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Comparing the Competition Law Regimes of the United States and India

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ABSTRACT

In this article, Professor Pierce compares the oldest system of competition law—the U.S. system—with one of the youngest systems of competition law—the Indian system. He identifies several strengths and weaknesses of the U.S. system. He then gives the Indian Parliament high marks for creating an institutional environment that has the potential to produce an excellent body of law.

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Richard J. Pierce, Jr.[1]

My goal in this article is to engage in a critical comparison of the legal regimes that the United States and India use to implement and enforce their competition laws. In Part I, I describe the U.S. institutions that play major roles in implementing and enforcing competition law, including their powers, their staffing, and the procedures they use to announce policies and to adjudicate disputes. In Part II, I engage in critical evaluation of the U.S. system of implementing competition law. Which elements work well? Which elements work poorly? What changes should the U.S. make to improve the performance of its competition law regime? In Part III, I describe the Indian institutions that implement and enforce competition law, including their powers, their staffing and the procedures they use to announce policies and to adjudicate disputes. In Part IV, I evaluate the Indian competition law regime using the same criteria I applied to the U.S. competition law regime in Part II.

I. The U.S. Competition Law Regime

A. The statutes

U.S. competition law is based on three statutes.

1. The Sherman Act

The Sherman Antitrust Act of 1890 outlaws "contracts in restraint of trade" and "monopoliz[ing] or attempt[ing] to monopolize."[2] The courts interpret the prohibition on contracts in restraint of trade to prohibit only contracts that *unreasonably* restrain trade, in recognition of the reality that virtually all contracts, including socially beneficial contracts, restrain trade to some extent. The courts interpret the prohibition on monopolizing or attempting to monopolize to prohibit only use of improper means to obtain, attempt to obtain, or to retain, a monopoly in a market. That limit is important because courts do not want the competition laws to have the effect of deterring firms from attempting to obtain a monopoly through means such as maximizing the quality of the products and services they sell or minimizing the cost of those products and services. The courts have recognized that, while monopoly power has bad effects on the performance of a market, attempts to obtain monopoly power through such legitimate

[1] Lyle T. Alverson Professor of Law, George Washington University. I am grateful to Ritwik Bhattacharya, a student at the National Law School of India, for providing the entire basis for my description of the Indian competition law regime in Part III of this article.

[2] 15 U.S.C. §§1-7.

means are essential to the effective performance of any market-based economy.[3] The Sherman Act authorizes a court to provide remedies for a violation of the Act that include an order declaring a practice unlawful, an order enjoining an unlawful practice, civil penalties, criminal penalties, and award of treble damages to parties that have been damaged by violations of the Act.

2. The Clayton Act

The Clayton Act of 1914 prohibits price discrimination, tying one product or service to another, requirements contracts, mergers, and acquisitions if, but only if, the effect of that conduct "may be to substantially lessen competition . . . or tend to create a monopoly."[4] That important qualification reflects recognition by Congress that price discrimination, tying, requirements contracts, mergers, and acquisitions often have little or no potential adverse effect on the performance of markets and often have socially-beneficial effects.

3. The Federal Trade Commission Act

The Federal Trade Commission Act of 1914 created the Federal Trade Commission (FTC) and gave it concurrent power to enforce the Sherman and Clayton Acts through use of civil remedies.[5] Only the courts, acting in response to charges brought by the Department of Justice (DOJ), have the power to impose the criminal penalties authorized by the antitrust acts. Generally, FTC has the same powers as DOJ but it also has three unique powers—(1) the power to enforce a statutory prohibition on unfair methods of competition, and unfair or deceptive acts or practices; (2) the power to obtain a court order temporarily enjoining conduct that violates the antitrust laws by meeting a standard that is less demanding than the standard DOJ must meet to obtain such an order; and, (3) the power to conduct hearings to decide whether a firm has violated the antitrust laws in-house before one of the FTC's Administrative Law Judges (ALJ) instead of asking a court to make that decision.[6] The first unique power has rarely been used. FTC uses the second and third powers with great frequency but both are controversial.

After decades of controversy and uncertainty, a consensus developed among U.S. enforcement agencies and federal courts about forty years ago that the antitrust laws should be interpreted and implemented to maximize social welfare through application of principles of microeconomics. As a result, they are implemented with the goal of protecting the performance of competitive markets and not with the goal of protecting competitors. That distinction has important implications. Thus, for instance, U.S. antitrust law recognizes that so-called "predatory pricing" should not be discouraged because it is almost always a symptom of a properly performing competitive market, and that price discrimination often has beneficial effects on the performance of a market.[7]

B. The Institutions

Six institutions play important roles in implementing competition law in the U.S.

[3] Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).
[4] 15 U.S.C. §§12-27.
[5] 15 U.S.C. §§41-58.
[6] See Richard Pierce, The Rocky Relationship Between the Federal Trade Commission and Administrative Law, 83 Geo. Wash. L. Rev. 2026 (2015).
[7] See Brooke Group v. Brown & Williamson Tobacco Corp, 509 U.S. 209 (1993); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

1. The Department of Justice

The Assistant Attorney General for Antitrust is nominated by the President subject to confirmation by the Senate. She can be removed at will by the President. She reports to the Attorney General, who also is nominated by the President subject to confirmation by the Senate. The Antitrust Division of the Department of Justice (DOJ) is staffed by a combination of lawyers who have a good understanding of the principles of microeconomics and economists who have a good understanding of antitrust law. Every investigation and court proceeding is staffed by a combination of economically literate lawyers and legally literate economists.

The Antitrust Division of DOJ conducts investigations to determine whether firms are violating antitrust law. If DOJ makes such a determination, it has the power to ask a federal district court to impose any of the civil or criminal remedies authorized by the antitrust laws.

2. The Federal Trade Commission

The FTC is headed by five Commissioners, one of whom is the Chair. Each Commissioner is nominated by the President subject to confirmation by the Senate. Each can be removed by the President, but only "for cause." The FTC makes decisions by majority vote. Each Commissioner serves a five-year term. The terms are staggered so that one Commissioner's term expires each year. No more than three Commissioners can be members of the same political party. These characteristics of the FTC are believed to make it somewhat more independent of the President and somewhat more responsive to the wishes of Congress than DOJ.

The Bureau of Competition within the FTC is staffed in much the same way as the Antitrust Division at DOJ. It includes lawyers who have a good understanding of principles of microeconomics and economists who have a good understanding of antitrust law. Every investigation, administrative proceeding, and court proceeding is staffed by a team that includes economically literate lawyers and legally literate economists.

FTC has the power, concurrent with DOJ, to go to court to seek any of the civil remedies authorized by the antitrust laws. It has no power to seek criminal penalties. In addition, it has the three unique powers mentioned in section I(A)(3). DOJ and FTC meet regularly to decide which agency should take primary responsibility to investigate potential violations of the antitrust laws and to take actions against any violations they find. The agencies divide their responsibilities by sector of the economy. Thus, for instance, one will take responsibility for monitoring compliance by firms that participate in the market for beverages, while the other will take responsibility for monitoring compliance by hospitals. The allocation is based on a combination of comparative expertise with respect to each sector of the economy and the resources available to each agency. If FTC determines that there is reason to believe that criminal conduct has taken place in a market for which it has responsibility, it refers the matter to DOJ, since FTC lacks the power to seek criminal penalties.

3. The Courts

Federal courts have the power to provide any of the civil or criminal remedies authorized by the antitrust laws in response to a complaint filed by DOJ or FTC. They also have the power to review any action that

FTC has taken through use of its internal procedures to determine whether the FTC action is consistent with the antitrust laws, supported by substantial evidence and not arbitrary and capricious.

Federal judges are appointed for life and cannot be removed from office except by impeachment for committing a “high crime or misdemeanor.” They are nominated by the President subject to confirmation by the Senate. They are experienced lawyers who are chosen because they are believed to be particularly good lawyers and are believed to have the temperament and sense of justice critical to the role of a judge. They usually have no formal training or experience in microeconomics, though they were exposed to some of the vast literature that discusses the relationship between law and economics during law school.

The only staff support available to federal judges consists of two to four law clerks. Those clerks typically are recent graduates of well-regarded law schools who performed particularly well in their studies. Each usually serves as a law clerk for one year. Like federal judges, law clerks usually have no formal training or experience in microeconomics but they were exposed to some of the law and economics literature in law school.

4. Juries

Defendants in civil antitrust cases that are adjudicated in courts are entitled by statute to a trial by jury. Defendants in criminal cases are entitled to a trial by jury by both the antitrust statutes and by the U.S Constitution. A jury consists of six to twelve people who are chosen at random from the general population. They typically have no knowledge of either law or economics.

5. Private Parties

Private parties that have been injured by violations of antitrust laws can file a complaint in a federal court and can seek any of the civil penalties authorized by the antitrust statutes. The antitrust remedy that has the greatest deterrent effect on firms that are tempted to violate antitrust law is the power of a court to award private parties who are victims of violations of antitrust law three times the damages they have suffered as a result of the violations committed by the defendants.

In 1977, the U.S. Supreme Court issued two opinions that made it much more difficult for private parties to bring actions to enforce the antitrust laws by limiting the circumstances in which firms have standing to bring an antitrust action.[8] Those opinions had the effect of reducing the number of complaints filed by private parties from a high of almost 14,000 per year to the present level of about 400 per year. [9]

6. State Attorney Generals

State Attorney Generals can sue firms for violating federal antitrust law on behalf of the citizens of their states. They can ask a court to impose on the defendants any of the civil penalties authorized by antitrust statutes.

B. Procedures used to implement and enforce antitrust law

[8] Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977); Illinois Brick v. Illinois, 431 U.S. 720 (1977). See also Cargill v. Montfort, 479 U.S. 104 (1986).

[9] Steven Salop & Lawrence White, Economic Analysis of Private Antitrust Litigation, 74 Georgetown L.J. 1001,1002 (1986).

The procedures used to implement and enforce antitrust law vary significantly depending on the context in which implementation and enforcement takes place.

1. Adjudication of Criminal Cases

DOJ is the only institution that is authorized to ask a court to impose criminal penalties against a firm for violating antitrust law. DOJ brings criminal cases only in the relatively few cases in which it believes that one or more firms intentionally violated antitrust law.

The international vitamin price-fixing conspiracy DOJ uncovered in 1999 illustrates the relatively rare circumstance in which DOJ seeks criminal penalties.[10] All of the major manufacturers of vitamins met regularly and secretly in various locations in many countries to agree to fix prices at levels that had the effect of increasing the firms' revenues by billions of dollars each year. With the active cooperation of antitrust authorities in several other countries, DOJ obtained evidence that was so powerful that each of the firms and individuals in the firms that participated in the conspiracy agreed to accept serious criminal and civil penalties without a court trial. In the rare situation in which DOJ seeks criminal penalties, and the firms and individuals who are accused of criminal violations attempt to defend their conduct in court, the defendants are entitled to a jury trial in which they enjoy all of the many procedural safeguards to which all criminal defendants are entitled in the U.S.

2. Adjudication of Civil Cases

DOJ, FTC, a state Attorney General, or a private party with antitrust standing can seek civil remedies against firms that they allege to have violated antitrust law by filing a complaint in a federal court. The court then conducts a trial to determine whether the defendants violated antitrust law and, if so, what remedies the government or private party is entitled to obtain. A trial of that type typically takes many years and is extremely expensive. The liberal discovery rules that apply to federal court trials typically create a situation in which the trial cannot even begin for years after the complaint is filed. The trial itself then typically takes at least months to complete because many of the disputed issues are complicated, and the parties invariably present extensive expert testimony that is subject to lengthy cross-examination. The decision of the federal district judge is then appealed to a circuit court, adding another 12 to 24 months to the decision making process.

If the defendants assert their right to a jury trial, the trial is even longer and more expensive. In a non-jury trial, the judge can adopt time-saving procedures like having the parties file all of their direct testimony in writing in advance of the trial. The oral hearing then consists only of cross-examination. Those procedures are not available in a jury trial. The jury must have the opportunity to listen to each witness give her direct testimony in oral form.

The FTC has the option of conducting a hearing in-house before one of its ALJs. Those hearings also take a lot of time and resources. After the ALJ issues his decision, the parties invariably appeal that decision to the full Commission. The defendant then appeals any adverse decision to a federal appeals court, adding another 12 to 24 months to the lengthy process.

In any civil case, either DOJ or FTC has the option of seeking a temporary injunction that requires the defendants to cease engaging in the conduct that allegedly violates antitrust law pending the outcome of

[10] See Vitamin Price-Fixing Draws Record $755 Million in Fines, Chicago Tribune (May 21, 1999).

the proceedings on the merits of the case. I will defer detailed discussion of that option until the next section, because DOJ and FTC seek that remedy most frequently in the context of mergers or acquisitions that they believe violate antitrust law.

3. Mergers and Acquisitions

Until 1976, mergers and acquisitions were subject to the same procedures as any other civil case. If DOJ or FTC believed that a merger or acquisition violated antitrust law, one or the other filed a complaint in court against the parties who were involved in the transaction. The agency sought either an order forbidding the parties from completing the transaction or an order requiring the parties to reverse the transaction through forced divestiture of assets in the frequent situation in which the parties had completed the transaction by the time that DOJ or FTC filed a complaint in court in which they sought to prove that the transaction was illegal. This method of proceeding produced unacceptable results in two forms—the proceedings took far too long and they often produced poorly reasoned court opinions.

In 1976, Congress changed the decision making process in merger cases dramatically by enacting the Hart-Scott-Rodino (HSR) Act.[11] That Act requires any large firm that proposes to merge with, or to acquire the assets of, another large firm to make a filing with both DOJ and FTC at least 30 days before the date on which the firms propose to take the proposed action. In the HSR filing the firms are required to describe the proposed action, and they are given the opportunity to explain why they believe that the proposed transaction does not violate antitrust law.

HSR gives DOJ or FTC 30 days in which to review the HSR filing and to decide whether to challenge the legality of the proposed transaction. DOJ and FTC allocate responsibility to review an HSR filing between the two agencies based primarily on comparative expertise in the sector of the economy in which the proposed transaction will take place. If the firms hear nothing by the end of the thirty day period, they can assume that DOJ or FTC have decided not to challenge the transaction as a violation of antitrust law. In a high proportion of cases, the transaction is relatively simple; the firms hear nothing from the responsible agency within 30 days of the filing; and the firms complete the transaction.

In the relatively few cases in which the HSR filing causes the agency to have concerns that the proposed action will have adverse effects on the performance of one or more markets, the agency notifies the firms of its concerns within the 30 day period and asks the firms to extend the review period by some specified amount, e.g., 60 days. The agency also asks the firms to provide additional data and analysis that might (or might not) satisfy the agency's concerns. The firms always agree to a request of that type because they know that the agency will oppose the proposed transaction in court if they do not agree and instead go forward with the transaction. They prefer to agree to extend the review time and to provide additional data and analysis in the hope that the agency will then decide not to oppose the transaction in court.

If the agency believes that the proposed transaction violates antitrust law at the end of the review period, it notifies the firms that it will oppose the transaction if the firms follow through with their intent to complete the transaction. In some cases, the agency notifies the firms that it will oppose the transaction in court unless they agree "voluntarily" to take actions that will eliminate the agency's concerns about the effects of the merger. Those actions usually consist of divestiture of some assets so that the resulting firm will have a smaller share of a market than otherwise would be the case. Many disputes with respect to

[11] 15 U.S.C. §18a.

proposed mergers or acquisitions end at this point because the firms decide that they would rather abandon the transaction or agree to take the actions that will cause the agency not to oppose the transaction in court rather than to go forward with the transaction as it was originally proposed, knowing that they will then need to defend the legality of the transaction in court.

If the parties decide to complete the transaction after the agency has notified the parties that it opposes the transaction, the agency files a complaint in federal court in which it alleges that the transaction is illegal. The agency asks both for an order that permanently prohibits the parties from completing the transaction and for an order that temporarily prohibits the parties from completing the transaction pending the outcome of the (lengthy) proceeding to decide whether to grant the permanent relief the agency requests.

When DOJ asks for a temporary injunction that prohibits the parties from completing the transaction pending the outcome of the proceedings to decide whether to prohibit the transaction on a permanent basis, it can prevail only by satisfying the relatively demanding standard that applies to most requests for temporary injunctions. The party that requests the temporary injunction must satisfy a four-part test that requires the moving party to prove: (1) that there is a likelihood of irreparable harm with no adequate remedy at law if the court does not issue the temporary injunction; (2) that the balance of harm favors the movant; (3) that there is a likelihood of success on the merits of the case; and, (4) that the public interest favors the granting of the injunction.[12]

When FTC asks for a temporary injunction that prohibits the parties from completing the transaction pending the outcome of the proceedings to decide whether to prohibit the transaction on a permanent basis, it can prevail by satisfying the less demanding standard contained in the FTC Act. In order to obtain a temporary injunction FTC must show only that, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . ."[13] Unlike DOJ or any other party that seeks a temporary injunction, FTC is not required to demonstrate that failure to grant the injunction would be likely to cause "irreparable harm with no adequate remedy at law."

As a practical matter, the decision of the court in response to the agency request for a temporary injunction is the end of the proceeding. The oral evidentiary hearings that must take place either in court of before an FTC ALJ take a long time. Agreements to merge or to acquire another firm are far too time-sensitive to survive the decision making process on the merits of the transaction. Thus, there is never a decision on the merits of any proposed merger or acquisition that is challenged by DOJ or FTC.[14]

4. Procedures to Announce Interpretations of Antitrust Law

The substantive standards in the Sherman and Clayton antitrust statutes are broad and vague. The statutes prohibit contracts that unreasonably restrain trade, conduct that is considered to be an inappropriate means of obtaining, retaining or attempting to obtain monopoly power, and tying, requirements contracts, price discrimination, mergers and acquisitions when the effects of any of those forms of conduct may be to substantially lessen competition or tend to create a monopoly. Thus, it is

[12] See, e.g., United States v. New York Telephone Co., 434 U.S. 159 (1977).
[13] 5 U.S.C. §53(b).
[14] See Pierce, supra. note 6, at 2030-31.

particularly important that government officials, judges, and firms have good ways of determining how those vague standards are interpreted by DOJ, FTC, and the courts.

Except in the context of mergers and acquisitions, the only reliable source of interpretations of antitrust law are contained in judicial opinions. In many cases, there are no recent opinions that address patterns of fact similar to the pattern of facts that an enforcement agency, a court, or a lawyer who is advising her clients with respect to the legality of some proposed form of conduct can use as the basis for an opinion about the legality of the conduct at issue.[15] In that common situation, the court, agency or private attorney must make an educated guess with respect to the legality of the conduct based on judicial opinions that address patterns of fact that often differ in material ways from the pattern of facts that is before the agency, court, or private attorney. In many situations, the court opinions that are relevant to the question at issue are decades old and reflect methods of reasoning that courts have since abandoned.

It is much easier to determine the law that is applicable to mergers and acquisitions. DOJ and FTC publish joint guidelines that describe in detail the analytical framework that they apply when they decide whether to oppose or to acquiesce in a proposed merger or acquisition.[16] They update the guidelines frequently to insure that they reflect the analytical tools that the agencies are using to evaluate proposed mergers and acquisitions and the ways in which they are applying those tools on a current basis. Courts that consider whether to grant or deny DOJ or FTC requests to enjoin proposed mergers or acquisitions sometimes disagree with the manner in which the agencies apply the guidelines, but they rarely, if ever, disagree with the guidelines themselves. Thus, private attorneys who provide clients with opinions with respect to the legality of proposed mergers and acquisitions can rely on the guidelines as an authoritative source of the law governing such transactions.

II. Evaluating the U.S. Competition Law Regime

A. Good Characteristics of the U.S. Competition Law Regime

The U.S. competition Law regime has several characteristics that help it to perform in socially beneficial ways. First, as interpreted by the U.S. Supreme Court, the statutes that govern competition law are sensible. They prohibit practices only when some government institution determines that the practice is likely to have an adverse effect on the performance of a market. That characteristic of the statutes recognizes the reality that most practices that might have adverse effects on the performance of a market only have those effects in some circumstances. In other circumstances, they may have beneficial effects.

The effects of that characteristic of U.S. competition law depend critically on the nature and quality of the staffing of the institutions that make decisions in the U.S. The most important of those institutions—the Antitrust Division of DOJ and the Bureau of Competition at the FTC--are staffed by a combination of economically literate lawyers and legally literate economists. That creates a legal regime in which the institutions that play the dominant roles in interpreting and applying competition law have the expertise required to adopt statutory interpretations and policies that are likely to maximize social welfare.

Federal courts also play important roles in implementing the U.S. competition law regime. They lack the staffing required to choose statutory interpretations and policies that are likely to maximize social welfare. Federal judges are able lawyers with excellent legal training, but they have no formal training in

[15] Id. at 2045-47.
[16] See, e.g., DOJ/FTC Horizontal Merger Guidelines (2010).

economics. Their staff assistants are recent graduates of the nation's top law schools, but they too lack the kind of systematic education in microeconomics that is essential for an institution that is assigned the challenging task of devising and implementing rules applicable to competitive markets that are likely to maximize social welfare.

In most cases, courts choose statutory interpretations and policies that have good effects primarily because they are greatly aided in that process by DOJ or FTC, in their roles as parties to the litigation before the court. The lack of relevant expertise in the federal courts is apparent, however, in cases in which neither DOJ nor FTC participate. When a court decides a case in which the only participants are private parties, they often make serious errors that have the potential to cause a great deal of harm to the performance of markets. The role of the lawyers for the private parties is to win the case for the client. They have no obligation to attempt to obtain results that will benefit the nation. It is often in the best interests of the private parties and their lawyers to mislead the court with respect to the likely effects of alternative statutory interpretations and policies in their efforts to prevail in the litigation.

In cases in which DOJ or FTC are parties, the private participants have little ability to lure the court into making a decision that will have a bad effect on the performance of markets because DOJ and FTC provide a valuable check on that tendency. One of the most important steps the U.S. has taken to produce good competition policies was the 1977 decision of the U.S. Supreme Court that greatly limited the circumstances in which private parties can initiate antitrust actions.[17] That decision reduced by over 95% the number of antitrust cases in which private parties could mislead courts into adopting interpretations and policies that have adverse effects on the performance of the U.S. economy.

The institution that has the least relevant expertise and, therefore, the greatest potential to make bad decisions is the jury. Its potential to create bad law or policy is greatly limited, however, by the power of judges to keep juries from making completely irrational decisions by granting summary judgment in cases in which the theory of the case offered by a plaintiff makes no economic sense and by giving detailed instructions to the jury in cases in which a judge concludes that a plaintiff's theory of recovery is economically plausible.[18]

The U.S. competition law regime has several other noteworthy strengths. The treble damage remedy acts as a powerful deterrent to potential violations of U.S. competition law. Firms must think twice before they engage in unlawful behavior that has the potential to increase their profits when they face the risk that they will suffer a loss three times as great as the increased profits they hope to earn if their violation of law is detected. The likelihood of detection is high, partly because of the aggressive efforts of DOJ and FTC to detect violations and partly because of their successful efforts to coordinate their investigations and enforcement efforts with those of other nations.

The process of evaluating proposed mergers and acquisitions is another strength of the U.S. competition law regime. A description of the sad history of U.S. merger policy will help the reader appreciate the virtues of the present U.S. approach. For the first seventy years after the U.S. began to implement a competition law regime, the courts refused to apply competition law to mergers and acquisitions.[19] That

[17] Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477.
[18] See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (not allowing jury to decide case of alleged predatory pricing because plaintiff's theory of the case made no economic sense).
[19] E.g., Northern Securities Co. v. United States, 193 U.S. 197 (1904).

period was followed by a decade in which the U.S. Supreme Court issued about twenty opinions in which it held a wide variety of mergers unlawful. Most of those opinions made no sense as a matter of basic economics.[20] Most of the transactions had no realistic potential to harm the performance of any market, and many had the potential to improve the performance of the economy.

The main sources of the poor performance of the U.S. competition law regime in the context of mergers and acquisitions were weaknesses in the staffing of the institutions that were primarily responsible for implementation of U.S. competition law at the time. All three of those institutions—federal courts, FTC, and DOJ—were staffed by capable lawyers who had a good understanding of law but little understanding of the principles of microeconomics that should be the basis for competition law and policy.

That situation changed during the period 1973 to 1976 as a result of three developments. First, the U.S. Supreme Court experienced major changes in its composition. The new majority of Justices had a much better understanding of economics than did most of their predecessors. As a result, the Supreme Court issued three opinions in 1974 and 1975 that implicitly acknowledged the serious errors in its prior merger opinions by applying a method of reasoning that was obviously inconsistent with the reasoning that was the basis for its misguided opinions of the prior decade.[21]

Second, the staffing of the Antitrust Division of DOJ and of the Bureau of Competition at FTC changed dramatically. Both institutions added to their staff of capable lawyers a large number of economists with particular expertise with respect to the principles of microeconomics that are critical to the development of a competition law regime that will produce good results. The economists were given major roles in the decision making process and were also assigned the task of helping the lawyers on the staff gain enough understanding of economics to be able to persuade courts to make decisions that are consistent with principles of microeconomics.

Third, the U.S. Congress implicitly recognized the institutional weaknesses of the federal courts relevant to mergers and acquisitions by enacting a statute that gave primary responsibility for merger policy to DOJ and FTC.[22] That statute requires anyone who proposes to implement a merger or acquisition to make a filing with DOJ and FTC in which they describe the proposed transaction and explain why they believe that the transaction is consistent with competition law. DOJ or FTC then review the proposed transaction.

In this system, 97% of all proposed mergers and acquisitions survive the initial 30-day review process and are implemented about 30 days after the proponents of the transaction make their filing. 3% raise issues that concern FTC or DOJ so much that the agencies require more than 30 days to review the proposed transaction.

The remaining 3% of cases are resolved in one of four ways. In some cases, FTC or DOJ eventually decide that the proposed transaction is unlikely to have an adverse effect on the performance of any market. Those transactions are implemented after the agencies have completed a rigorous analysis of their potential effects—typically within 60 to 180 days of the proponents filing with the agency. In a second

[20] E.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (holding a merger unlawful because it would create a firm with 4.5 per cent of a market in which 970 other firms participate). See generally Thomas Morgan, Modern Antitrust Law and Its Origins 404-462 (5th ed. 2014).

[21] United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975); United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[22] 15 U.S.C. §18a.

group of cases, FTC or DOJ conclude that the transaction is acceptable if but only if the parties agree to implement steps that would avoid any adverse effect on the performance of a market—typically sale of some assets to a third party. In most such cases, the parties agree to take the steps identified by the agency and the transaction is implemented within a year of the filing with the agencies. In a third group of cases, FTC or DOJ notify the proponents that they will oppose the merger in court if the proponents attempt to implement the transaction, and the proponents decide to abandon the transaction rather than to litigate with the agency. In the fourth group of cases, the agency notifies the proponents that it will oppose the transaction in court if the parties attempt to implement the transaction, and the proponents decide to implement the transaction even at the cost of litigating its merits in court.

That final group of cases constitutes less than 1% of all proposed mergers or acquisitions that are the subject of pre-merger filings. Thus, over 99% of all major mergers and acquisitions in the U.S. are evaluated only by one of the agencies with expertise in competition law. The evaluation process is completed within 30 days in 97% of cases and within a year in over 99% of cases.

DOJ and FTC publish extremely detailed guidelines with respect to the methods the agencies use to evaluate all proposed mergers and acquisitions.[23] They revise the guidelines frequently to insure that they reflect the current methods the agencies are using to evaluate the proposed transactions. Those methods change with some frequency because of improvements in our understanding of the principles of microeconomics that both agencies apply to predict the likely effects of each transaction on the performance of markets.

The DOJ/FTC merger guidelines are not binding on courts, but courts regularly apply them to evaluate the relatively few mergers that are the subject of litigation. Courts recognize the superior expertise of FTC and and DOJ in the process of evaluating the likely effects of mergers. The clarity of the detailed guidelines and the respect that courts give them explain why so few proposed mergers or acquisitions produce conflicts that courts must resolve. Some unknown, but undoubtedly large, number of mergers or acquisitions that firms would like to implement are never the subject of proposals that are filed with FTC and DOJ because the firms can predict with a high degree of confidence that FTC or DOJ would challenge the proposed transaction in court and would prevail in the resulting litigation.

B. Bad Characteristics of the U.S. Competition Law Regime

The U.S. competition law regime has bad characteristics that can be placed in one of three categories—(1) it still produces occasional bad decisions; (2) it takes far too long to resolve most disputes; and, (3) it creates a legal environment in which it is extremely difficult to identify the legal principles that apply to most disputes.[24]

While most of the opinions of the U.S. Supreme Court over the last forty years have reached sensible results based on sound reasoning, there have been a few cases in which the Court has used poor reasoning to support a result that makes no sense.[25] Each of those cases has a common characteristic. Each was brought by one private party against another private party. Without the benefit of the views of DOJ or FTC it is often possible for private parties to lead the Court astray. The Court lacks the level of economic

[23] E.g., DOJ/FTC Guidelines on Horizontal Mergers (2010).
[24] I describe these problems and their potential solutions in Pierce, supra. note 6.
[25] E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

expertise needed to be able to identify situations in which private parties have a shared interest in misleading the Court and then to use the Justices' own knowledge to reach a conclusion through use of sound economic reasoning.

There is an obvious remedy for this problem. Private parties should not have standing to initiate antitrust cases. Their role should be limited to the important function of bringing actions for treble damages caused by violations of competition law that are identified as a result of litigation between DOJ or FTC and the firms that allegedly violated competition law.

It takes many years to obtain a final resolution of a competition case in the U.S. There is an obvious and costly mismatch between the length of time it takes to resolve a competition law dispute and the dynamic nature of the U.S. economy. Three cases illustrate this problem and its unfortunate effects.

First, DOJ filed an action against Alcoa for allegedly monopolizing the aluminum ingot market in 1937. By the time a court issued a final decision in the case in 1945, the aluminum ingot market had changed to such an extent that Alcoa had only a modest share of the market. The court determined that Alcoa had monopolized the market, but it saw no need to provide any remedy for that violation of competition law because it had been remedied by the passage of time.[26]

Second, in 1969 DOJ filed an action against IBM for allegedly monopolizing the computer market. In 1982, when the case was still in the pre-trial discovery process, DOJ withdrew its complaint because IBM's share of the computer market had shrunk to the point at which it could not conceivably have monopoly power.[27]

Finally, no court has reached a final decision with respect to the merits of any proposed merger or acquisition in many decades.[28] If the proponents of a proposed merger or acquisition decide to proceed with the transaction after DOJ or FTC notify the proponents that they will oppose the proposed transaction in court, DOJ or FTC seek a temporary injunction from a court. In theory, the injunction lasts only until a court can resolve the merits of the dispute. In fact, it takes so long to resolve the merits of any such dispute that either one of the parties capitulates after it loses the battle for a temporary injunction or the parties settle the dispute.

The problem of undue delay is also easy to solve. DOJ and FTC have long used the process of oral evidentiary hearings to resolve competition law disputes. Most federal agencies have substituted the process of "paper hearings," i.e., written exchanges of evidence and arguments, for oral evidentiary hearings when they resolve economic issues like those that arise in a typical competition law dispute.[29] Paper hearings can be completed and can form the basis for a final decision on the merits in a much shorter period of time than can oral evidentiary hearings. The process that DOJ and FTC use to evaluate proposed mergers and acquisitions illustrates the efficiency advantages of the paper hearing process. In 97% of cases, DOJ and FTC complete the process of evaluating the potential anticompetitive effects of a proposed merger or acquisition within 30 days, and they rarely require more than a few months to complete the process of evaluating even the most complicated proposed transactions that raise the most

[26] United States v. Alcoa, 148 F. 3d 416 (1945).
[27] See David Levy & Steve Welzer, System Error: How the IBM Antitrust Suit Raised Computer Prices, Regulation 27 (Sep./Oct. 1986).
[28] See Pierce, supra. note 6, at 2030-31.
[29] For a discussion of the case law on this issue see Richard Pierce, I Administrative Law Treatise §8.2.

serious questions with respect to the risk that they will have an adverse effect on the performance of a market.

The final unfortunate characteristic of the U.S. competition law regime is the difficulty of determining what the law is at any point in time. As an antitrust professor, I am in the awkward position of having to tell my students that I can only guess what the law is with respect to the vast majority of the patterns of conduct that can be deemed by a court to violate U.S. competition law. In all contexts except mergers and acquisitions, my only source of data to answer that question is an opinion of the U.S. Supreme Court that is so old that it almost certainly does not reflect the thinking of the members of the Court today.[30]

The law governing the practice of tying one good or service to another good or service illustrates the problem. The most recent Supreme Court opinion that announces a test for deciding when tying is unlawful was issued by a plurality of three Justices in 1984.[31] It is virtually certain that the Justices would not apply that test today, but I can only make an educated guess about the test they would apply today. Lower court judges that have to decide tying cases and lawyers who are asked to advise their clients with respect to the law of tying have the same problem.

Like the other two bad characteristic of the U.S. competition law regime, this problem is easy to solve. If FTC had the power to issue rules to implement the U.S. competition law statutes, they would do so and would revise those rules on a regular basis to insure that they reflect the agency's current methods of evaluating conduct like tying. The DOJ/ FTC guidelines illustrate the value of agency guidelines of that type. Firms that are considering whether to propose a merger or acquisition can use the merger guidelines to predict with great confidence the manner in which DOJ or FTC will evaluate the proposed transaction and the results of that evaluation process.

III. The Indian Competition Law Regime

I do not have nearly the depth of understanding of the Indian competition law regime that I have of the U.S. competition law regime. Most of my limited knowledge was provided by the able student research assistant that the National Law School of India provided me. I will use that limited knowledge to describe the Indian competition law regime and to evaluate it through use of the same criteria I applied to the U.S. competition law regime.

A. The statutes

Indian competition law is much younger than U.S. competition law. The basic statute that governs competition law in the U.S., the Sherman Antitrust Act, was enacted 77 years before India existed as an independent country. Development of competition law in India also was delayed by the lack of enthusiasm for a market-based economy that was shared by most of the population and political leadership of India for several decades after India obtained its independence.

The first Indian competition statute, the Monopolies and Restrictive Trade Practices Act of 1969, was replaced by the Competition Act of 2002 (CA). That statute prohibits any agreement "which causes or is likely to cause an appreciable adverse effect on competition within India" (AAEC).[32] Some agreements are

[30] See Pierce, supra. note 6, at 2045-47.
[31] Jefferson Parish Hospital v. Hyde, 466 U.S. 2 (1984).
[32] Competition Act §3(1).

presumed to have AAEC.[33] They are unlawful unless they can be shown to create efficiency gains. They correspond roughly to the types of agreements that remain subject to a qualified per se prohibition in U.S. law—agreements to determine price, agreements to limit supply, agreements to share a market, and agreements to engage in collusive bidding. Other types of agreements are unlawful only if they can be proven to have AAEC and they do not create efficiency gains.[34] The statute also prohibits "abuse of dominant position."[35]

The CA also regulates mergers but those provisions did not go into effect until 2011.[36] Large firms that propose to merge or to acquire other large firms must notify the government in advance. Mergers that have AAEC are unlawful.

The CA specifically authorizes the government to issue rules to implement the Act,[37] and the government has already issued many procedural and substantive rules.

B. The Institutions

Five institutions play major roles in implementing Indian competition law.

1. The Competition Commission

The Competition Commission of India (CCI) consists of a Chair and 2 to 6 other members.[38] They are appointed by the Central Government based on the recommendations of a committee consisting of the Chief Justice of India, the Secretary of the Ministry of Corporate Affairs, the Secretary of the Ministry of Law and Justice and two reputed experts. The Chair and the members serve a term of five years and they can be removed by the central Government only for cause.

The CCI has the power to determine that any practice violates the CA. It has the power to ban any such practice and to ban it on an interim basis during the period in which it is investigating the practice. It can impose civil penalties and criminal penalties of up to three years in prison for violations of the CA. It has the same powers as a civil court and it has exclusive jurisdiction over disputes that arise under the CA. It also has the power to determine its own procedures.

2. The Director General

The Director General (DG) is the investigative arm of the CCI.[39] The DG is appointed by the Central Government. The DG has a duty to investigate any alleged violation of the CA or the rules of the CCI when requested to do so by the CCI. At the end of his investigation, the DG must issue a report that is not binding on the CCI. The DG has many of the powers of a civil court, including the power to require the production of documents and the power to seize documents. The DG has the power to issue orders, the violation of which can be punished by the CCI.

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[33] Id. at §3(3).
[34] Id. at §3(4).
[35] Id. at §4(1).
[36] Id. at §§5 and 6.
[37] Id. at §64(1).
[38] Id. at §§7-12.
[39] Id. at §39.

3. The Competition Appellate Tribunal

The Competition Appellate Tribunal (COMPAT) has exclusive jurisdiction to hear appeals from decisions of the CCI.[40] It consists of a chair and two members who are appointed by the Central Government from a list prepared by a selection committee. Members can be removed only for cause by the Central Government in consultation with the Chief Justice of India. COMPAT has the powers of a civil court and can issue its own rules of procedure.

4. The Supreme Court

The Supreme Court of India has exclusive jurisdiction to hear appeals from decisions of COMPAT.[41]

5. Private Parties

Private parties can provide information that can form the basis for an inquiry by the CCI and can apply for compensation from the COMSAT based on the findings of the CCI or the orders of COMSAT.[42] Notably, however, private parties can not actually initiate proceedings to determine whether a firm has violated the CA.

IV. Evaluating the Indian Competition Law Regime

There are many important gaps in my knowledge of the Indian competition law regime. To some extent the gaps are attributable to my relative ignorance of the actions that the Indian competition institutions have taken. The institutions are so new, however, that some of the most important characteristics of the Indian competition law regime are unknown and unknowable to anyone at this early stage in the development of India competition law. As Dr. K.D. Singh, Deputy Director (Law) at the Competition Commission noted at a 2015 Symposium on Competition Law sponsored by the National Law School, “there is no established jurisprudence on most substantive issues.” Any legal regime this young must be considered a work in progress that requires more work to complete.

This is an ideal time for India to look at the rich history of the U.S. competition law regime for lessons on how to construct a competition law regime in India that will serve the nation well. I am not suggesting that Indian government officials try to replicate the U.S. regime. The U.S. has made many serious mistakes in its 126 years of efforts to craft a good competition law regime. The U.S. has corrected many of its past mistakes, but the U.S. competition regime is still far from ideal, as section II of this article explains.

The Transcript of the 2015 Symposium on Indian Competition Law describes well-informed debates with respect to all of the most important problems that confront the other major competition law regimes of the world. The debates drew heavily on the academic literature and the experiences of the U.S. and E.U. institutions that implement competition law. Many of the issues addressed at the symposium are challenging, but the sophisticated nature of the debates suggests that India has as good a chance as the U.S. and E.U. of addressing the issues effectively.

India can learn from the trial and error method the U.S. has used to try to create a good competition law regime. By studying the history of U.S. competition law, Indian scholars and government officials can avoid

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[40] Id. at §43.
[41] Id. at §53T.
[42] Id. at §53N

the mistakes the U.S. has made and can create a competition law regime that functions better than the U.S. competition law regime. There is a saying among law reform advocates in the U.S.: "take the best and leave the rest." India should take that approach in its efforts to use the U.S. competition law regime as part of its basis to finish the task of creating a competition law regime for India. That is the spirit in which I provide this evaluation of the Indian competition law regime.

The basic elements of the Indian competition law regime are excellent. The statutes are drafted in ways that recognize the need for the institutions to decide when a particular type of conduct is likely to produce bad effects on the performance of a market and when that same type of conduct is unlikely to produce bad effects and has instead the potential to produce socially desirable results. The institutions also seem well suited to the task.

The basic elements of the Indian competition law regime are better than their U.S. counterparts in several important ways. First, unlike the FTC and DOJ, the CCI has the power to issue substantive rules to implement the CA. Second, unlike the U.S., India has avoided the risk that private parties will create bad legal precedents by litigating cases before courts of general jurisdiction whose judges lack the expertise required to consider critically the often implausible theories the private parties urge the courts to adopt. India has accomplished that both by conferring exclusive jurisdiction on institutions with appropriate expertise and by declining to allow private parties to initiate competition law proceedings. Third, the Indian Competition Commission has the power to determine its own rules of procedure. Used wisely, that power allows the Commission to adopt procedures that are adequate to the task but do not produce the interminable delays that plague the decision making processes of the FTC and U.S. courts.

The Indian Supreme Court has issued two opinions that establish basic ground rules applicable to the Competition Commission. In Rangi International Ltd. v. Nova Scotia Bank and Others (2013) 7 Supreme Court Cases 160, the Court held that the Commission must state reasons to support its actions. That requirement is critical to the success of any agency-administered legal regime. Courts, the Prime Minister, Parliament, and the public must have a means of understanding why the Commission acted as it did in each case.

In Competition Commission of India v. Steel Authority of India Limited and Another (2010) 10 Supreme Court Cases 744, the Court held that all proceedings before the Commission must be completed "most expeditiously" and in a period of time even shorter than the demanding decisional deadlines stated in the applicable statute. The Commission may find this mandate difficult, or impossible, to implement, and the Supreme Court may experience great difficulty enforcing the mandate. That has been the U.S. experience.

U.S. courts lack the power to require U.S. agencies to act expeditiously. U.S. courts have the power, and the duty, to enforce statutory deadlines on agency actions, but they have not been able to accomplish that task effectively. The U.S Congress imposes hundreds of unrealistic statutory deadlines on agency actions, requires agencies to use procedures that are extremely time-consuming, and then refuses to provide agencies with the resources required to accomplish more than a modest fraction of the many demanding tasks they are required to perform. The disappointing results are described in chapter 12 of my Treatise on Administrative Law and in an article by Yale Law Professor Nicholas Parrillo that will be published in the next issue of Harvard Law Review.

India can complete the process of creating an excellent competition law regime by taking just a few important steps. First, and most important, India needs to pay a lot of attention to appropriate staffing of the institutions. The U.S. improved its competition law regime dramatically when it added large numbers of talented economists to the FTC Bureau of Competition and the DOJ Antitrust Division and gave economists a major voice in the process of shaping and applying competition law.

Second, India can avoid the crippling delays in the U.S. competition law regime by adopting rules of procedure that recognize that paper hearings are at least as good as oral evidentiary hearings for purposes of resolving the typical disputes that arise in proceedings before competition law tribunals.

Third, India can make good use of the CCI’s power to issue rules by issuing rules that describe in detail the way the CCI makes decisions about whether a particular type of conduct violates the CA. The FTC/DOJ merger guidelines are a good illustration of the kinds of rules and guidelines that can be extremely valuable in allowing all members of the public to understand what the CCI is doing and to predict the manner in which CCI will evaluate a particular form of conduct in a variety of factual situations.

Fourth, India should consider amending the CA to allow COMPAT to award treble damages to private parties who have been injured by violations of the CA as determined by the CCI. The treble damage remedy in U.S. competition law provides a powerful deterrent to firms that are tempted to violate the competition laws.

Conclusion

I am optimistic that India will complete the difficult process of creating a competition law regime that will be a model for the rest of the world. The Indian Parliament has provided the raw materials that have the potential to produce that result.