoid of any overriding power over other regulators.

#### *D. The Telecom Regulator*

The telecom regulator, the TRAI, is perhaps another interesting instance. It was established, *inter alia*, in order to ensure orderly development of the telecom sector.<sup>88</sup> Accordingly, one of its critical functions is to “facilitate competition and promote efficiency.”<sup>89</sup> Nevertheless, the appellate authority established to adjudicate telecom disputes<sup>90</sup> has no jurisdiction over competition matters, or at least those arising under the old MRTP Act.<sup>91</sup> Unlike the IRDA, the TRAI does not have a generic duty, but rather a limited duty to aid other authorities existing in the telecom sector<sup>92</sup> and does not possess any overarching

in force, the Authority shall have the duty to *regulate, promote and ensure orderly growth of the insurance business and re-insurance business.*” *Id.* § 14(1) (emphasis added).

87. “Without prejudice to the generality of the provisions contained in sub-section (1), the powers and functions of the Authority shall include . . . promoting *efficiency* in the conduct of insurance business.” *Id.* § 14(2)(e) (emphasis added).

88. The Telecom Regulatory Authority of India Act (“TRAI Act”) is an Act to provide for the establishment of Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

The Telecom Regulatory Authority of India Act, No. 24 of 1997, pmb., available at <http://indiacode.nic.in/>.

89. Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to (a) make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely . . . measures to *facilitate competition and promote efficiency* in the operation of telecommunications services so as to facilitate growth in such services . . . and *efficient* management of available spectrum.

*Id.* § 11 (emphasis added).

90. Section 14 of the TRAI Act states: “The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—(a) adjudicate any dispute—(i) between a licensor and a licensee; (ii) between two or more service providers; (iii) between a service provider and a group of consumers . . .” *Id.* § 14.

91. Provided that nothing in this subsection shall apply in respect of matters relating to—(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).

*Id.* § 14(2)(iii).

92. The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 (13 of 1885) and the Indian Wireless Telegraphy Act, 1933 (17 of 1933) and, in

powers over other regulators. Perhaps way back in 1997, no one's crystal ball was clear enough to anticipate the sudden explosion of regulatory authorities.

### *E. The Securities Market Regulator*

The securities market regulator, the SEBI, is one the oldest regulators and was set up on the cusp of market reforms in India.<sup>93</sup> The SEBI has been entrusted with the dual task of protecting investors' interests and developing the securities market.<sup>94</sup> It also has authority to regulate "fraudulent and unfair trade practices."<sup>95</sup> While the enactment does not venture to define fraudulent and unfair trade practices,<sup>96</sup> the regulator nevertheless oversees mergers.<sup>97</sup>

Interestingly, though the SEBI was one of the first actors to emerge on the Indian regulatory horizon, it has a duty to aid other regulators.<sup>98</sup> Unlike the CERC, the SEBI does not possess any overarching powers.

particular, nothing in this Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority.

*Id.* § 38.

93. See generally The Securities and Exchange Board of India Act, 1992, No. 15 of 1992, available at <http://indiacode.nic.in/> (search Act Year "1992").

94. The SEBI Act is "[a]n Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto." *Id.* pmb1. See also § 11(1) of the SEBI Act, which stipulates that "[s]ubject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit" (emphasis added).

95. "Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for . . . (e) prohibiting *fraudulent and unfair trade practices* relating to securities markets." *Id.* § 11(2) (emphasis added).

96. The definitions section does not contain any specific definition for "fraudulent and unfair trade practice." However, § 12A of the SEBI Act states that

[n]o person shall directly or indirectly— (a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any *manipulative or deceptive* device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder; (b) employ any device, scheme or artifice to *defraud* in connection with issue or dealing in securities which are listed or proposed to be listed on a recognized stock exchange; (c) engage in any act, practice, course of business which operates or would operate as *fraud or deceit* upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognized stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder . . . .

*Id.* § 12A (emphasis added).

97. Section 11(2), in relevant part, states: "Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for . . . regulating substantial acquisition of shares and takeover of companies." *Id.* § 11(2).

98. "The provisions of this Act shall be in addition to, and not in derogation of, the provisions of

The absence of overarching powers accentuates the potentially overlapping jurisdictions involved in merger review from a competition law perspective.<sup>99</sup> The SEBI has an elaborate set of regulations dealing with reporting and open-offer requirements corresponding with the various levels of ownership and control an acquiring entity could obtain.<sup>100</sup> In accordance with the needs of such a market, the requirements emphasize transparency<sup>101</sup> as well as adherence to strict limits.<sup>102</sup> Commercial realities ensure that time remains of the essence in mergers and insistence upon time limits within competition legislation indicates a potential sequencing problem.<sup>103</sup>

The following table summarizes the positions of the aforementioned regulators on overriding, or *non obstante*, powers; the duty to aid other regulators; and the presence of a competition clause in the legislative framework.

any other law for the time being in force.” *Id.* (emphasis added).

99. Section 5 of the Competition Act deals with combination. Section 6 deals with the regulation of combinations. The Competition Act, 2002, No. 12 of 2003, *available at* <http://indiacode.nic.in/>.

100. *See generally* Substantial Acquisition of Shares and Takovers Regulations, 1997, GAZETTE OF INDIA, *available at* <http://www.sebi.gov.in/acts/act/sa.html>.

101. “Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.” The Securities and Exchange Board of India Act, § 12. Section 2(1)(c) defines “control” as

includ[ing] the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholder agreements or voting agreements or in any other manner . . . .

102.

The public announcement referred to in Regulation 10 or Regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein . . . .

*Id.* § 14(1).

103.

Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, may, at his or its option, give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within *seven days* of—(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be; (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (h) of that section.

The Competition Act, 2002, § 6(2) (emphasis added).

TABLE 2: *NON OBSTANTE* POWERS, DUTY TO AID, AND COMPETITION CLAUSES

Regulator	<i>Non Obstante</i> Clause	Affirmative Duty to Aid	Competition Clause
Petroleum	No	No	Yes
Electricity	Yes	Yes	Yes
Insurance	No	No	No
Telecom	No	Limited	Yes
Securities	No	Yes	No

#### IV. THE *PRIMUS INTER PARTES*: THE COMPETITION COMMISSION AS “CHIEF CHEF” IN THE REGULATION/COMPETITION KITCHEN

The multitude of cooks in the regulation/competition kitchen perhaps unwittingly underscores the significance of business regulation in the modern age. The drafters of the legislation, in their anxiety to address potential problems, perhaps did not wish to omit any areas of concern.<sup>104</sup> Business regulation has always attracted concerned voices. Even the father of modern-day economics, Adam Smith, had presciently warned about the anti-competitive conduct of business enterprises.<sup>105</sup>

Having settled on a framework for overseeing business conduct, Indian policy-makers are faced with the dilemma of choosing between sectoral

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104. Indeed, the trend continues and several new regulators are on the horizon. *See* Chidambaram, *supra* note 3. India’s Finance Minister notes that

India has been on an ambitious path of building or restructuring institutions. This is particularly striking in the regulatory arena. Regulations in banking, commodity futures markets, capital markets, insurance, telecommunications and power are now in place and reasonably well established. Others, in the area of competition policy, pension, etc., are at different states of formation, and still some more (petroleum, civil aviation, railways) are under consideration.

*Id.*

105. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 117 (J.M. Dent & Sons Ltd. 1937) (1776).

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.

*Id.*

regulation and competition law. There are three broad options available for dividing the task: (a) the sectoral regulator supplants the competition authority, (b) the competition authority replaces the sectoral regulator, and (c) the competition authority and sectoral regulator coexist. After considering the pros and cons of options (a) and (b), this section posits that, though sectoral regulators may coexist with the competition authority in India, the Commission ought to trump sector-specific regulators.

#### *A. Sectoral Regulators Supplant the Competition Commission*

The notion that a sector-specific regulator ought to take primacy over a competition authority appears very attractive at first blush. The sector-specific regulator is closest to the sector and would naturally be a repository of pertinent information available within that sector. In other words, it would be more in tune with the needs of the businesses within its sector.

However, when the institutional setup grants a sector-specific regulator jurisdiction over both sectoral regulation and competition matters arising within the sector, conflicts may arise between the objective of protecting competition and other goals such as, for instance, the orderly development of a specific market.<sup>106</sup> Additionally, sectoral regulators may shy away from enforcing competition law in order to reduce the potential for any conflict with regulated entities.<sup>107</sup>

#### *B. The Competition Commission Replaces Sectoral Regulators*

Another option is to make the Commission responsible for both sector-specific regulation as well as overarching competition enforcement. This approach is advantageous, as it reduces the multiplicity of regulators and accumulates sectoral expertise. Indeed, Australia has used this approach to create an economy-wide economic regulator that integrates technical and competition regulation.<sup>108</sup>

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106. See Alberto Heimler, Antitrust Enforcement in Regulated Sectors: Introduction, Seoul ICN Annual Conferences, 2004, available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_3rd\\_seoul\\_2004/heimler2aers.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/heimler2aers.pdf).

107. DEP'T OF TRADE & INDUS. & HM TREASURY, CONCURRENT COMPETITION POWERS IN SECTORAL REGULATION, 20 (2006), available at <http://www.berr.gov.uk/files/file29454.pdf> [hereinafter CONCURRENT POWERS IN SECTORAL REGULATION].

108. INT'L COMPETITION NETWORK, ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GROUP, SUBGROUP 3: INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES, REPORT TO THE THIRD ICN ANNUAL CONFERENCE, SEOUL, APRIL 2004, 20–23 (2004).

However, experts have expressed their concern that this scheme may lead to a complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.<sup>109</sup>

### C. Co-existence of the Competition Commission and Sectoral Regulators

Institution-building is a complex, time-consuming exercise. At a pragmatic level, sector-specific regulators are here to stay, as it would be practically impossible to abolish the authorities that have already come into existence.<sup>110</sup>

Further, the experiences of other countries are not of much assistance. There is wide diversity in the models available. Australia, on one hand, privileges its competition authority, while the UK, on the other hand, grants explicit concurrent powers to sectoral regulators.<sup>111</sup> Empirically, there is no final, definitive conclusion on which regulatory body should be favored.<sup>112</sup> Indeed, even in the UK, despite concurrent competition powers exercised by sectoral regulators, no infringement decisions had been made until September 2005.<sup>113</sup>

The optimal, *sui generis* model must be rooted in the legal context. To be sure, both sector-specific regulators and competition authorities have unique core competencies to offer. Nevertheless, there are pragmatic, descriptive, and normative reasons why the Commission ought to trump sectoral regulators in India.

Descriptively, the compelling justification for the primacy of the Commission is that, unlike legislation governing sector-specific regulators, competition legislation grants a private right of action and provides for damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare that is unavailable under the legislative framework of any sector-specific regulator.

Normatively, since enforcement of competition law is a sophisticated, specialized field, leaving it in the hands of the Commission would reduce transaction costs and enhance efficiency.

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109. *Id.* at 5.

110. INT'L COMPETITION NETWORK, ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GROUP, SUBGROUP 2: INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES, REPORT TO THE FOURTH ICN ANNUAL CONFERENCE, BONN, JUNE 2004, 9 (2004) [hereinafter SUBGROUP 2].

111. See CONCURRENT COMPETITION POWERS IN SECTORAL REGULATION, *supra* note 107.

112. SUBGROUP 2, *supra* note 110, at 4–6.

113. CONCURRENT COMPETITION POWERS IN SECTORAL REGULATION, *supra* note 107, at 28.

### 1. *Private Enforcement*

As Friedrich Hayek, a Nobel Prize-winning economist, has suggested, the most significant advantage of the free market is its ability to make use of decentralized, individual knowledge of day-to-day affairs in life.<sup>114</sup> Similarly, it is arguable that private individuals often have better information about the violation of legislative provisions. No matter how powerful an economic regulator is, it cannot possibly replicate the mélange of information accessible to individuals.<sup>115</sup>

Increased private enforcement can augment the public enforcement of competition law. It would also increase deterrence, as enterprises would be more inclined to comply. Private enforcement would bring people closer to competition law, creating stakeholders in Indian economic growth and competitiveness.<sup>116</sup> Indeed, private enforcement remains the bulwark of U.S. antitrust law, with private actions constituting around ninety percent of antitrust cases.<sup>117</sup>

Indian competition law clearly lays down a private right of action by mandating that the Commission act upon a complaint<sup>118</sup> by any person.<sup>119</sup> This stands in contrast to the older competition law regime, which conferred a right of complaint to a “consumer”<sup>120</sup> only in cases involving a “restrictive trade practice.”<sup>121</sup>

114. See generally FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (2001). See also Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

115. For an excellent explanation of how information available to an army of individuals can be utilized in business for promoting path-breaking innovation, see generally WILLIAM C. TAYLOR & POLLY LABARRE, *MAVERICKS AT WORK: WHY THE MOST ORIGINAL MINDS IN BUSINESS WIN* (2007).

116. European Comm’n, *Annex to the Green Paper: Damages Actions for Breach of EC Antitrust Rules* 6–8 (Commission Staff Working Paper, 2005), available at [http://eur-lex.europa.eu/RECH\\_naturel.do](http://eur-lex.europa.eu/RECH_naturel.do) (search document type “SEC,” year “2005,” and number “1732”) [hereinafter *Annex to the Green Paper*].

117. CLIFFORD A. JONES, *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK AND USA* 16 (1999).

118.

The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or (b) a reference made to it by the Central Government or a State Government or a statutory authority.

The Competition Act, 2002, No. 12 of 2003, § 19(a), available at <http://indiacode.nic.in/> (emphasis added).

119. The Act defines a “person” to include an individual. *Id.* § 2(1).

120.

The Commission may inquire into—(a) any restrictive trade practice—(i) upon receiving a complaint of facts which constitute such practice from any trade association or from any consumer or a registered consumers’ association, whether such consumer is a member of that

The granting of a private right of action confers a mere *locus standi* to an individual to knock at the doors of the Commission. It does not necessarily constitute any special allurements to initiate action. But coupled with the possibility of damages, it confers upon a potential plaintiff an incentive to sue.<sup>122</sup>

## 2. Damages

The possibility of damages is critical in order to compensate a victim for the loss suffered from the infringement of competition laws. Compensatory damages merely make a victim of anti-competitive conduct whole. They do not necessarily deter the conduct of an enterprise. Anti-competitive conduct, on several occasions, could be quite sophisticated. Since there is a very low possibility of detection, compensatory damages only mean that *if* an enterprise is caught violating competition legislation, the enterprise would have to restore the victim to its position prior to the infringement.<sup>123</sup>

In order to punish or deter violators of competition law, certain jurisdictions traverse beyond compensatory damages and allow the recovery of illegal gain<sup>124</sup> or exemplary or punitive damages. In England for instance, one of the situations warranting exemplary damages occurs when “the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.”<sup>125</sup> Specifically, under the competition law regime, if a violator could determine through cost-benefit analysis that illegal gains would outweigh potentially payable damages, an action for exemplary damages may be available.<sup>126</sup>

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consumers’ association or not, or (ii) upon a reference made to it by the Central Government or a State Government, or (iii) upon an application made to it by the Director General, or (iv) upon its own knowledge or information, (b) any monopolistic trade practice, upon a reference made to it by the Central Government or upon an application made to it by the Director general or upon its own knowledge or information.

The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 10, available at <http://indiacode.nic.in> (search Act Year “1969”) (emphasis added).

121. See *id.* § 2(o).

122. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 39 (2004) (asserting that the “plaintiff will sue when his cost of suit is less than his expected benefits from suit”).

123. *Annex to the Green Paper*, *supra* note 116, at 34.

124. *Id.* at 34–35.

125. *Rookes v. Barnard* [1964] 1 All E.R. 367, 410.

126. Barry J. Rodger, *Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages*, 24 EUROPEAN COMPETITION L. REV. 103, 111 (2003).

Indian competition law incorporates a provision for the award of compensation for any loss or damage suffered by any victim.<sup>127</sup> Though there is no specific provision for punitive or exemplary damages, since the provision speaks of “loss or damage caused . . . as a *result* of any contravention” rather than loss or damage *arising out of* any contravention, it is arguable that Indian competition legislation, in tune with the position in England, may incorporate punitive or exemplary damages.<sup>128</sup>

In addition, the Competition Act also contains a provision for “representative actions” in order to aid the filing of complaints by a group.<sup>129</sup> Such an action would ensure that once the Commission has found contravention of the Competition Act, victims in a group would be able to file for compensation claims through the Commission. This is, however, only a “representative action” and not “collective action,” “class

127.

Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or *any person* may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for *any loss or damage shown to have been suffered*, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

The Competition (Amendment) Act, 2007, No. 70 of 2007, sec. 43, § 53N(1), *available at* [http://www.cuts-ccier.org/pdf/IndianCompetitionAmendmentBill\\_2007.pdf](http://www.cuts-ccier.org/pdf/IndianCompetitionAmendmentBill_2007.pdf) (emphasis added). *See also* Rahul Singh, *Cementing Law and Policy*, MINT, Feb. 14, 2008, *available at* <http://www.livemint.com/2008/02/13235813/Cementing-law-and-policy.html>.

128.

The Appellate Tribunal, may after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a *result of* any contravention of the provisions of Chapter II having been committed by such enterprise:

Provided that the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

The Competition (Amendment) Act, 2007, sec. 43, § 53N(3) (emphasis added).

129.

Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908, shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

*Id.* sec. 43, § 53N(4).

action,” or “public interest litigation.”<sup>130</sup> The provisions for compensation under the Competition Act were also available under the old enactment.<sup>131</sup>

It is instructive to determine whether private actions and damages are also available from sector-specific regulators. Table 3 summarizes the position.

TABLE 3: REMEDIES AVAILABLE FROM SECTOR-SPECIFIC REGULATORS

Enactment	Right of Private Action	Damages
The Petroleum and Natural Gas Regulatory Board Act, 2006	Unclear <sup>132</sup>	No <sup>133</sup>
The Electricity Act, 2003	No	Limited <sup>134</sup>
The Insurance Regulatory and Development Authority Act, 1999	No	No
The Telecom Regulatory Authority of India Act, 1997	No <sup>135</sup>	No

130. A “representative action” is an action brought by a representative natural or legal person, such as a consumer organization, on behalf of a group of identified individuals, usually its members, and aimed at protecting the individual rights of those represented. A “collective action” is brought on behalf of a group of identified or identifiable individuals and aimed at protecting interests of those represented. A “public interest litigation” is not commenced on behalf of any identified individuals but for the benefit of the public at large. *Annex to the Green Paper, supra* note 116, ¶ 192.

131. The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 12B, *available at* <http://indiacode.nic.in> (search Act Year “1969”).

132. *See* The Petroleum and Natural Gas Regulatory Board Act, No. 19 of 2006, §§ 12(a)–(b), *available at* <http://indiacode.nic.in/> (search Act Year “2006”) (not defining a “person”).

133. Damages and compensation are only for entities, not individuals. *Id.* §§ 21(3), 27, 43(2), and 60(2)(i).

134. “If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission.” The Electricity (Amendment) Act, No. 57 of 2003, § 57(2), *available at* <http://indiacode.nic.in/>. This provision has to be read along with § 62(6), which states:

If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Further, § 147 states that “[t]he penalties imposed under this Act shall be in addition to, and not in derogation of, any liability in respect of payment of compensation or, in the case of a licensee, the revocation of his license which the offender may have incurred.”

135. The TRAI Act mentions “either suo motu or on request from the licensor.” The Telecom Regulatory Authority of India Act, No. 24 of 1997, §11(a), *available at* <http://indiacode.nic.in/>. Further, § 14(a)(iii) mentions “a group of consumers.”

Enactment	Right of Private Action	Damages
The Securities and Exchange Board of India Act, 1992	No <sup>136</sup>	No <sup>137</sup>
The Monopolies and Restrictive Trade Practices Act, 1969	Limited <sup>138</sup>	Yes <sup>139</sup>
The Competition Act, 2002	Yes	Yes

From the above chart, it is clear that the sector-specific regulators are *parens patriae* regulators, meaning that the regulator takes on the task of protecting consumers' interests. Besides the Commission, the CERC is the only sector-specific regulator capable of imposing damages, albeit limited ones. Nonetheless, damages recoverable through the CERC are confined to the violation of a specified standard of performance or payment of excess tariff. There is no possibility of recovering damages for causing an adverse effect on competition in the electricity industry.<sup>140</sup>

The right of private action under the PNGRB Act is unclear. Subject to the existence of an arbitration agreement, the PNGRB has jurisdiction over disputes "between an entity and any other person."<sup>141</sup> The regulator also has the jurisdiction to "receive any complaint from any person."<sup>142</sup>

136. Section 26 of the SEBI Act grants monopoly over complaints to SEBI. The Securities and Exchange Board of India Act, No. 15 of 1992, *available at* <http://indiacode.nic.in/> (search Act Year "1992").

137. In the recent IPO scam case, though, SEBI has experimented with disgorgement orders. *In Re: Investigation into Initial Public Offerings*, MANU/SB/0263/2006 (Manupatra), also available without subscription at <http://indiankanoon.org/doc/1100601/>.

138. Section 10 of the MRTP Act deals with only restrictive trade practices. The The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, § 10, *available at* <http://indiacode.nic.in> (search Act Year "1969").

139. *Id.* § 12B.

140. *See* The Electricity (Amendment) Act, No. 57 of 2003, § 60, *available at* <http://indiacode.nic.in/>.

141. The PNGRB Act states:

The Board shall have jurisdiction to—(a) adjudicate upon and decide any dispute or matter arising amongst entities or between an entity and any other person on issues relating to refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas according to the provisions of Chapter V, *unless the parties have agreed for arbitration.*

The Petroleum and Natural Gas Regulatory Board Act, No. 19 of 2006, §§ 12(1), *available at* <http://indiacode.nic.in/> (search Act Year "2006") (emphasis added).

142.

The Board shall have jurisdiction to— . . . (b) receive any complaint from any person and conduct any inquiry and investigation connected with the activities relating to petroleum, petroleum products and natural gas on [sic] contravention of—(i) retail service obligations; (ii) marketing service obligations; (iii) display of retail price at retail outlets; (iv) terms and

Nevertheless, any complaint by *individual consumers* maintainable before a consumer disputes redressal forum is exempt.<sup>143</sup> The most bizarre aspect of this enactment is that, unlike the Competition Act, it neither defines a “person,” nor does it provide any guidance for construing the term. No matter how liberally the term “person” is interpreted, the right of private enforcement under the PNGRB Act cannot be construed to allow recovery of any damages for anti-competitive conduct.

### 3. Transaction Costs

Competition law enforcement is a specialized, sophisticated field. Like any other legal discipline, it requires time, effort, and dedication to master. Recently, the U.S. and EU models of competition law have been converging, both increasingly relying upon economic analysis to determine competition questions.<sup>144</sup> The emergence of a common language of competition analysis in the United States and European Union has ensured that competition law enforcement is increasingly nuanced and rooted in rigorously developed economic methodology.<sup>145</sup> Competition authorities in advanced jurisdictions depend upon years of experience to be in a position to confidently enforce competition law.

While sector-specific regulators are critical components of modern-day economic regulation, it is inefficient to rely upon their specialized knowledge of their sectors to enforce competition law effectively. Reliance on competition authorities significantly reduces transaction costs. Enforcing the legal regime of competition law through a competition authority creates predictability and certainty for business entities. Like human beings, corporations are capable of deliberation and choice, and in

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conditions subject to which a pipeline has been declared as common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorisation has been granted to an entity for laying, building, expanding or operating a pipeline as common carrier or contract carrier or authorization has been granted to an entity for laying, building, expanding or operating a city or local natural gas distribution network; (v) any other provision of this Act or the rules or the regulations or orders made thereunder.

*Id.* § 12(1)(b).

143. Section 25(1) of the PNGRB Act states that “[a] complaint may be filed before the Board by any person in respect of matters relating to entities or between entities on any matter arising out of the provisions of this Act.” However, the proviso adds, “[p]rovided that the complaints of *individual consumers* maintainable before a consumer disputes redressal forum under the Consumer Protection Act shall not be taken up by the Board but shall be heard and disposed of by such forum.” *Id.* § 25(1) (emphasis added).

144. See Mario Monti, Eur. Comm’r for Competition, International Antitrust—A Personal Perspective, Speech at the Fordham Corporate Law Institute in New York (Oct. 7, 2004), available at <http://europa.eu/rapid/searchAction.do> (search complete database, reference “SPEECH/04/449”).

145. EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS (2007).

order to facilitate their compliance with competition legislation, the law must be certain, clear, and predictable.<sup>146</sup>

Further, if regulatory authorities could negotiate without any transaction costs, the outcome would certainly favor a competition authority.<sup>147</sup> Yet since such negotiations do involve cost, it would be a better idea to formulate a default rule mandating that the competition authority have primacy over and above sector-specific regulators.

Interestingly, the current legal framework in India includes a strong incentive for businesses to prefer the Commission over a sector-specific regulator: unlike sector-specific regulators, competition legislation offers strong protection for confidential information.<sup>148</sup>

#### V. CONSUMER WELFARE AS THE PRIMARY CONCERN IN THE REGULATION/COMPETITION DICHOTOMY

The initiation of Indian economic reforms in the last decade and a half has meant a gradual decline in governmental control over economic decision making. The absence of governmental rules controlling business conduct does not necessarily indicate a void in the field of consumer welfare. The social contract of governmental withdrawal has an underlying concordat of promotion and protection of consumer welfare through alternative, direct, and less intrusive mechanisms.

##### A. *Consumer Welfare and the Regulation/Competition Dichotomy*

The underlying rationale behind the proliferation of regulatory authorities is the anxiety to honor the social contract's promise to protect consumer welfare. The PNGRB is reminded of its duty to protect the "interests of consumers" in the preamble of its own enabling legislation.<sup>149</sup> The CERC is no different.<sup>150</sup> Similarly, the IRDA has been entrusted with

146. See generally LON L. FULLER, *THE MORALITY OF LAW* (1995) (suggesting that any genuine legal system ought to abide by certain moral principles, accordingly, the "inner morality of law" stipulates that law must be prospective and clear so that it can be complied with).

147. See generally Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 405 (1937).

148.

No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

The Competition Act, 2002, No. 12 of 2003, § 57, available at <http://indiacode.nic.in>.

149. See The Petroleum and Natural Gas Regulatory Board Act, No. 19 of 2006, pmb., available at <http://indiacode.nic.in/> (search Act Year "2006").

150. See The Electricity (Amendment) Act, No. 57 of 2003, pmb., §§ 81(iv), 88, available at

the task of protecting “the interests of the policy holders.”<sup>151</sup> The TRAI finds itself on similar footing.<sup>152</sup> Finally, the SEBI’s mandate “to protect the interests of investors” extends to “promoting investors’ education and training.”<sup>153</sup>

In the absence of any legislative mechanism to protect consumer welfare, the aforementioned legislative dictates appear to be mere lip service. The Commission appears to be on an entirely different footing. As delineated in Part IV of this Article, private enforcement combined with the ability to collect damages within competition law not only ensures the protection of consumer interests,<sup>154</sup> but also creates a robust framework to ensure a qualitatively higher standard of consumer welfare.

Two distinct, yet related, tools of interpretation are necessary to aid the process of competition enforcement in the Indian legal framework. First, like the United States, with its twin provisions of private enforcement and damages, there must be a strong presumption against exemption from competition law. Any possible exemption ought to be strictly construed.<sup>155</sup> Second, any probable usage of the “state action doctrine” or “regulatory conduct defense” ought to be specifically excluded.

<http://indiacode.nic.in/>.

151. Section 14(2)(b) of the IRDA Act, in its relevant part states:

the powers and functions of the Authority shall include . . . protection of the interests of the policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, surrender value of policy and other terms and conditions of contracts of insurance . . . .

The Insurance Regulatory and Development Authority Act, No. 41 of 1999, § 14(2), *available at* <http://indiacode.nic.in/> (search Act Year “1999”).

152. *See* The Telecom Regulatory Authority of India Act, No. 24 of 1997, § 11(b)(iv), *available at* <http://indiacode.nic.in/>.

153. *See* The Securities and Exchange Board of India Act, No. 15 of 1992, pmbl., §§ 11(1), 11(2)(f), *available at* <http://indiacode.nic.in/> (search Act Year “1992”).

154. *See* The Competition Act, 2002, No. 12 of 2003, pmbl., § 18, *available at* <http://indiacode.nic.in/>.

155.

The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—(a) any class of enterprises if such exemption is necessary in the interest of security of the State or *public interest*; (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:

Provided that in case an enterprise is engaged in any activity including the activity relating to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relating to the sovereign functions.

*Id.* § 54 (emphasis added). This is in accordance with the definition of “enterprise” contained in section 2(h) of the Competition Act, which incorporates a section for the “sovereign functions of the Government.”

### *B. Capturing Sectoral Regulators' Expertise*

Recognition of the primacy of competition law in ensuring consumer welfare does not necessarily mean eschewing sectoral regulators. In order to ensure that the default rule conferring primacy to the Commission does not mean the public loses out on the expertise of the sector-specific regulator, it would be desirable to constitute an across-the-sector Common Regulatory Appellate Tribunal (“CRAT”) empowered to hear appeals from all the regulatory authorities in India. Most importantly, such a body would lead to a semblance of certainty and predictability in regulatory jurisprudence, which is currently in a state of disarray.

Taking a cue from the PNGRB, which utilizes the existing electricity appellate tribunal for matters related to the petroleum sector,<sup>156</sup> the CRAT ought to consist of members with technical expertise in each regulated sector, including competition. The total number of members, including the expert member (for each respective regulated sector), should be nine. Besides the expert member, who would be drawn from the specific regulated sector, the members of the CRAT should be drawn from the judiciary or have experience in international trade, economics, business, law, finance, accounting, management, industry, public affairs, administration, academia, and the like.

For each specific case emerging from a regulated sector, the expert member, along with the legal member, ought to take the lead in writing the order. The draft text of the order, after being prepared by the expert member and the legal member, should be circulated amongst the Chairperson and other members of the CRAT.

This proposal would ensure that the CRAT acts as a repository of jurisprudence emerging in the field of regulation. In addition, it would also create certainty and predictability to help business enterprises and consumers plan their affairs.

## VI. CONCLUSION

The aim of this Article was to analyze the see-saw relationship between sector-specific regulators and the competition authority in India—the Commission. The seemingly uneasy interface between the two is evident from the legislative framework. International examples are of little

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156. See The Petroleum and Natural Gas Regulatory Board Act, No. 19 of 2006, § 30, available at <http://indiacode.nic.in/> (search Act Year “2006”).

assistance as other countries have chosen frameworks against the backdrop of their own legal and social contexts.

Closer scrutiny of the interface and a survey of Indian sector-specific regulators yields interesting exploratory, as well as normative, insights. Descriptively, the Article found that, unlike sectoral regulators, the Commission combines the twin powers of private enforcement and the right to claim damages. In the absence of the two, sector-specific regulators cannot possibly serve as effective instruments for the promotion and protection of consumer welfare.

Normatively, competition enforcement is a sophisticated, complex endeavor. Therefore, in order to reduce transaction costs and efficiently enhance legal certainty, the realm of competition law enforcement ought to be left in the hands of the Commission.

This does not necessarily lead to the conclusion that the sector-specific regulators must close shop. This Article proposes the establishment of a common, cross-sector regulatory appellate tribunal in order to develop a strong, predictable regulatory jurisprudence that would be in the best interest of both consumers and business enterprises.