

THE TEETER-TOTTER OF REGULATION AND COMPETITION: WHY INDIAN COMPETITION AUTHORITY MUST TRUMP SECTORAL REGULATORS

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TABLE OF CONTENTS

I. INTRODUCTION	3
II. THE SEE-SAW OF REGULATION AND COMPETITION: SECTORAL REGULATORS & COMPETITION AUTHORITY	6
A. GENESIS OF INDIAN STRAND OF REGULATION	6
B. INCEPTION OF INDIAN COMPETITION LAW	8
C. REGULATION/COMPETITION DICHOTOMY	10
1. <i>The Port of Confusion: The JNPT Case</i>	12
2. <i>Judicial Review & JNPT</i>	14
III. OVERLAPPING JURISDICTIONS: TOO MANY COOKS IN THE REGULATION/COMPETITION KITCHEN?	15
A. PETROLEUM REGULATOR	15
B. ELECTRICITY REGULATOR	18
C. INSURANCE REGULATOR.....	19
D. TELECOM REGULATOR	20
E. SECURITIES MARKET REGULATOR	21
IV. THE PRIMUS INTER PARTES: THE “CHIEF CHEF” COMPETITION AUTHORITY IN REGULATION/COMPETITION KITCHEN	23
A. SECTORAL REGULATOR SUPPLANTS COMPETITION AUTHORITY	24
B. COMPETITION AUTHORITY SUBSTITUTES SECTORAL REGULATOR.....	25
C. CO-EXISTENCE OF COMPETITION AUTHORITY AND SECTORAL REGULATOR.....	25
1. <i>Private enforcement</i>	26
2. <i>Damages</i>	28
3. <i>Transaction Cost</i>	31
V. CONSUMER WELFARE AS THE PRIMACY CONCERN OF REGULATION/COMPETITION	33
A. CONSUMER WELFARE & REGULATION/COMPETITION	33
B. CAPTURING SECTORAL REGULATORS’ EXPERTISE	34
VI. CONCLUSION.....	35

Abstract

This paper is set in the backdrop of the emergence of a plethora of regulatory authorities in the field of economic regulation in India. Unlike sector specific regulators, competition authority is of recent vintage in India. The Parliament enacted the competition legislation in 2002 and the substantive provisions are not yet in force.

As per the legislative framework, the duty of the competition authority is 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 wide and overlaps with the jurisdiction of the sector-specific regulators such as the petroleum regulator, electricity regulator, insurance regulator, telecom regulator and securities market regulator.

This paper 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 mapping the regulation/competition dichotomy through an instance, it delineates the overlapping jurisdictions manifested in the multiplicity of regulators and their legislative design.

The paper 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.

Descriptively, based upon a critical survey of relevant legislations, the paper finds that unlike sector specific regulatory authorities, Indian competition authority combines the twin powers of private enforcement with claim for damages and is, therefore, uniquely situated to ensure a robust level of consumer welfare.

Normatively, the paper utilizes the methodological tool of law-and-economics and suggests that the enforcement of competition is a sophisticated, specialized field and in order to reduce transaction cost and efficiently enhance legal certainty/predictability, the realm of competition law enforcement ought to be left in the hands of the competition authority. This, it is argued, is in the best interest of both consumers and business entities.

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Rahul Singh*

I. Introduction

Following a structural adjustment program in 1991, India embarked on the path of market liberalization, and consequently it increasingly relies upon market rivalry as the organizing principle for economic activity. The seminal role of markets in ensuring allocation of resources has generally been understood to be efficient. Nevertheless, considering that markets are imperfect and many a time prone to failures, the role of competition law and policy can hardly be overemphasized.

The Indian competition law framework, through Competition Act, 2002, envisages a Competition Commission of India as a competition authority. The aftermath of a securities scam in 1992 has seen several sector specific regulators emerging on the Indian regulatory horizon. Ostensibly, the multitude of regulators, many a time, may regulate similar aspects of a corporate behaviour.

Sector specific regulation presents distinct challenges in competition law and policy. The role of competition authority and sector specific regulator can be complimentary. However, at times, the interface between the two could also be a source of tension. While a sector specific regulation seeks to identify a problem *ex ante*, and creates an administrative machinery to address behavioural issues before the

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problem arises, competition policy generally would address the problem *ex post* in the backdrop of market conditions.

Section 18 of the Competition Act, 2002 states that “it *shall* be the *duty* of the [Competition] Commission [of India] 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”. Indubitably, this mandate is extraordinarily wide. It is also agnostic about sector specific regulators. The wide amplitude contained in s. 18 reverberates in the preamble of the enactment as well, where similar language has been used.¹

Specific provisions contained within the legislation exemplify the possible tension. Section 60 of the Competition Act, 2002 is the usual *non obstante* provision asserting the supremacy of competition legislation within the domain of competition enforcement.² Nonetheless, section 62 of the Competition Act, 2002 hortatorily declares that competition legislation ought to work along with other enactments.³ Both sections 60 and 62, ironically, are couched in mandatory language.

If the triumvirate of sections 18, 60 and 62 weren't adequate to cause sufficient conundrum, section 21 of the Competition Act, 2002, suggests that in any proceedings before a statutory authority⁴, if such a need arises, the statutory authority *may* make a reference to competition authority.⁵ Incidentally, upon reference, the opinion of the competition

¹ 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.”

² Section 60 of the Competition Act, 2002 reads: “The provisions of this Act *shall* have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.” (emphasis supplied)

³ Section 62 of the Competition Act, 2002 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”. (emphasis supplied)

⁴ Section 2(w) of the Competition Act, 2002 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”

⁵ 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.”

authority is not binding upon the statutory authority.⁶ The competition authority is bound to deliver its opinion to the statutory authority within a stipulated time period of two months.⁷

The nub of the interface between competition authority and sector specific regulators in India lies on the four limbs of sections 18, 21, 60 and 62 of the Competition Act, 2002. Competition authority could have potential interface with the jurisdiction of sector-specific regulators viz. the Securities Exchange Board of India (SEBI), Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission (CERC), Insurance Regulatory Development Authority (IRDA) and Petroleum and Natural Gas Regulatory Board .

This paper proposes to address the issue of such an interface. The lynchpin of the paper is that unlike sector specific regulatory authorities, competition authority combines the twin powers of private enforcement with claim for damages and hence is uniquely situated to ensure a robust level of consumer welfare. Further, the paper utilizes the methodological tool of economic analysis of law and posits that the enforcement of competition law is a sophisticated, specialized field and in order to reduce transaction cost and enhance efficiency, it ought to be left in the hands of competition authority in India.

Structurally, the paper is divided into several parts. The paper, in section II, deals with the juxtaposition between regulation and competition. It deals with the emergence of the idea of regulation in India and its development leading to competition law as an instance of regulation. It explains the emerging dichotomy between competition and regulation through an instance in the port sector. Section III builds upon section II and provides a synoptic perspective on several sector specific regulators and their potential interface with competition authority. Section IV analyzes a range of possibilities between sector specific regulators and competition authority. It puts forth descriptive and normative justifications behind granting competition authority primacy over sectoral regulators. Section V argues that competition authority has the most robust legislative mechanism to ensure the original concern behind regulation/competition -- consumer welfare. Section VI concludes.

⁶ Section 21(2) states: "On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it *deems fit*" (emphasis supplied)

⁷ Proviso to section 21 states: "Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference"

II. The See-saw of Regulation *and* Competition: Sectoral regulators & competition authority

The interface between sector specific regulation and competition law in India is unique. In the immediate past, India has witnessed a massive spurt in its rate of growth.⁸ While the fast-paced development has uplifted millions of people from poverty levels, it has also led to concomitant challenges.⁹ India has seen several economic scandals and other crises during the period of economic boom. A significant feature of Indian economic and legal regime during this period has been 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 Indian Strand of Regulation

The history behind Indian strand of regulation has a close relationship with the advent of the process of liberalization, privatization and globalization in 1991.¹⁰ In spite of more than one and a half decade of commitment to economic reforms, there is no consensus amongst the political parties regarding the *rationale* behind the reforms.¹¹ Arguably, there has been increasing realization that government ought to focus

⁸ See generally, Economic Survey, 2006-2007, Ministry of Finance, Government of India.

⁹ Post-1991, with the ushering in of an era of liberalization in India, the percentage of poor people in India has been a subject matter of intense debate. The official estimate pegs it around 26%. The figures released by the government are allegedly based upon severely flawed methodology and hence have attracted scathing criticisms from economists. See generally, Angus Deaton & Jean Dreze, "Poverty and Inequality in India: A Re-Examination", *Economic and Political Weekly*, September 7, 2002, pp. 3729 – 3748.

¹⁰ Indeed, while India is characterized by Liberalization, Privatization and Globalization (LPG) post – 1991, pre-1991 India was characterized by another variant of LPG (License, Permit & Government).

¹¹ India has seen governments run by two different hues of political parties in seventeen years since the reform. While both NDA government (led by right wing, conservative BJP) and UPA government (led by centrist, liberal Congress) have carried on the process of economic reforms, Left leaning political parties such as CPI(M), in-principle, oppose the process of economic reforms.

only upon its core activity – governance – instead of manufacturing, for instance, hair oil or bread.¹²

Along with this realization, the Indian legal system has been characterized by a sudden proliferation in the birth of regulatory authorities.¹³ Literally, “regulation” means influencing the flow of events.¹⁴ Under this broad rubric, regulation has been in existence since time immemorial all around the world.¹⁵ 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.¹⁶

There are several reasons behind emergence of economic regulation along with the process of liberalization in India. Significant *rationale* behind economic regulation are¹⁷: (a) remedial of information failures (e.g, SEBI regulations for initial public offers of corporations, Stock Exchange listing agreements); (b) prevention of abuse of market power (e.g. TRAI for telecom companies and cable television service providers); (c) correction of externalities like pollution (Pollution Control Boards) and market failure (e.g. Monopoly Cotton Procurement Scheme).

Globally, it is understood that pursuant to emergence of a “risk society”, there has been rise of a new regulatory state.¹⁸ India is no

¹² Government of India used to manufacture bread through Modern Foods Limited which has been sold to Hindustan Lever Limited.

¹³ One of the first regulatory authorities in India, consequent upon securities scandal was the Securities and Exchange Board of India (“SEBI”) through the Securities and Exchange Board of India Act, 1992 (“SEBI Act”). Modeled upon the Securities and Exchange Commission of the US, as per section 11 and preamble of the SEBI Act, the purpose of 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”.

¹⁴ Christine Parker & John Braithwaite, “Regulation” in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, p. 119.

¹⁵ Long time ago, the human civilization realized that regulation of incest was fundamental to survival of our genes. Further, emergence of state, imposition of taxes, usage of currency for legal exchange are all instances of “regulation”. Christine Parker & John Braithwaite, “Regulation” in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, p. 120.

¹⁶ Paul A. Samuelson & William D. Nordhaus, *Economics*, 17th ed., Tata McGraw-Hill Publishing Company Limited, New Delhi, p. 345.

¹⁷ See, Paul A. Samuelson, pp. 345 – 347.

¹⁸ “Risk society” doesn’t mean that the society *per se* has become more risky. It means that as a modern society, we spend increasingly enormous amount of time in order to manage the society’s response to emerging risks. For instance, the ubiquitous plastic money is supposed to make life simpler by eschewing the necessity of carrying cash. Nonetheless, any holder of credit card in India knows that one has to spend time at the end of the month minutely going through each transaction as credit card companies are

exception. The fast-paced, robust growth has invariably been accompanied with unpredictable scandals. This has ensured that governmental approach to regulation is ostensibly paradoxical. While liberalization process of the government meant cutting through the red-tape and making industrialization more entrepreneur-friendly, there has been emergence of independent regulatory authorities for several sectors of the economy.¹⁹ Indeed, economic reforms has led government to reinvent itself through doing less “rowing” and more “steering”.²⁰

Unlike the socialist hue that pervaded governance till 1991, India increasingly relies upon market rivalry for allocation as well as distribution of resources.²¹ Nonetheless, there is also a realization that the textbook model of perfect competition does not exist in reality. One of the intervention strategies to address the market imperfections that may induce welfare-reducing monopolies is that of competition law and policy.²²

B. Inception of Indian Competition Law

The prevailing wisdom in competition law literature is aware of only two dominant paradigms – the US antitrust model and the EU competition law model. There is also a belief that till 1975, these were

known for their obscure trade practices, which usually leads the 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*, Christine Parker & John Braithwaite, “Regulation” in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, p. 122.

¹⁹ *See for instance*, *Monnet Sugar Limited v. Union of India*, MANU/UP/0823/2005 where the Allahabad High Court dealt with Industrial (Development and Regulation) Act, 1951 which prior to the process of liberalization was the epitome of license and permit controls.

²⁰ For instance, when government thought it fit that the department of telecom cannot be regulator as well player in the telecom sector it replaced the department of telecom with the Telecom Regulatory Authority of India. *See also*, *Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India*, 2006 (11) SCALE 208; MANU/SC/4912/2006 where the Supreme Court of India endorsed the public private partnership approach to development.

²¹ The latest step in reliance upon market is freeing up of exploration of oil and gas sector for private players. *See for instance*, Raghuvir Srinivasan, “Well of paradoxes”, *The Hindu Business Line*, <http://www.blonnet.com/bl10/stories/2004012800732300.htm> (visited on September 1, 2007).

²² Paul A. Samuelson, pp. 353 – 360.

the only two competition law models available.²³ Contrary to this belief, India had a *sui generis* model of competition law way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act.²⁴

Right after the first plan period, the government was increasingly concerned about the uneven impact of growth upon poor people. There was an evident anxiousness that there has been a disproportionate amount of economic power being vested with a privileged few. Accordingly, the MRTP Act was enacted in order to “provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices” and other related matters.²⁵ The influence of the Constitution of India is eminently visible.

The Indian Constitution in its part on directive principles of state policy clearly lays down that that the economic system should function in such a manner that it does not lead to concentration of wealth in the hands of the few.²⁶ Further, the Constitutional mandate is also clearly in favour of serving the common good of the society.²⁷

While the MRTP Act was an embodiment of the constitutional mandate, it exempted the governmental companies from its purview and focused only upon the private entities.²⁸ Perhaps the philosophy underlying the MRTP Act was that governmental companies were the harbinger of public interest and private companies were the only entities in need of regulation to promote public interest.²⁹ Pursuant to liberalization of the economy in 1991, the MRTP Act was found to be

²³ Judge Dennis Davis, Harvard Law School, Trade and Competition Law Class, Spring 2004.

²⁴ Hereinafter MRTP Act for the sake of brevity.

²⁵ See, the preamble of the MRTP Act.

²⁶ 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”.

²⁷ 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”.

²⁸ 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...”

²⁹ The term “public interest” in law has attracted interesting comments. See for instance, Per D.A. Desai, J. in *Baldev Raj v. State of Punjab*, 1984 Supp SCC 221, where he finds that “public interest is an unruly horse”.

inadequate to address the needs of the new, globalized economy.³⁰ It would have been a monumental task to amend MRTP Act to address the needs of the economy.³¹ Hence, India opted for a modern legislation on competition law that was mandated to enhance consumer welfare through sustaining competition in the market.³²

Section 18 of the Competition Act, 2002 entrusts the competition authority with an overarching duty of sustaining competition in the market. The amplitude of the duty, as a corollary, entails that the competition authority is vested with a comprehensive, overall vantage point on the economy. Such a broad, sweeping vantage point is unavailable to any sector specific regulator. It is in keeping with goals of competition law in advanced jurisdictions such as the US and the EU. The US antitrust law frowns upon the unfair transfers of wealth taking place between consumers and powerful firms.³³ The EU competition law intends to promote market integration and protect competition.³⁴

C. Regulation/Competition Dichotomy

Business regulation is perhaps as old as the businesses themselves. While modern, liberalized economies have increasingly relied upon markets for allocation of resources, markets can also fail and lead to undesirable upshots.³⁵ These extreme possibilities with the market has ensured that governments oscillate between the limbs of regulation and competition in order to ensure that when market fails, it doesn't crash land but is provided with a suitable parachute. Regulation, implemented through sector specific regulators and competition

³⁰ See generally, Report of the High Level Committee on Competition Policy and Law, 2000.

³¹ See generally, Rahul Singh, "Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India", Vol. 8, Issue 1, *Journal of Corporate Law Studies* (forthcoming).

³² 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".

³³ Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 *Hastings Law Journal* 67 (1982).

³⁴ David J. Gerber, "Competition" in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, pp. 522 - 526.

³⁵ See generally, Cass R. Sunstein, *Free Markets and Social Justice*, Oxford University Press, Oxford, 1997, p.3. (where he looks at free market and free trade as not only the engine of growth and productivity but also that of social justice and equity).

regulation, through the competition authority, differ in their approach to regulating business in the market. The following table summarizes the difference in their approach.

Sector specific Regulator	Competition Authority
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 problem arises	<i>Ex post</i> (except merger review)
Focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare	Focus 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 the above chart, it is evident that the role of sector specific regulators is overlapping but quite distinct. Unlike the sector specific regulators, competition authority takes a holistic perspective of the economy and addresses behavioural issues after the problem arises.³⁶ As per the legal mandate, competition authority also addresses the unfair transfer of wealth that may take place between the consumers and firms wielding market power.

Since the substantive aspects of Indian competition law is not yet in force, there is a dearth of instances from Indian context that exemplify the dichotomy between sector specific regulation and competition authority. This paper takes an example of an interface leading to regulatory muddle in the port sector.

³⁶ Merger Review provisions are an exception under competition law.

1. The Port of Confusion: The JNPT Case

The case of *P&O Australia Ports Pty Limited v. Board of Trustees of Jawaharlal Nehru Port Trust*³⁷ is an epitome of a sector specific authority's obfuscated comprehension of a competition issue. JNPT deals with the Jawaharlal Nehru port in Mumbai, India that had two terminals – container terminal and bulk terminal.³⁸ P&O Australia Pty Limited was disqualified at the bid stage for conversion of bulk terminal to container terminal.³⁹

The Board of Trustees was anxious about P&O Australia Pty Limited because it already had been operating a container terminal at Jawaharlal Nehru Port since 1995.⁴⁰ 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”.⁴¹

Notwithstanding the concerns of the Board of Trustees on prevention of monopoly, interestingly, P&O Australia Pty Limited was permitted to bid for another port based in Mumbai, the Mumbai port but disqualified from bidding for the second terminal at Jawaharlal Nehru Port!⁴² Further, there is an independent authority, the Tariff Authority for Major Ports that determines the ceiling for the tariffs by the private players' services.⁴³

One of the foremost concerns playing on the minds of the Board of Trustees was that P&O already controls Chennai Container Terminal and one of the Jawaharlal Nehru Port terminals and adding the second terminal at Jawaharlal Nehru Port would lead P&O to control in excess of 30% of the total container traffic to and from India.⁴⁴ Bombay High Court agreed with the anxiety expressed by the Board and failed to appreciate the boundaries of the “market” that it ought to be concerned about.

If one could take the aid of the Competition Act, 2002, “relevant market” is an amalgamation of “relevant product market” and “relevant

³⁷ Hereinafter “JNPT” for the sake of brevity. MANU/MH/1121/2003.

³⁸ Paragraph 2 of JNPT.

³⁹ Paragraph 2 of JNPT.

⁴⁰ Paragraph 2 of JNPT.

⁴¹ Paragraph 2 of JNPT.

⁴² Paragraph 9 of JNPT.

⁴³ Section 48 of the Major Port Trust Act, 1963.

⁴⁴ Paragraph 5 of JNPT.

geographic market”.⁴⁵ Further, “relevant product market” is dependant upon all interchangeable/substitutable goods and services.⁴⁶ In addition, “relevant geographic market” is dependant upon homogeneity of conditions of competition and whether the conditions are distinguishable from the neighbouring areas.⁴⁷ An application of SSNIP test as reflected in the legislative provisions indicates that the relevant market isn’t entire India as a ship entering port situated in Mumbai doesn’t have a realistic chance of entering through, for instance, Chennai.⁴⁸

The problem with *JNPT* is not the outcome but the process of the judgment. Neither the Board of Trustees nor the Bombay High Court appears to have appreciated the nuances of competition law and policy. *JNPT* does not even explore an alternative possibility – a standard clause in the bid stating that if parties are found contravening conditions of competition, then the contract could be revoked. Indeed, *JNPT* could have explored a stricter version of such a clause – it could have suggested that in case P&O Australia Pty Ltd. is found adversely affecting “conditions of competition”, then its licenses across India would stand revoked.⁴⁹

Additionally, by excluding P&O Australia at the bid stage, perhaps the Board of Trustees unwittingly affected conditions of competition at the bidding stage. Presumably, existence of a player such as P&O Australia at the bidding stage would have goaded other competitors to come up with their best possible bid. If other potential players are aware

⁴⁵ Section 2(r) of the Competition Act, 2002 states: “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.

⁴⁶ Section 2(t) of the Competition Act, 2002 states: “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.

⁴⁷ Section 2(s) of the Competition Act, 2002 states: “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 homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.

⁴⁸ Indeed, an application of SSNIP test indicates that Jawaharlal Nehru Port and Mumbai Port are interchangeable/substitutable. Therefore, if the government was truly worried about an emerging monopoly, it should not have permitted P&O Australia to bid for Mumbai Port while it was still operating 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 impact upon conditions of competition.

⁴⁹ Given India’s stature as major emerging economy, such a clause would have definitely acted as a great deterrent for P&O Australia.

of absence of competition from P&O Australia, they would lower their guards about their bids. Therefore, it was in the self interest of the Board of Trustees to let P&O place its bid and at a later stage decide about P&O's application.⁵⁰

2. Judicial Review & JNPT

The emergence of independent regulatory authorities the world over has been because of the need for an expert body addressing intricate issues arising in a field.⁵¹ In the US, such independent, expert regulatory authorities have led to development of new doctrines in the field of judicial review. There are two possibilities in the realm of judicial review of a decision – a *de novo* review or a *deferential* review.⁵² Courts, usually, faced with a decision rendered by a specialized body lean upon a deferential standard of review rather than taking a fresh look at the case.

JNPT is an example *par excellence* of an application of a deferential standard of judicial review. However, the application of the deferential standard in *JNPT* is wholly misplaced. *Delhi Science Forum*⁵³ and *Tata Cellular*⁵⁴, have clearly laid down that one of the reasons behind judicial review of an action could be illegality where the court would inquire whether the decision making authority could comprehend the applicable law or not. In *JNPT*, failure to appreciate the nuances of competition law and policy by both the Board of Trustees and the Bombay High Court is evident.

JNPT 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, it is evident that

⁵⁰ Interestingly, this argument wasn't taken up by counsels 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.

⁵¹ Sir William Wade & Christopher Forsyth, *Administrative Law*, 9th ed., Oxford University Press, New Delhi, 2004, pp. 3 – 19.

⁵² See generally, Mark Tushnet, "Judicial Review of Legislation" in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, pp. 164 - 182.

⁵³ *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405.

⁵⁴ *Tata Cellular v. Union of India*, (1994) 6 SCC 651.

the process of reasoning is not based upon sound foundations.⁵⁵ This signifies the importance of an independent, specialized expert competition authority that is well-equipped to warrant a deferential standard of judicial review. Unfortunately, drafters of legislations, in India, haven't been too cautious about formulating clear, unambiguous law on the jurisdictions 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. Drafters of legislation haven't been very careful while allocating specific areas of work for economic regulators. The muddled understanding of framers of the legislation is evident both in recent legislations as well as past ones. Besides inelegance, sometimes legislations reflect lack of comprehension of regulatory jurisprudence.

A. Petroleum regulator

In spite of the Competition Act, 2002 already on statute book, one of the objectives behind the Petroleum and Natural Gas Regulatory Board Act, drafted as recently as March, 2006 is "to promote competitive markets"⁵⁶ and "protect the interest of consumers by fostering fair trade and competition amongst the entities".⁵⁷

⁵⁵ See for instance, P Chidambaram, *A View from the Outside: Why good economics works for everyone*, Penguin, New Delhi, 2007 (where he believes that Bombay High Court did not commit any illegality). This perhaps signifies the importance of "competition advocacy" enumerated under section 49 of the Competition Act, 2002. Section 49(1) of the Competition Act, 2002 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". Section 49(3) 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."

⁵⁶ See, the preamble to the Petroleum and Natural Gas Regulatory Board Act, 2006 that states that it an "Act to provide for the establishment of Petroleum and Natural Gas

The Petroleum and Natural Gas Regulatory Board (“PNGRB”) is mandated to be mindful of competition while dealing with access to common carriers or contract carrier⁵⁸ as well as distribution networks⁵⁹. Specifically, if PNGRB is interested in declaring existing pipeline or distribution network as a common carrier, it still needs to be guided by the principles of competition.⁶⁰ Subject to an entity’s right of first use, the entity’s excess capacity is to be distributed by PNGRB in accordance with ‘fair competition’.⁶¹ Further, while determining transportation tariffs⁶², PNGRB is expected to keep considerations of competition and efficiency at the back of its mind⁶³.

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”. (emphasis supplied)

⁵⁷ Section 11 (a) of the Petroleum and Natural Gas Regulatory Board Act, 2006 states that the “Board shall protect the interest of consumers by *fostering fair trade and competition* amongst the entities”. (emphasis supplied)

⁵⁸ Section 11(e)(i) states that 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”. (emphasis supplied)

⁵⁹ Section 11 (e) (iii) of the PNGRB Act states that 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”. (emphasis supplied)

⁶⁰ Section 20(5) of the PNGRB Act states that “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”.

⁶¹ Section 21(1) of the PNGRB Act states: “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”.

⁶² Section 22(1) states: “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.”

⁶³ Section 22(2) states: “For the purposes of sub-section (1), the Board shall be guided by the following, namely :- (a) the factors which may *encourage competition, efficiency, economic use of the resources, good performance and optimum investments...* (c) the principles rewarding *efficiency* in performance...” (emphasis supplied).

Interestingly, the PNGRB Act borrows the concept of ‘restrictive trade practice’⁶⁴ from the Monopolies and Restrictive Trade Practices Act, 1969⁶⁵ that Competition Act, 2002 seeks to repeal⁶⁶. After four years of drafting the competition legislation, the framers of legislation appear to have either forgotten about the earlier legislation or developed cold feet about the need for modern competition legislation.⁶⁷

In order to deter the infringers of the enactment, a la other regulatory enactments, contravention of the directions given by the Petroleum and Natural Gas Regulatory Board attracts civil penalty.⁶⁸ A complaint based upon the phoenix entitled ‘restrictive trade practice’ ensures that penalty is enhanced by five times.⁶⁹ However, unlike the

⁶⁴ As per Section 2 (zi) 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.”

⁶⁵ 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.”

⁶⁶ 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”.

⁶⁷ See, Report of the High Level Committee on Competition Policy and Law, 2000 (emphasizing the need for a new competition framework for competition law).

⁶⁸ Section 28 of the PNGRB Act states: “In case any complaint is filed before the Board by any person or of 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”.

⁶⁹ 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”.

electricity regulator, the PNGRB Act does have any overriding, *non obstante* provision.

B. Electricity regulator

The Electricity Act, 2003 is redolent 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, which is a good four and a half months after the Competition Act, 2002 was passed on January 13, 2003, one of the objectives behind the Electricity Act is that of promotion of competition.⁷⁰ Indeed, the framers of the legislation exhibited amnesia about the competition legislation and conferred power upon the regulator to deal with anti-competitive agreements, abuse of dominant position and mergers related to impediment to competition in electricity.⁷¹ The regulator, while fixing tariff levels, is to be guided by the principle of competition and efficiency.⁷² In order to promote competition, it is open to the regulator to issue directions to the licensees engaged in transmitting, distribution or trading in electricity.⁷³ The regulator has

⁷⁰ The preamble of the Electricity Act, 2003 states that it is “[a]n 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, rationalization 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.” (emphasis supplied)

⁷¹ Section 60 of the Electricity Act, 2003 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”. (emphasis supplied)

⁷² Section 61 in, relevant parts, state: “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 optimal investments; ... (e) the principles rewarding efficiency in performance...”. 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”.

⁷³ Section 23 of the Electricity Act, 2003 states: “If the Appropriate Commission is of the opinion that 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.” (emphasis supplied)

also been entrusted with the task of advising the government in competition within electricity sector.⁷⁴ The regulator has been mandated to be guided by the lodestar of competition while evolving scheme for reorganization of provincial electricity boards that were under financial distress.⁷⁵

To add insult to the injury inflicted upon the competition legislation, the electricity regulator, too, has been armoured with the *non obstante* powers that stipulates that the electricity legislation trumps other enactments.⁷⁶ Like competition authority, the electricity regulator also finds itself hamstrung by a duty to act in aid of other regulators.⁷⁷

C. Insurance regulator

Perhaps to mitigate this assault on the competition authority, the insurance regulator has a duty to act augmenting efforts of other regulators.⁷⁸ Though the insurance regulator has been entrusted with the task of regulating and promoting orderly growth of the insurance industry⁷⁹, including promoting efficiency in insurance sector⁸⁰, it is devoid of any overriding power over other regulators.

⁷⁴ Section 79(2), in its relevant part, states: “The Central Commission shall advise the Central Government on all or any of the following matters, namely :- (a) (ii) *promotion of competition*, efficiency and economy in activities of the electricity industry...” (emphasis supplied). *See also*, Section 86(2) (i) that 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 supplied)

⁷⁵ Section 131 (5) (a) states that: “[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...” (emphasis supplied)

⁷⁶ *See*, Section 174 of the Electricity Act, 2003 states: “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.” This is similar to the mandate of the competition authority under section 60 of the Competition Act, 2002.

⁷⁷ Section 175 of the Electricity Act, 2003 states: “The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”

⁷⁸ Section 28 of the Insurance Regulatory and Development Authority Act, 1999 states: “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.”

⁷⁹ *See*, the preamble of the Insurance Regulatory and Development Authority Act, 1999 that states that it is an “Act to provide for the establishment of an Authority to protect the interests of holders of insurance policies, to *regulate, promote and ensure orderly*

D. Telecom regulator

The telecom regulator is perhaps another interesting instance. It was established, *inter alia*, in order to ensure orderly development of telecom sector.⁸¹ Accordingly, one of the critical functions of the telecom regulator is to ‘facilitate competition and promote efficiency’.⁸² Nevertheless, the appellate authority established to adjudicate telecom disputes⁸³ excludes competition matters, albeit those arising under the old, MRTP Act⁸⁴. Unlike the insurance regulator, the telecom regulator,

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”. (emphasis supplied). See also, section 14 (1) of the Insurance Regulatory and Development Authority Act, 1999 that states: “Subject to the provisions of this Act and any other law for the time being in force, the Authority shall have the duty to *regulate, promote and ensure orderly growth of the insurance business and re-insurance business*”. (emphasis supplied)

⁸⁰ Section 14 (2) (e) of the Insurance Regulatory and Development Authority Act, 1999, in relevant parts, state “[w]ithout 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”. (emphasis supplied)

⁸¹ The preamble of the Telecom Regulatory Authority of India Act, 1997 states that it 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”.

⁸² Section 11 of the Telecom Regulatory Authority of India Act, 1997 states: “(1)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:... (iv) measures to *facilitate competition and promote efficiency* in the operation of telecommunications services so as to facilitate growth in such services... (viii) *efficient* management of available spectrum”.

⁸³ Section 14 of the TRAI Act, 1997 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...”.

⁸⁴ Proviso (A) to section 14(a) of the TRAI Act, 1997 states: “Provided that nothing under this clause 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”.

does not have a generic, but a limited duty to aid other authorities existing in the telecom sector⁸⁵ and does not possess any overarching powers over other regulators. Perhaps way back in 1997, no one's crystal ball was clear enough to anticipate the spurt in regulatory authorities.

E. Securities market regulator

The securities market regulator, the Securities and Exchange Board of India ("SEBI"), is one the oldest regulators and was set up at the cusp of the inception of market reforms in India.⁸⁶ The securities market regulator has been entrusted with the dual task of protection of investors' interest as well as development of the securities market.⁸⁷ The securities market regulator is also responsible for 'fraudulent and unfair trade practices'.⁸⁸ While the enactment does not venture to define

⁸⁵ Section 38 of the TRAI Act, 1997 states: "The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 and, in 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."

⁸⁶ See generally, the Securities and Exchange Board of India Act, 1992.

⁸⁷ The preamble to the SEBI Act, 1992 states that it 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." See also, section 11(1) of the SEBI Act that 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 supplied)

⁸⁸ Section 11(2), in its relevant part, states: "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"

fraudulent and unfair trade practice,⁸⁹ nevertheless, the regulator oversees mergers.⁹⁰

Interestingly, though the securities regulator is one of the first to emerge on the Indian regulatory horizon, it has been mandated with a duty to aid other regulators.⁹¹ Unlike the electricity regulator, the securities market regulator does not possess any overarching powers.

The absence of overarching powers accentuates the potential overlapping jurisdiction on merger review from competition law perspective.⁹² The securities market regulator has an elaborate set of regulations dealing with reporting and open offer requirements corresponding with various levels of ownership and control obtained by an acquiring entity.⁹³ In accordance with needs of such a market, the requirements emphasize upon transparency⁹⁴ as well as adherence to strict limits⁹⁵. Commercial realities ensure that time remains of great

⁸⁹ The definition section does not contain any specific meaning of 'fraudulent and unfair trade practice'. However, section 12A of the SEBI Act merely 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...". (emphasis supplied)

⁹⁰ Section 11(2), in its relevant part, states: "Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for – (h) regulating substantial acquisition of shares and takeover of companies".

⁹¹ See, section 32 of the SEBI Act that states: "The provisions of this Act *shall* be in addition to, and not in derogation of, the provisions of any other law for the time being in force." (emphasis supplied)

⁹² Section 5 of the Competition Act, 2002 deals with combination. Section 6 of the Competition Act, 2002 deal with regulation of combinations.

⁹³ See *generally*, SEBI (Substantial Acquisition of Shares and Takovers) Regulations, 1997.

⁹⁴ Regulation 12 of SEBI (Substantial Acquisition of Shares and Takovers) Regulations, 1997 state: "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". Section 2(1)(c) defines "control" as "including 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".

⁹⁵ Regulation 14(1) of SEBI (Substantial Acquisition of Shares and Takovers) Regulations, 1997 state: "The public announcement referred to in Regulation 10 or

essence in mergers and insistence upon time limit within competition legislation indicates a potential sequencing problem.⁹⁶

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

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 market	No	Yes	No

IV. The *primus inter partes*: The “chief chef” competition authority in regulation/competition kitchen

The multitude of cooks in regulation/competition kitchen perhaps unwittingly underscores the significance of regulation of business in the modern age. The drafters of the legislation, in their anxiety to address the potential problems, perhaps did not wish to omit their areas of

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”.

⁹⁶ Section 6(2) of the Competition Act, 2002 states: “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”. (emphasis supplied)

concern.⁹⁷ Business regulation has attracted concerned voices since time immemorial. The father of modern day economics, Adam Smith, too had presciently warned about anti-competitive conduct of business enterprises.⁹⁸

Having settled for some sort of framework overseeing business conduct, the Indian policy makers are faced with the dilemma of choice between sectoral regulation and competition law. In order to organize the division of labour between sectoral regulators and competition authorities, there are three board options available: (a) sectoral regulator supplants competition authority; (b) competition authority substitutes sectoral regulator; and (c) concurrent existence of competition authority and sectoral regulator. After considering the pros and cons of options (a) and (b), this section posits that, in India, though sectoral regulators and competition authority may co-exist, competition authority ought to trump sector specific regulators.

A. Sectoral regulator supplants competition authority

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

However, in an institutional set-up where sector specific regulator has jurisdiction over both sectoral regulation and competition matters arising within the sector, there is a possibility of a conflict that may arise

⁹⁷ Indeed, the trend continues and several new regulators are in the offing. See, Indian Finance Minister Mr. P. Chidambaram's speech at the fourteenth annual convocation of the National Law School of India University, Bangalore, India < <http://tradeandcompetition.blogspot.com/> > (visited on August 29, 2006) (where he notes that "India is 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."

⁹⁸ See, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (where he laments, "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").

between the objective of protecting competition and other goals such as, for instance, orderly development of a specific market.⁹⁹ Additionally, sectoral regulators may shy away from enforcing competition law in order to reduce the potential for any conflict with the regulated entities.¹⁰⁰

B. Competition authority substitutes sectoral regulator

Another option is to make competition authority responsible for both sector specific regulation as well as overarching competition enforcement. This approach is advantageous as this reduces the problem of multiplicity of regulators and accumulates sectoral expertise. Indeed, Australia has taken this approach to settle for an economy-wide economic regulator that integrates technical and competition regulation.¹⁰¹

However, experts have expressed their concern that this may lead to complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.¹⁰²

C. Co-existence of competition authority and sectoral regulator

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.¹⁰³

Further, experiences of other countries aren't of much assistance. There is a wide diversity in models that are available. While Australia on

⁹⁹ See generally, Alberto Heimler, "Antitrust Enforcement in Regulated Sectors", Seoul ICN Annual Conference, 2004.

¹⁰⁰ Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244, p. 20.

¹⁰¹ "Subgroup 3: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, pp. 20-23.

¹⁰² Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, p. 5.

¹⁰³ "Subgroup 2: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Fourth ICN Annual Conference, Bonn, June 2004, p. 9.

one hand, privileges competition authority, the UK grants explicit concurrent powers to sectoral regulators.¹⁰⁴ Empirically, there is no final, definitive conclusion available.¹⁰⁵ Indeed, as the UK experience shows, despite concurrent competition powers exercised by sectoral regulators, there hasn't been any infringement decision till September 2005.¹⁰⁶

The optimal, *sui generis* model must be rooted in contextual legal milieu. To be sure, both sector specific regulator and competition authority have unique core competencies to offer. Nevertheless, there are pragmatic, descriptive as well as normative justifications why Indian competition authority ought to trump sectoral regulators.

Descriptively, the compelling justification behind primacy of competition authority is that unlike legislations governing sector specific regulators, competition legislation grants private right of action along with provision of damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare which is unavailable under the legislative framework of any sector specific regulator.

Normatively, since enforcement of competition law is a sophisticated, specialized field it would reduce transaction cost and enhance efficiency to leave it in the hands of competition authority.

1. Private enforcement

As Friedrich Hayek, a Nobel Prize winning economist has suggested, most significant advantage of the free market is its ability to make use of decentralized, individual knowledge of day-to-day affairs in life.¹⁰⁷ Similarly, it is arguable that private individuals many a time would have better information about infringement of legislative

¹⁰⁴ See generally, Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244.

¹⁰⁵ "Subgroup 2: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Fourth ICN Annual Conference, Bonn, June 2004, pp. 4-6.

¹⁰⁶ Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244, para. 5.1, p. 28.

¹⁰⁷ See generally, Friedrich Hayek, *The Road to Serfdom*, Routledge, 2001. See also, Friedrich Hayek, "The Use of Knowledge in Society", *American Economic Review* 35(4), 1945, pp. 519 – 530.

provisions. No matter how powerful an economic regulator is, it cannot possibly replicate the mélange of information accessible to individuals.¹⁰⁸

An increased private enforcement can augment the public enforcement of competition law. It would also enhance the deterrence level. Enterprises would be more inclined to comply. Private enforcement would bring people closer to competition law creating stakeholders in Indian economic growth and competitiveness.¹⁰⁹ Indeed, private enforcement remains the bulwark of the US antitrust law and private actions constitute around 90% of antitrust cases.¹¹⁰

Indian competition law clearly lays down a private right of action by mandating the competition authority to act upon complaint¹¹¹ by any person¹¹². This is in contrast with the older competition law regime that conferred a right of complaint to a ‘consumer’¹¹³ only in cases of ‘restrictive trade practice’.¹¹⁴

Grant of private right of action confers a mere *locus standi* to an individual to knock at the doors of the competition authority. It does not necessarily constitute any special allurements to initiate action. Coupled

¹⁰⁸ For an excellent exposition on 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*, HarperCollins Publishers, New Delhi, 2007.

¹⁰⁹ Commission Staff Working Paper, Annex to the Green Paper, “Damages Actions for Breach of EC Antitrust Rules”, SEC(2005) 1732, pp. 6-8.

¹¹⁰ C. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, 1999, p. 16.

¹¹¹ Section 19(1) of the Competition Act, 2002 states: “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.” (emphasis supplied)

¹¹² Section 2 (l) defines a “person” to include an *individual*.

¹¹³ Section 10 of the MRTP Act, 1969 states: “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 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.

¹¹⁴ Section 2(o) of the MRTP Act, 1969 defines “restrictive trade practice”, *supra*

with possibility of damages, private right of enforcement confers upon a potential plaintiff an incentive to sue.¹¹⁵

2. Damages

Possibility of damages become critical in order to compensate a victim for the loss suffered owing to infringement of competition law. A compensatory damage merely makes a victim of anti-competitive conduct whole. It does 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 found violating competition legislation, it would have to restore the victim in its position prior to the infringement.¹¹⁶

In order to punish or deter violators of competition law, certain jurisdictions, traverse beyond compensatory damages and include recovery of illegal gain¹¹⁷ or exemplary or punitive damages. One of the categories, in England for instance, warranting exemplary damages is ‘wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant’.¹¹⁸ Specifically, under competition law regime, if there is a cost benefit analysis by a violator that illegal gains would outweigh potentially payable damages, an action for exemplary damages may lie.¹¹⁹

Indian competition law incorporates a provision for award of compensation by the competition authority for any loss or damage suffered by any victim.¹²⁰ Though there is no specific provision for

¹¹⁵ Steven Shavell, *Foundations of Economic Analysis of Law*, Harvard University Press, Cambridge, 2004, p. 390 (where he asserts that the “plaintiff will sue when his cost of suit is less than his expected benefits from suit”).

¹¹⁶ Commission Staff Working Paper, Annex to the Green Paper, “Damages Actions for Breach of EC Antitrust Rules”, SEC(2005) 1732, para. 114, p. 34.

¹¹⁷ See, Section 34 GWB (German Competition Law) *cited from* Commission Staff Working Paper, Annex to the Green Paper, “Damages Actions for Breach of EC Antitrust Rules”, SEC(2005) 1732, para. 115, pp. 34-35.

¹¹⁸ *Per* Lord Devlin in *Rookes v. Barnard* [1964] AC 1129.

¹¹⁹ B. Rodger, “Private Enforcement and the Enterprise Act: An exemplary system of awarding damages”, [2003] ECLR 103.

¹²⁰ Section 34(1) of the Competition Act, 2002 states: “Without prejudice to any other provisions contained in this Act, *any person* may make an application to the Commission for an order for the recovery of compensation from any enterprise for *any loss or damage shown to have been suffered*, by such person as a result of any contravention of the provisions of Chapter II, having been committed by such an enterprise”. (emphasis supplied)

punitive or exemplary damages, since the provision speaks of ‘loss or damage caused... as a *result* of any contravention’ rather than ‘loss or damage caused... *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.¹²¹

In addition, there is also a provision for representative action in order to aid filing of complaints by a group.¹²² This would ensure that once the competition authority has found contravention of the competition law, victims in a group would be able to file for compensation claims from the competition authority. This is only a ‘representative action’ and not ‘collective action’, ‘class action’ or ‘public interest litigation’. The provisions for compensation under Competition Act, 2002 were also available under the old enactment.¹²³

It is instructive to compare the mechanism of right of private action coupled with damages with the legal framework available under sector specific regulators. The following table summarizes the position:

Enactment	Right of Private Action	Damages
Petroleum and Natural Gas Regulatory Board Act, 2006	Unclear ¹²⁴	No ¹²⁵

¹²¹ Section 34(2) of the Competition Act, 2002 states: “The Commission, 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 realizable 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”. (emphasis supplied)

¹²² Section 34(3) of the Competition Act, 2002 states: “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 Commission, make an application under that sub-section for an 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 Commission and the order of the Commission thereon”.

¹²³ See, section 12B of the MRTP Act, 1969.

¹²⁴ Section 12 (a), (b) of PNGRB Act, 2006 read with proviso to s.25. No definition of a ‘person’.

¹²⁵ Damages and compensation are only for entities not individuals. Section 21(3), section 27, s. 43(2) read with s. 60(2)(i) of PNGRB Act, 2006.

Electricity Act, 2003	No	Limited ¹²⁶
Insurance Regulatory and Development Authority Act, 1999	No	No
The Telecom Regulatory Authority of India Act, 1997	No ¹²⁷	No
The Securities and Exchange Board of India Act, 1992	No ¹²⁸	No ¹²⁹
Monopolies and Restrictive Trade Practices Act, 1969	Limited ¹³⁰	Yes ¹³¹
Competition Act, 2002	Yes	Yes

From the above chart, it is clear that the sector specific regulators are *parens patriae* regulators, where regulator dons the mantle of protection of consumer interest. Besides competition authority, electricity regulator is the only sector specific regulator having provision for, albeit limited damages. Nonetheless, damages recoverable through the electricity regulator are confined to violation of 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.¹³²

¹²⁶ Section 57(2) of the Electricity Act, 2003 states: “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”. This provision has to be read along with section 62(6) that 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 the interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee”. Further, section 147 states that: “The penalties imposed under this Act shall be in addition to, and not in derogation, 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”.

¹²⁷ Section 11 of the TRAI Act, 1997 mentions “either suo motu or on request from the licensor”. Further, section 14(a)(iii) deals with “group of consumers”.

¹²⁸ Section 26 SEBI Act grants monopoly over complaint to SEBI.

¹²⁹ In the recent IPO scam case, though, SEBI has experimented with disgorgement orders.

¹³⁰ Section 10 of MRTP Act, 1969 deals with only RTP.

¹³¹ Section 12B of MRTP Act, 1969.

¹³² See, section 60 of the Electricity Act, 2003.

The right of private action under petroleum regulator is unclear. Subject to the existence of any arbitration agreement, the petroleum regulator has jurisdiction over dispute 'between an entity and any other person'.¹³³ The regulator also has right to 'receive any complaint from any person'.¹³⁴ Nevertheless, complaint by *individual consumers* maintainable before consumer disputes redressal forum is exempt.¹³⁵ The most bizarre aspect of this enactment is that unlike Competition Act, 2002, it does not define a 'person'. There is also an absence of any guidance under the enactment to construe 'person'.

Even if one gives a liberal interpretation to 'person' and construes a right of private enforcement under petroleum regulator, there is no possibility of recovery of any damages for anti-competitive conduct.

3. Transaction Cost

Competition law enforcement is a specialized, sophisticated field of study. Like any other legal discipline, it requires time, effort and dedication to master it. Of late, there has also been convergence of the US and the EU model of competition law, both increasingly relying upon economic

¹³³ Section 12(1) of the PNGRB Act, 2006 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*" (emphasis supplied)

¹³⁴ Section 12(1)(b) of the PNGRB Act, 2006 states: "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 contravention of – (i) retail service obligations; (ii) marketing service obligations; (iii) display of retail price at retail outlets; (iv) terms and 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 authorization 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."

¹³⁵ Section 25(1) of the PNGRB Act, 2006 states: "A complaint may be filed before the Board by any person in respect of matters relating to entities or any matter arising out of the provisions of this Act" However, the proviso adds, "Provided that the complaints of *individual consumers* maintainable before a consumer disputes redressal forum under the Consumer Protection Act, 1986 shall not be taken up by the Board but shall be heard and disposed of by such forum". (emphasis supplied)

analysis of law to determine competition questions.¹³⁶ The emergence of common language of competition analysis in the US and the EU has ensured that competition law enforcement is increasingly nuanced and rooted in rigorously developed economic methodology.¹³⁷ Competition authorities, in advanced jurisdictions, depend upon years of experience to be in a position to confidently enforce competition law.

Whilst sector specific regulators are critical components of modern day economic regulation, it is inefficient to rely upon their specialized knowledge of their sector to enforce competition law effectively. Reliance on competition authority would significantly reduce transaction cost. The legal regime of competition law enforced through competition authority would be predictable and certain for business entities. Like human beings, corporations are capable of deliberation and choice and in order to facilitate their compliance with competition legislation, law must be certain, clear and predictable.¹³⁸

Further, if regulatory authorities could negotiate without any transaction cost involved in their negotiation, the outcome would certainly be in favour of competition authority.¹³⁹ Since such negotiations do involve cost, it would be a better idea to formulate a default rule that mandates that competition authority would have primacy over and above sector specific regulators.

Interestingly, there is strong incentive in-built within current legal framework for businesses as well to prefer competition authority over sector specific regulator. Unlike sector specific regulators, competition legislation offers a strong protection of confidential information.¹⁴⁰

¹³⁶ See, Mario Monti, "International Antitrust – A personal perspective", Fordham Corporate Law Institute, New York, October 7, 2004
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/449&format=HTML&aged=0&language=EN&guiLanguage=en> (visited on December 15, 2006).

¹³⁷ Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, Hart Publishing, Portland, 2007, p. v.

¹³⁸ See generally, Lon Fuller, *The Morality of Law*, Universal Book Trust, New Delhi, 1995 (where he suggests 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 could be complied with).

¹³⁹ See generally, Ronald H. Coase, "The Nature of the Firm", Vol. 4. No.16, *Economica*, 1937.

¹⁴⁰ Section 57 of the Competition Act, 2002 states: "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."

V. Consumer Welfare As the Primacy Concern of Regulation/Competition

The initiation of Indian economic reforms since past one and half decade has meant gradual withdrawal of the extent of governmental control over economic decision making. 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 & Regulation/Competition

The underlying *rationale* behind the proliferation of regulatory authorities is the anxiety to keep up with the social contract of protection of consumer welfare. The petroleum regulator is reminded of its duty towards protection of ‘interests of consumers’ in its preamble itself.¹⁴¹ The case of the electricity regulator is no different.¹⁴² Similarly, the insurance regulator has been entrusted with the task of protection ‘of the interests of the policy holders’.¹⁴³ The telecom regulator finds itself on a similar footing.¹⁴⁴ Finally, the securities regulator’s mandate ‘to protect the interests of investors extend to ‘promoting investors’ education and training’¹⁴⁵

In the absence of any legislative mechanism to protect consumer welfare, the aforementioned legislative dictates appear mere lip service. The case of competition authority appears to be on an entirely different footing. As delineated in section IV of this paper, private enforcement combined with right of damages within competition law provides for not

¹⁴¹ See, the preamble and section 11(a) of the PNGRB Act, 2006.

¹⁴² See, the preamble, section 81(iv), section 88 (iv) of the Electricity Act, 2003

¹⁴³ Section 14(2) (b), 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...”.

¹⁴⁴ See, the preamble, section 11(b) (v) of the TRAI Act, 1997.

¹⁴⁵ See, the preamble, section 11(1) and section 11(2)(f) of the SEBI Act, 1992.

only a mandate of protection of consumer interest¹⁴⁶ but also a robust framework to ensure a qualitatively higher standard of consumer welfare.

In order to aid the process of competition enforcement, there are two distinct yet related tools of interpretation that are necessary in Indian legal framework. First, like the US, owing to the twin provisions of private enforcement and damages, there must a strong presumption against exemption from competition law. Any possible exemption ought to be strictly construed.¹⁴⁷ Further, any probable usage of ‘state action doctrine’ or ‘regulatory conduct defence’ ought to be specifically excluded.

B. Capturing Sectoral Regulators’ Expertise

Recognition of the primacy of competition law ensuring consumer welfare does not necessarily mean eschewing sectoral regulators. In order to ensure that the default rule conferring primacy to competition authority does not lose 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, it would lead to a semblance of certainty/predictability in regulatory jurisprudence which is currently in a state of disarray.

Taking cue from the petroleum regulator that utilizes the existing electricity appellate tribunal for matters related to petroleum sector as well¹⁴⁸, CRAT ought to consist of technical members of each regulated sector, including competition. The total number of members, including the technical member (of the respective regulated sector) should be nine. Besides the technical member who would be drawn from the specific

¹⁴⁶ See, preamble and section 18 of the Competition Act, 2002.

¹⁴⁷ Section 54 of the Competition Act, 2002 states: “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” (emphasis supplied). This is in accordance with the definition of “enterprise” contained in section 2(h) of the Competition Act, 2002 which incorporates a carve out for the “sovereign functions of the Government”.

¹⁴⁸ See, Section 30 of PNGRB Act, 2006.

regulated sector, the members of CRAT should be drawn from judiciary, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration, academia and the like.

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

This proposal would ensure that CRAT acts as repository of jurisprudence emerging in the field of regulation. In addition, there would also be certainty and predictability for the business enterprises and the consumers to plan their affairs in life.

VI. Conclusion

The aim of the paper was to analyze the see-saw relationship between sector specific regulators and competition authority in India. The seemingly uneasy interface between the two is evident from the legislative framework. International instances are of little assistance as countries have chosen frameworks at the backdrop of legal and social context.

A closer scrutiny of the interface and a survey of Indian sector specific regulators entail interesting exploratory as well as normative insights. Descriptively, the paper found that unlike sectoral regulators, competition authority combines the twin powers of private enforcement with right to claim damages. In the absence of the two, sector specific regulators cannot possibly serve as an effective instrument for promotion and protection of consumer welfare.

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

This does not necessarily, as a corollary lead to conclusion that the sector specific regulators must wind up their shops. The paper proposes establishment of a common, across-the-sector regulatory appellate tribunal in order to develop a strong, predictable regulatory jurisprudence that would be in the best interest of both the consumers and business enterprises.