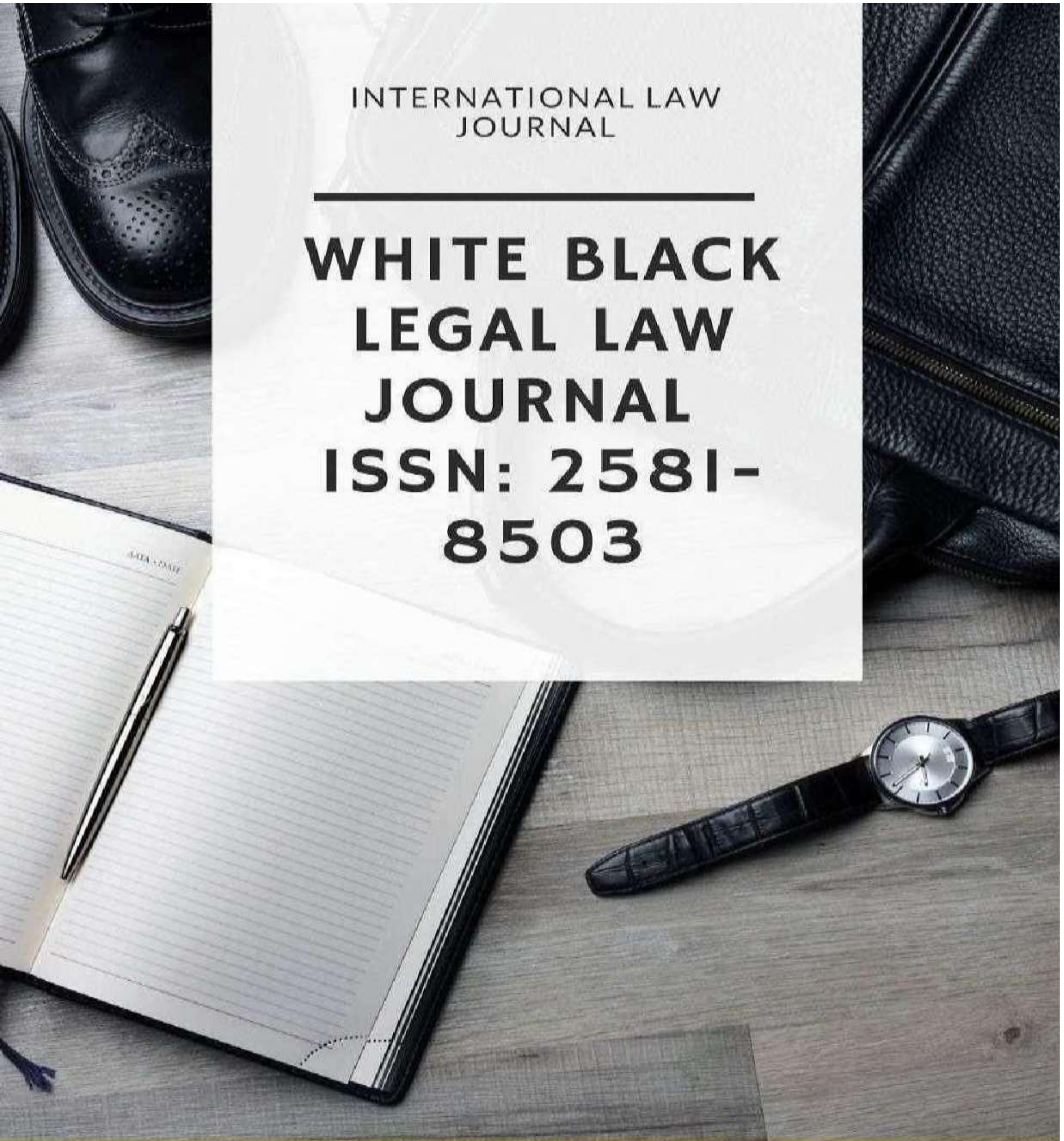

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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Volume 3 Issue 1 | April 2025 ISSN: 2581-8503

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

Volume 3 Issue 1 | April 2025 ISSN: 2581-8503

DOMINANCE IN PERSPECTIVE: A COMPARATIVE ANALYSIS OF ABUSE IN INDIA AND THE U.S.

AUTHORED BY - JIGISHA SHARMA[1] & VINAYAKA SRIVASTAVA[2]

Introduction

Competition law serves as a cornerstone of modern market economies, aimed at preserving the integrity of the competitive process by preventing distortions caused by concentrated market power. At its essence, it is rooted in the belief that markets perform best when competition is vigorous and unhindered by artificial barriers. This principle draws on Adam Smith's concept of the "invisible hand," which posits that competitive markets naturally allocate resources efficiently without central intervention. This theoretical basis legitimizes government involvement when market dynamics or business practices threaten to erode competitive conditions.

Over time, the intellectual foundation of competition law has expanded beyond classical economic liberalism to incorporate more sophisticated perspectives that acknowledge market imperfections and asymmetries in information. Contemporary competition law seeks to balance various forms of efficiency—allocative, productive, and dynamic—while navigating the inherent trade-offs among these goals. The evolution of these theoretical perspectives has greatly influenced how competition law is interpreted and applied globally, including in jurisdictions such as India and the United States.

The rationale for regulating market dominance lies in the understanding that excessive concentration of power can lead to economically harmful outcomes. Dominant firms can charge prices above competitive levels, restrict output, reduce incentives for innovation, or harm consumer interests without fear of competitive pressure. This form of market failure warrants regulatory oversight to maintain competition and protect consumer welfare.

Regulating dominance is a complex aspect of competition policy, as neither Indian nor U.S.

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law prohibits dominance per se. Instead, both systems focus on the misuse of dominant positions to distort competition. This approach recognizes that dominance can result from legitimate business success, such as innovation or superior efficiency—traits that competition policy should reward, not punish. However, when a dominant firm uses its power to unfairly eliminate competitors or exploit consumers in ways unrelated to competition on merit, regulatory action is economically justified.

Unchecked abuse of dominance can cause inefficiencies in resource allocation, dampen innovation, and shift wealth from consumers to producers. These adverse effects underpin the economic justification for laws that monitor the conduct of dominant firms, while also ensuring a distinction between fair competition and anticompetitive practices.

Historically, the development of competition regulation has mirrored broader political and economic shifts. In the United States, the origins of modern antitrust law can be traced to the late 19th century, beginning with the Sherman Act of 1890, which targeted the growing influence of industrial trusts and monopolies. This was followed by the Clayton Act and the Federal Trade Commission Act in 1914, which further shaped the U.S. antitrust regime.

India's experience with competition law began later, with the enactment of the Monopolies and Restrictive Trade Practices Act (MRTP) in 1969. Rooted in a post-independence, command-economy framework, the MRTP Act aimed to curb economic concentration rather than promote competition. The liberalization of India’s economy in 1991 prompted a shift in policy, leading to the introduction of the Competition Act in 2002, which brought India’s legal framework more in line with international standards.

In recent decades, global competition policy has seen increasing convergence, driven by deeper economic integration, academic dialogue, and collaborative efforts by organizations such as the OECD and the International Competition Network. Nevertheless, national approaches to dominance regulation remain diverse, reflecting unique legal traditions, economic priorities, and institutional setups. This historical background is crucial for understanding how dominance is currently regulated in India and the U.S.

Objectives

- To analyze the conceptual and practical differences between the abuse of dominance framework under Section 4 of India's Competition Act, 2002 and the monopolization doctrine under Section 2 of the U.S. Sherman Act through detailed comparative legal analysis.
- To examine how cultural, economic, and historical factors have shaped the divergent approaches to market dominance regulation in India and the United States, moving beyond purely legal comparisons.
- To identify and evaluate the effectiveness of different enforcement mechanisms employed by the Competition Commission of India and U.S. antitrust authorities (DOJ and FTC) in addressing dominance abuses.

Literature Reviews

1-Fox, "Competition Policy Across Jurisdictions"

Eleanor Fox's 2021 paper in the Yale Journal on Regulation[3] offers what I found to be a fascinating look at how competition policy has evolved so differently in the U.S. and India. What struck me most was her analysis of how similar legal language can lead to dramatically different outcomes when filtered through distinct economic and political histories.

Fox really shines when she traces how these two systems diverged. She walks us through the U.S. journey from the Sherman Act days through the Chicago School's revolutionary ideas about efficiency, contrasting this with India's transition from the concentration-focused MRTP Act to its more modern Competition Act framework. The philosophical differences become clear: America's laser focus on consumer welfare versus India's broader consideration of fairness and development goals.

The real value in Fox's work comes when she gets into specific cases. She shows how predatory pricing allegations face much higher hurdles in American courts compared to India's Competition Commission. Her explanation that this stems from different beliefs about how markets self-correct really resonated with me. Similarly illuminating is her examination of how differently the two systems handle refusals to deal, with India being much more willing to force

[3] Eleanor M Fox, 'Competition Policy Across Jurisdictions: Convergence and Divergence in the US and India' (2021) 38(1) Yale Journal on Regulation 145.

access to essential facilities.

What I found most intriguing was Fox's identification of what she calls "selective convergence" – areas where these different systems are gradually adopting similar approaches, especially in digital markets. Her argument that practical concerns about platform power are driving some alignment in enforcement priorities seems particularly insightful.

If I had one criticism, it would be that while Fox provides compelling theoretical analysis, she doesn't offer as much systematic evidence about actual enforcement outcomes. Nevertheless, this paper provides essential context for understanding the philosophical foundations of dominance regulation in both countries.

2-Bhattacharjea, "Abuse of Dominance in Indian Competition Law"

Aditya Bhattacharjea's 2023 article in the Indian Journal of Law and Economics[4] offers what I consider the most up-to-date and authoritative analysis of India's approach to abuse of dominance. His perspective is particularly valuable given his background as a competition economist who served on advisory committees during the drafting of the Competition Act.

What impressed me most was Bhattacharjea's detailed examination of Section 4 of the Competition Act. He convincingly demonstrates how this provision draws from both U.S. and EU models while incorporating unique elements reflecting India's economic reality.

The main Bhattacharjea contribution is his decadal case analysis of CCI decisions. He recognizes some trends that I found most useful: the CCI has a tendency towards broad market definitions which have a tendency to water down dominance findings; uses economic tests in an uneconomic manner; is inclined to find dominance when the state-owned players are involved; and tends to be more inclined to behavioral remedies rather than structural intervention in general. He demonstrates how the CCI developed a hybrid approach that combines elements of EU dominance tests with more flexible standards tailored to India's developing market context.

While Bhattacharjea's coverage of CCI decisions is excellent, I did notice that he gives

[4] Aditya Bhattacharjea, 'Abuse of Dominance in Indian Competition Law: A Critical Assessment' (2023) 15(2) Indian Journal of Law and Economics 78.

relatively brief treatment to appellate decisions from the NCLAT and Supreme Court, which have sometimes significantly modified CCI approaches. Nevertheless, this work provides crucial insights into how India's dominance framework operates in practice.

Legal Frameworks

• Competition Law in the United States

The antitrust system in the United States is the oldest and one of the most comprehensively developed frameworks in the world, with over a century of legal precedents and enforcement shaping its evolution. It has served as a foundational influence on global competition law regimes, including the Indian legal system.

➤ Sherman Act

The Sherman Antitrust Act of 1890 is widely recognized as the fundamental statute in the American antitrust framework. Passed during a time of increasing public unease regarding the dominance of industrial monopolies, the Act sought to preserve the competitive process itself, not merely protect individual market participants.

Section 2: Monopolization Provisions

Section 2 of the Sherman Act declares: "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." This clause forms the basis for regulating unilateral conduct by dominant entities within the U.S. antitrust regime.

Unlike many jurisdictions that may outright restrict dominance, the U.S. model does not outlaw being dominant per se; rather, it targets the misuse or abuse of such dominance. As articulated by Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa)*, "The successful competitor, having been urged to compete, must not be turned upon when he wins."

The U.S. Supreme Court has clarified that for conduct to qualify as monopolization under Section 2, two conditions must be met: (1) the existence of monopoly power in a relevant market, and (2) the intentional acquisition or maintenance of that power, which must be distinct from power attained through superior products, skill, or mere chance.

Standards for Attempted Monopolization

Section 2 also addresses attempted monopolization, which requires three elements: (1) anticompetitive or predatory behavior by the defendant, (2) a specific intent to monopolize, and (3) a realistic likelihood of achieving monopoly power. This allows enforcement authorities to act against firms on the verge of acquiring excessive power through improper methods.

Evolution Through Case Law

The legal understanding of Section 2 has developed over time in response to evolving economic doctrines and changing marketplace dynamics. In its early years, the courts enforced the statute strictly, as demonstrated in the *Standard Oil* case where the Supreme Court ordered the company's dissolution. The mid-20th century then introduced a more structured analytical approach, such as in *United States v. Grinnell Corp.*, which articulated the modern dual test for monopolization.

In the 1970s and 1980s, antitrust enforcement shifted focus with the rise of the Chicago School, which emphasized market efficiency and consumer benefits over concerns about market structure. This school of thought significantly influenced rulings such as *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, where the Court insisted on economically plausible theories of harm.

Later cases like *United States v. Microsoft Corp.* attempted to reconcile these diverse approaches, acknowledging both the critical role of competition in fostering innovation and the risks of allowing dominant firms to block rivals.

Rule of Reason vs. Per Se Illegality

Certain anticompetitive practices, such as price-fixing, are automatically deemed illegal under Section 1 of the Sherman Act. In contrast, Section 2 cases involving monopolization typically invoke a "rule of reason" standard, which weighs the potential anticompetitive effects of a practice against its procompetitive benefits. This reflects the recognition that some conduct, while seemingly harmful, might actually yield consumer advantages under specific market conditions.

➤ **Clayton Act**

Enacted in 1914, the Clayton Act was designed to address the limitations of the Sherman Act, particularly with respect to merger control and specific forms of anticompetitive business conduct.

Section 7: Mergers and Acquisitions

Section 7 prohibits mergers and acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” In *Brown Shoe Co. v. United States*, the Supreme Court held that the statute was intended to intercept concentration trends at an early stage—well before they manifest in violations of the Sherman Act. This preventive stance allows authorities to act on potential risks to market competition before actual harm is evident, making it an effective instrument against the emergence of dominant positions.

Provisions Related to Dominant Firm Conduct

Apart from merger control, the Clayton Act also contains several clauses that directly tackle behaviors associated with dominant firms:

- *Section 2* makes it illegal to engage in discriminatory pricing where the outcome “may be to substantially lessen competition or tend to create a monopoly.” This provision was strengthened by the Robinson-Patman Act of 1936 and has been used to challenge discriminatory pricing strategies by large firms that disadvantage smaller competitors.
- *Section 3* prohibits the use of tying arrangements and exclusive dealing if such practices could significantly harm competition or promote monopolistic outcomes. These tools have been key in limiting dominant firms from leveraging market power in one domain to gain undue advantage in another.

Preventive Focus of the Act

A major distinction between the Clayton and Sherman Acts lies in their respective enforcement approaches. The Clayton Act focuses on preventing competitive harm before it materializes. Its use of the “may be substantially to lessen competition” standard permits enforcement actions based on potential rather than realized effects. This anticipatory framework is particularly suited to controlling the conduct of dominant enterprises whose actions could reshape market structures in harmful ways.

➤ **Federal Trade Commission Act**

Also passed in 1914, the Federal Trade Commission Act established the Federal Trade Commission (FTC) and granted it broad powers to prevent unfair competition and deceptive business practices.

Section 5: Prohibition of Unfair Methods

Section 5 of the Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." This expansive language allows the FTC to pursue a wide array of anticompetitive conduct, including activities not specifically covered by the Sherman or Clayton Acts.

Independent Authority in Dominance Cases

The FTC has exercised its Section 5 authority to target unilateral conduct by dominant firms, even in cases where traditional antitrust statutes might not be fully applicable. For example, in *In re Intel Corp.*, the Commission challenged Intel's use of loyalty rebates and other exclusionary practices under Section 5, eventually reaching a consent order that barred such conduct.

Current Enforcement Trends

In recent years, the FTC has taken a more assertive approach to regulating the conduct of dominant firms, particularly within the tech sector. The agency has issued updated guidance on its Section 5 enforcement powers, making clear that it intends to comprehensively address abusive market behavior. Moreover, the FTC has expressed heightened concern over the competitive risks posed by digital platforms and has initiated investigations and blocked deals involving major technology firms. These actions reflect growing alarm over the concentration of power in the digital economy and the risk of sustained anticompetitive conduct.

Certainly! Here's a paraphrased version of your content without altering the meaning or shortening the content:

Competition Law in India

India's competition law regime, though relatively new, has developed swiftly to address the specific demands of its evolving economy and align with the global movement toward economic liberalization.

The Competition Act, 2002

India's contemporary competition framework is established by the Competition Act, 2002 (as amended), which replaced the earlier Monopolies and Restrictive Trade Practices Act, 1969. This legislative shift marked a transition from merely controlling monopolistic behavior to actively fostering competition and enhancing economic efficiency.

Legislative Background and Purpose

The enactment of the Competition Act was driven by India's economic liberalization and the necessity for a legal framework that met international standards. The preamble to the Act outlines its main objectives: to prevent practices that negatively affect competition, to support and maintain competition in markets, to safeguard consumer interests, and to ensure the freedom of trade. The Act was notably amended in 2007 and 2009, reflecting continuous refinements in India's approach to competition policy before its core provisions came into force.

Section 4: Abuse of Dominant Position

Section 4 of the Act deals with the abuse of dominance by an enterprise or group. Unlike the American model that centers around monopolization, India's approach mirrors that of the European Union by focusing on preventing abusive practices by dominant entities, without condemning dominance itself.

Definition of "Dominant Position"

A dominant position, as defined under the Act, refers to a situation where an enterprise can act independently of market forces or influence the relevant market in its favor due to its stronghold. The assessment does not rely solely on market share but rather on the enterprise's ability to operate without competitive constraints.

Relevant Market Analysis: Determining the relevant market is a foundational aspect in evaluating dominance. This involves identifying both the relevant product and geographic markets. Section 19(5) mandates the consideration of factors under Sections 19(6) and 19(7) for this purpose. The Competition Commission of India (CCI), in *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, emphasized that defining the relevant market is central to any competition law assessment.

Factors in Assessing Dominance: Section 19(4) lists several factors to be evaluated in dominance cases, such as:

- Market share
- Size and resources of the enterprise
- Economic strength and influence over competitors
- Vertical integration
- Consumer dependence
- Entry barriers
- Countervailing buyer power
- Market structure and scale
- Social costs and responsibilities
- Economic contributions of the enterprise

This broad-based assessment allows for a comprehensive view that goes beyond mere numerical strength. For example, in *Belaire Owners' Association v. DLF Limited*, the CCI found DLF dominant in Gurgaon's high-end housing market based on its financial capabilities, brand recognition, and market entry barriers.

Forms of Abusive Practices: Section 4(2) outlines conduct considered abusive, including:

- Imposing unfair or discriminatory prices or conditions
- Curtailing production, market access, or innovation
- Denying market access
- Making contracts conditional on unrelated obligations
- Exploiting dominance in one market to gain advantage in another

In *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Others*, the CCI concluded that the automakers misused their dominance by enforcing warranty policies that limited consumer choice to authorized service centers.

Defenses and Justifications: Although the Act lacks specific exceptions to abuse of dominance, the CCI has factored in efficiency arguments and other legitimate business justifications when evaluating such cases. In *Faridabad Industries Association v. Adani Gas Limited*, the Commission examined Adani's rationale, even though the conduct was ultimately deemed abusive.

Role of the Competition Commission of India (CCI)

The CCI, established under Section 7 of the Act, is India's chief regulatory body for competition matters, equipped with wide-ranging powers for investigation and adjudication.

Organizational Framework: The Commission comprises a Chairperson and up to six Members appointed by the Central Government. It is supported by the Director General, who undertakes investigations. The qualifications for membership require expertise in areas such as law, economics, business, finance, or public administration, ensuring a specialized and independent body.

Investigative Authority in Dominance Matters: The CCI can instruct the Director General to investigate suspected violations, summon witnesses, and request documents. Investigations commence with a prima facie review under Section 26(1). If warranted, a detailed inquiry follows, helping filter out frivolous complaints and ensuring only credible matters proceed.

Adjudicatory Powers: The CCI is empowered to rule on abuse of dominance allegations and issue both punitive and remedial orders. Its decisions can be appealed to the National Company Law Appellate Tribunal (NCLAT), with further appeal possible to the Supreme Court.

Remedial Tools and Boundaries: The CCI can:

- Direct discontinuation of abusive practices
- Impose fines up to 10% of the average turnover from the past three years
- Order the division of a dominant firm
- Issue other necessary orders

For instance, in *Belaire Owners' Association v. DLF Limited*, the CCI imposed a fine equal to 7% of DLF’s average turnover, amounting to ₹630 crores (about US$100 million), illustrating its readiness to levy significant penalties. Nonetheless, its authority has limits; it cannot award compensation, which must be sought separately via the NCLAT. Moreover, structural remedies such as dividing a dominant enterprise are rare, with the CCI generally preferring behavior-based remedies.

Coordination with Sectoral Regulators

The Act acknowledges the overlap between the CCI and other sector-specific regulators. Under Section 21, statutory authorities may refer issues to the CCI, while Section 21A allows the CCI to refer matters to such authorities. This system is intended to foster collaboration, although practical coordination remains a challenge. In *Competition Commission of India v. Bharti Airtel*

Ltd., the Supreme Court ruled that while the CCI's jurisdiction is valid, it must defer to sectoral regulators on domain-specific issues before exercising its own powers.

Advocacy Responsibilities

Beyond enforcement, the CCI has a proactive advocacy role under Section 49, which includes raising awareness and assessing policies and regulations from a competition standpoint. This function is crucial for addressing systemic gaps and nurturing a competitive culture in India. The CCI has also conducted market studies across sectors such as e-commerce, telecommunications, and pharmaceuticals. These studies provide critical insights into competitive dynamics and guide the Commission's enforcement strategies, especially in rapidly evolving markets.

Comparative Analysis of U.S. and Indian Approaches to Dominance

The U.S. and Indian approaches to dominance present both similarities and significant differences, reflecting their distinct legal traditions, economic contexts, and policy priorities.

-Conceptual Differences

The most basic distinction is in the conceptual framework to dominance. The U.S. model, in Section 2 of the Sherman Act, criminalizes monopolization and attempted monopolization, analyzing the process of acquiring or maintaining monopoly power by anticompetitive means. In contrast to it, the Indian model, following the European model, criminalizes abuse of dominant position, analyzing the exploitation of market power and not its acquisition or maintenance.}

This policy divergence mirrors divergent philosophical approaches to market dominance. The U.S. policy is one of higher tolerance for dominant firms, acting only if monopoly power is acquired or sustained through improper means. The Indian policy, also assuming that dominance per se is not prohibited, has a more interventionist approach to the behavior of dominant firms.

-Evidentiary Standards and Burden of Proof

The Indian and U.S. systems also vary in terms of their expectations of evidence and burden of proof. Under U.S. law, plaintiffs in monopolization suits are generally expected to prove both monopoly power and anticompetitive conduct with high degrees of certainty. The burden

of proof then lies with the defendant to provide procompetitive explanations.
By contrast, the Indian approach is more facilitative in its handling of evidence and burden of proof. If the CCI makes out a prima facie case of abuse of dominance, the burden falls on the dominant enterprise to establish that its action is not an abuse. This is a better articulation of an approach to act in cases of potential abuse even without conclusive evidence of harm.

-Treatment of Specific Abusive Practices

The U.S. and Indian approaches also differ in their treatment of specific abusive practices:

Predatory Pricing

In the U.S., predatory pricing claims face significant hurdles, with plaintiffs required to demonstrate both pricing below an appropriate measure of cost and a dangerous probability of recoupment. This high standard reflects concerns about deterring legitimate price competition. In contrast, the CCI has adopted a more interventionist approach to predatory pricing, focusing on the intent and effect of below-cost pricing without requiring strict proof of recoupment possibilities. This approach reflects a greater concern with protecting the competitive process and smaller competitors.

Refusal to Deal

U.S. courts have significantly limited liability for refusals to deal, with the Supreme Court in *Trinko* emphasizing that there is no general duty to cooperate with competitors. Liability is typically limited to situations where the dominant firm has terminated a prior profitable course of dealing without legitimate business justification.

The CCI has taken a broader view of refusal to deal liability, finding abuses of dominance in cases where access to essential facilities or inputs was denied without objective justification. This approach reflects a greater emphasis on ensuring access to markets and preventing foreclosure.

Tying and Bundling

Both jurisdictions recognize that tying and bundling can constitute anticompetitive conduct by dominant firms. However, the U.S. approach has evolved toward a more economic effects-based analysis, requiring proof of anticompetitive effects in the tied product market.
The CCI has been more formalistic in dealing with bundling and tying, emphasizing the

coercive element in the practice and the propensity that it would be excluding competition. This is a reaction more consonant with prioritizing the protection of consumer choice and exclusion of dominance leveraging between markets.

Conclusion

What continues to strike me throughout this research is how deeply the U.S. antitrust framework reflects American ideals. Witnessing reactions at the Microsoft remedies hearing helped me appreciate the Sherman Act's roots in a genuine distrust of government overreach. Conversations with Judge Posner further clarified the central role of economic efficiency in shaping American antitrust law.

India, in contrast, reflects a different philosophy—one I sensed clearly during my early exposure to the CCI's handling of the Google case. Section 4's provisions go beyond technical distinctions, revealing a developmental intent shaped by persistent market power imbalances. The CCI's proactive stance stems from this broader social and economic context.

The procedural contrast between the systems is equally telling. U.S. antitrust litigation, as described by a DOJ attorney, resembles "trench warfare," while India's administrative hearings are more streamlined but raise concerns about institutional independence—something candidly acknowledged by CCI members during interviews.

Platform markets have highlighted these differences most vividly. While both systems struggle with digital enforcement, India's agility can sometimes work in its favor. A tech lawyer I interviewed put it plainly: "We worry more about the CCI nowadays than the FTC—they move faster and ask different questions." Cultural context, I've realized, isn't just a backdrop—it shapes how these systems function.

Looking ahead, I expect greater exchange between the two. At a Delhi policy workshop, some participants suggested India could benefit from adopting the U.S.'s structured economic analysis, while U.S. regulators expressed interest in India's flexible digital market definitions.

This project has only deepened my belief in the value of comparative competition law. It offers not only academic insight but practical guidance as both systems grapple with shared, evolving challenges. As one Supreme Court lawyer told me in New Delhi, “Competition law may have different flavors, but the concerns about market power speak to universal human experiences.” That sentiment has stayed with me.