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The Certainty-Severity Tradeoff in Antitrust Law and Administration: Where the United States and India Differ

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ABSTRACT

In this paper, I use the certainty-severity tradeoff as my analytical lens—a novel move in antitrust—to explain the difference between U.S. and Indian antitrust law. I argue that, in antitrust, India prefers certainty of enforcement while the U.S. prefers severity of enforcement. This difference is not driven by doctrine or economic policy; rather, I locate this difference in six key institutional factors. And using economic theory, I argue that a difference in social attitudes to risk explains and justifies this institutionally-manifested difference in law.

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INTRODUCTION

Today globally, antitrust law is center-stage. As the American political right and left fight about various aspects of antitrust law, and unite over others, regimes far away watch and learn, or try to. India is one such regime—a young one with great potential. There are many important differences between India's young antitrust regime and America's old one. Synthesizing them and looking beyond their superficialities reveals what I think is the core difference: India prefers certainty, the U.S. prefers severity. Institutions, rather than economic or doctrinal principles, drive this difference—as I will show through an examination of six key administrative factors. And differences in attitudes to risk might explain and justify this difference—as I will show through an application of economic theory.

In Part I, I will describe the key features of the two countries' systems of antitrust law and administration, and their substantive similarity. In Part II, I will argue that thinking in terms of the certainty-severity tradeoff captures the defining difference between the two systems, which is rooted in institutions and administration. In Part III, I will examine a potential cause of this difference and its implications, locating them in different attitudes toward risk.

I. THE LAY OF THE LAND(S)

A. The United States

Broadly, the Sherman Act outlaws anticompetitive agreements and the willful acquisition or maintenance of monopoly power.[1] The Clayton Act outlaws conduct including anticompetitive tying, price discrimination, requirements contracts, mergers, and acquisitions.[2] The Hart-Scott-Rodino Act amended the Clayton Act to ban some discriminatory prices and services, and to require a merging or acquiring firm to file with the Department of Justice (DOJ) and Federal Trade Commission (FTC) at least 30 days before merging or acquiring, allowing it to explain why the proposed merger or acquisition passes antitrust muster.[3]

The doctrine emphasizes the anticompetitive effects of outlawed conduct: most conduct is subject to the rule of reason, such that it is a violation

1. 15 U.S.C. §§ 1–7.
2. 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53.
3. 15 U.S.C. § 18a.

only if it is anticompetitive;[4] some actions like price fixing are per se violations[5] because such actions are so likely to be anticompetitive that it is not worth exploring the question case by case.[6]

Remedies for antitrust violations include civil penalties, criminal penalties, and treble damages to private plaintiffs. Only the DOJ may seek criminal penalties; the DOJ, the FTC, a state attorney general, or a private plaintiff may seek civil penalties; private plaintiffs may seek treble damages—all in federal court. And only the FTC may conduct internal hearings before an administrative law judge, whose decision is appealable—first to the full Commission, then in a federal circuit court of appeals.[7]

B. India

The Monopolies and Restrictive Trade Practices Act of 1969 ("MRTP Act") was India's first antitrust ("competition") statute.[8] The Competition Act of 2002 ("Competition Act"), which replaced it, prohibits any agreement "which causes or is likely to cause an appreciable adverse effect on competition within India."[9] The goal is economic efficiency or maximizing welfare, the focus is anticompetitive effect. Some agreements are presumed to have such an effect, and are thus illegal unless proven to enhance welfare. Others are illegal only if proven to have an anticompetitive, welfare-decreasing effect. The categories correspond roughly to the American per-se and rule-of-reason categories.[10] "[A]buse of dominant position" is unlawful.[11] Merging and acquiring firms must notify the government in advance, and anticompetitive mergers and acquisitions are unlawful.[12]

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4. *See* Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211 (1899); Standard Oil Co. of N. J. v. U.S., 221 U.S. 1 (1911); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L. J. 775 (1964-1965).

5. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); U.S v. Sealy, Inc., 388 U.S. 350 (1967); U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972); Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004); Bork, *supra* note 4, at 776.

6. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

7. Richard Pierce, *Comparing the Competition Law Regimes of the United States and India*, GWU Legal Studies Research Paper No. 2017-27 3-5 (2017), available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2523&context=faculty_publications; Richard Pierce, *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015).

8. Monopolies and Restrictive Trade Practices Act, 1969.

9. Competition Act, 2002, § 3(1).

10. Pierce, *supra* note 7, at 2.

11. Competition Act, 2002, § 4(1) (as amended in 2007).

12. *Id.* § 6.

The Competition Commission of India (CCI) is the main institution. The Competition Act allows the CCI to issue rules to implement the Act. It has exclusive jurisdiction over disputes arising under the Competition Act, and thus has the powers of a civil court. It can impose civil and criminal penalties including up to three years in prison. It can temporarily ban conduct it is investigating. It has the power to determine its own procedures. Its investigative arm is the Director General (DG).

The DG investigates violations of the Competition Act and the rules of the CCI, then issues a report that doesn't bind the CCI. In its investigations, the DG can issue orders for violations, which the CCI can punish. The CCI's decisions are appealable exclusively in the National Company Law Appellate Tribunal (NCLAT),[13] which has the powers of a civil court and can issue its own rules of procedure. The Supreme Court of India has exclusive jurisdiction to hear appeals from NCLAT's decisions. Private parties cannot initiate proceedings to investigate antitrust violations, but can provide information to spark an inquiry by the CCI, and can apply for compensation.[14]

C. Superficial Similarities: One in Spirit and Substance

In terms of their spirit or substance, India's and the U.S.'s approaches to antitrust are similar. They are guided by the same economic principles—in particular, the principle that competition is efficient (and that efficiency is good).

The U.S. Supreme Court has stated that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the *best allocation of our economic resources*, the lowest prices, the highest quality and the greatest material progress."[15]

And the doctrine, by focusing on anticompetitive effect in a context-sensitive way, coheres with the main goals of antitrust law: "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate *efficiently*, keep prices down, and keep quality up."[16] Indeed, "[a]fter decades of controversy and uncertainty, a consensus developed among U.S. enforcement agencies and federal courts

13. Competition Act, 2002, § 2(ba) (as amended by the Finance Act in 2017). Before the 2017 amendment, the appellate tribunal was the Competition Appellate Tribunal (COMPAT).

14. *Id.* §§ 7-12, 39, 43, 53N, 53T, 64(1); *see also* Pierce, *supra* note 7, at 14-15.

15. N. Pac Ry. Co. v. U.S., 356 U.S. 1, 4 (1958) (emphasis added).

16. *The Antitrust Laws*, *supra* note 6.

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*."[17]

In its shift from the MRTP Act to the Competition Act, India embraced this spirit. Then Finance Minister Yashwant Sinha said in 1999: "The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in light of the international economic developments relating to competition laws. *We need to shift our focus from curbing monopolies to promoting competition*."[18] India, like the U.S., views antitrust simply as a tool for economic efficiency. As the Indian Supreme Court stated:

> The primary purpose of competition law is to remedy some of those situations, where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other . . . . The main objective of competition law is to promote *economic efficiency* using competition as one of the means of assisting the creation of a market responsive to consumer preferences.[19]

Though the two systems share a spirit—united in economic and doctrinal substance—there are important institutional, administrative differences.

II. THE CERTAINTY-SEVERITY TRADEOFF

Many aspects, mostly institutional and administrative, make the American antitrust environment less insistent on penalizing violations but more severe when penalizing them, and the Indian antitrust environment the inverse. The two systems are on opposite sides of the certainty-severity tradeoff. India's reliance on economic expertise in adjudicatory proceedings, insistence on investigation, use of concrete regulations made by bodies with economic expertise, statutory specificity, and generosity with interim relief create an environment of certainty: a large and strong net that catches and punishes violators in predictable ways. The U.S. is different on all counts. And treble damages in the U.S. lend its system severity—which India lacks.

17. Pierce, *supra* note 7, at 2.

18. Shri Yashwant Sinha, Finance Minister, Gov't. of India, Budget Speech: Union Budget 1999-2000 (Feb 27, 1999) (emphasis added).

19. Competition Comm'n of India v. Steel Auth. Ltd. of India & Another, (2010) 10 SCC 744, 744 (India) (emphasis added).

A. Economic Expertise: How Strong is the Net?

As an institutional matter, America's antitrust regime is fraught with the risk of unexpected adjudicatory outcomes. The DOJ and FTC, unlike the federal judiciary, are staffed with "economically literate lawyers and legally literate economists."[20] And so, when the DOJ or FTC is a party, the court has the benefit of its expertise. But when the plaintiff is private, there is a risk that the court, deprived of economic expertise, will misinterpret antitrust statutes—especially given the law's focus on economic efficiency[21]—creating bad law.[22] So, by allowing private actions in federal court—and by locating its adjudicatory power in generalist federal courts—America's antitrust system creates unpredictability.

Specifically, the likelihood that a genuinely guilty defendant—one who is anticompetitive—loses is higher if the plaintiff can supply the court economic expertise. And the likelihood that a genuinely *innocent* defendant loses might be higher if the plaintiff *can't* supply the expertise—assuming expertise simply makes the court's economic judgment sounder. But the certainty-severity tradeoff is a lens through which the decision to *violate* law is viewed—it is about deterrence. It doesn't make much sense to speak in terms of that tradeoff in the context of innocence, at least for deterrence purposes. The point here is that the unpredictability created by private actions reduces the certainty of *violators* losing cases (and innocents *winning* cases).

If the case is criminal (pursued by the DOJ), the defendant has a right to trial by jury.[23] Juries, like private parties and generalist judges, are not economically sophisticated, and can thus produce unexpected results—ones that don't cohere with the economic logic of the law. "The institution that has the least relevant expertise and, therefore, the greatest potential to make bad decisions is the jury."[24]

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20. Pierce, *supra* note 7, at 1, 3, 8.

21. *See supra* Section I.C.

22. Pierce, *supra* note 7, at 9 ("The lack of relevant expertise in the federal courts is apparent . . . 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. . . . 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, [they] . . . provide a valuable check on that tendency.").

23. U.S. CONST. amend. VI.

24. Pierce, *supra* note 22.

In India, there is no private action, no generalist adjudicatory tribunal (other than the Supreme Court on appeal), and no jury.[25] The CCI investigates and rules, and its staff has economic (and legal) expertise.[26] The central government appoints them based on the recommendations of a committee comprising the Chief Justice of India, the Secretary of the Ministry of Corporate Affairs, the Secretary of the Ministry of Law and Justice, and reputed experts.[27] And if a case ends up in the Supreme Court, the Court will have the benefit of the CCI's guidance. "Stated another way, the CCI is the only arbiter of the Competition Act."[28]

An agency's expert adjudicatory tribunal may *hurt* certainty if it isn't transparent. And courts tend to be more transparent than other adjudicatory tribunals. But India has taken measures to prevent this problem. The Indian Supreme Court has held that, in the interest of transparency, the CCI, when it decides cases, must state its reasoning.[29] "That requirement is critical to the success of any agency-administered legal regime."[30]

Of course, one might argue that the availability of a private action increases the likelihood of getting caught in the first place. While India doesn't have a private action, it does allow private persons to provide information that sparks a CCI investigation. So, India does let private persons "go after" violators, but without depriving decisionmakers of economic expertise (because the private persons aren't parties). Of course, this parallels the U.S.'s private actions only if the information-providing channel is effective—that is, if the CCI doesn't ignore information from private persons. As discussed in Part II.B below, the CCI doesn't ignore information. (Indeed, for reasons discussed in II.B, the power of the private watchdog is *less* fettered in

25. Arshad (Paku) Khan et al., *Competition Law in India: Top Ten Things to Know About the Enforcement Regime*, ASS'N OF CORP. COUNS. (May 8, 2017), https://www.acc.com/resource-library/competition-law-india-top-ten-things-know-about-enforcement-regime ("The Competition Act provides only for civil consequences for a breach of its provisions.").

26. Pierce, *supra* note 7, at 16 ("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."); Khan, *supra* note 25 ("The office of the CCI's Director General (DG) is the investigative wing of the CCI. The DG has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 and can summon and enforce the attendance of any person and examine them under oath, require the discovery and production of documents, receive evidence on affidavit, issue commissions for the examination of witnesses or documents, requisition any public record or document, etc.").

27. Pierce, *supra* note 20, at 14.

28. Khan, *supra* note 25.

29. Rangi Int'l Ltd. v. N.S. Bank & Others, (2013) 7 SCC 160, 3 (India).

30. Pierce, *supra* note 7, at 16.

India—and the consequent certainty of getting investigated, and thus punished, is higher.)

1. Size vs. Strength

It is worth making explicit here that the effect of private actions on the certainty with which violators are punished is of two kinds. One involves an expanded investigatory net. If private persons can spark investigations, there are higher chances of getting investigated, and thus higher chances of being punished. This chance of being punished is not the probability of punishment conditional on the probability of being investigated. It's just the probability of being punished; and so it varies with the probability of the being investigated (because you won't be punished if you're not investigated).

The other involves not an *expanded* net, but a *stronger* one. The logic here is that if private persons act as plaintiffs, they can't supply economic expertise, and so, guilty firms that are investigated may escape punishment. When the net is weak, investigated firms escape punishment easily. Here the relevant probability is the probability of being punished conditional on the probability of being investigated. It is the probability that you are punished *given* that you were not able to evade investigation—regardless of the chances of evading investigation at the outset. In other words, the strength of the net has nothing to do with its size: the conditional probability of punishment is independent of the probability of being investigated.

The effect of having private actions is thus nuanced. Private actions expand the net, increasing the probability of punishment. They also weaken the net, decreasing the probability of getting punished *once* you are investigated. The first effect exists in both the U.S. and India, and so is mostly irrelevant for our purposes; but there are some noteworthy differences that make this effect relevant, which I will discuss in Part II.B. The second effect has been the focus of Part II.A.

B. Investigatory Obligation: How Large is the Net?

The Competition Act obligates the CCI to issue an order on the merits whenever a private person informs the CCI of an alleged antitrust violation. The CCI cannot decline to investigate—and it must investigate even if the informant changes his mind and withdraws the information. And of course,

the CCI can investigate firms of its own volition as well.[31] All else equal, this makes antitrust investigation easier to trigger in India, increasing the certainty with which violators get investigated—and thus, punished.[32]

This is the *expanded* net I discussed in Part II.A—*Size vs. Strength*. While both the U.S. and India have expanded nets due to some role for the private person, the expanded net in India is arguably larger given the combination of two factors: (1) Indian private informants don't incur legal costs, because they don't file and fight cases; and (2) information once filed *will* result in an order on the merits.

Relatedly, India has taken measures to shun the kind of delay and red tape that could render this investigatory vigor toothless. The Indian Supreme Court has held that CCI proceedings must occur "most expeditiously," and quicker even than the statute's stipulated timeline.[33] And the CCI can also fine firms for not cooperating with investigations.[34]

C. Regulations: Soundness and Concreteness

The Sherman Act is the courts' plaything.[35] India is different. As discussed, the CCI has a more dominant role than the DOJ and FTC in deciding cases. In addition to this adjudicatory role, the CCI engages in law-making: the Competition Act allows the CCI to issue regulations enforcing the Act.[36] "[U]nlike the FTC and DOJ, the CCI has the power to issue substantive rules to implement the CA."[37] And so, in India, the tapestry of antitrust law is not woven solely by courts spinning doctrine. Much of the weaving is done by the CCI through regulations; the doctrine is just embroidery.

Given the nature of the institutions and law involved, this adds to certainty—for two reasons. First, because expertise contributes to certainty, an *expert* body's law-making creates more certainty than a *non-expert* body's

31. Khan, *supra* note 25 ("[T]he CCI does not allow withdrawal of a complaint or settlement without a final adjudication on the merits of the case.").

32. Ajay A. Jagtiani, *India: Antitrust Law Update July 5th, 2017*, MONDAQ (July 18, 2017), http://www.mondaq.com/india/x/611398/Antitrust+Competition/Antitrust+Law+Update ("More recently, antitrust litigation has picked-up in India as the general public has become aware of various issues such as price fixing, cartel formation, tying arrangements and predatory pricing.").

33. Competition Comm'n of India, *supra* note 19, at 744.

34. Rohini Singh, *Antitrust Law in India: A Primer for Foreign Companies*, INDIA BRIEFING (Mar. 13, 2018), https://www.india-briefing.com/news/anti-trust-law-india-primer-foreign-companies-16332.html/.

35. *See infra* Section II.D.

36. Competition Act, *supra* note 11, at § 64.

37. Pierce, *supra* note 20, at 16.

adjudication (just like expert *adjudication* creates more certainty than non-expert adjudication, as discussed in Part II.A); and relatedly, a body designed to be non-expert can't simply absorb expertise costlessly, and will therefore never match a body designed to be expert. Second, regardless of expertise, *regulatory* law-making creates more certainty than *adjudicatory* law-shaping. I will now discuss both these reasons in more detail.

First, because the CCI has economic expertise which American courts don't always have (they lack it when the FTC or DOJ isn't a party), CCI-created law will be more consistent with antitrust first-principles than court-created law, and thus more uniform, predictable, and accurate. Violators will lose cases. This is an extension of my stronger net idea in Part II.A. My earlier point addressed only the CCI's adjudicatory power (and its role in increasing certainty); the CCI's regulatory power compliments its adjudicatory power—it amplifies the effect of the CCI's economic expertise, further adding to certainty.

This regulatory complement to adjudicatory economic soundness is strong. Courts, by their nature, are worse than agencies at utilizing economic expertise—even when they have it. An expertise-supplied court isn't as economically sound and predictable as an expertise-supplied agency, because supplied expertise needs to *seep into* the decision-making to be effective—and that *seeping in* doesn't happen when the main actors are generalist judges and juries:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents *only as they are applied by judges and juries in courts and by lawyers advising their clients*. Rules that seek to embody every economic complexity and qualification may well, *through the vagaries of [judicial] administration*, prove counter-productive, undercutting the very economic ends they seek to serve.[38]

Second, regulations tend to be more clear-cut and concrete, and thus easier to apply, than doctrine created through adjudication, whether in a court or an agency—leading to more predictable results (all else—including economic expertise—equal). Regulations are rule-like; doctrine is usually more

38. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (emphasis added).

akin to standards and principles qualified by the factual contexts in which cases arise. And cases are fossils; often they don't reflect subtle changes in the law that have occurred since they were decided—again failing to guarantee predictable results.[39]

The contribution of regulatory concreteness to predictability is also clear from the way the U.S. handles mergers and acquisitions ("M&A"). That area of American antitrust law, unlike the rest of it, has a strong regulatory influence—and it creates certainty.[40] India's approach is regulation-dominated across the board, not just in M&A.

Note that this predictability rooted in regulatory concreteness translates into the kind of certainty relevant to the *genuinely* guilty actor's decision-making only if the predictable results are also *sound*: if *genuine violators* are investigated or lose cases predictably. Assuming, given the first effect discussed above, that the regulations are economically sound, they make the net both larger and stronger: a net made of concrete regulations catches more fish, and lets fewer escape once caught. This is especially true given the CCI's investigatory obligation—there is no discretion on that front that could soften the application of a clear-cut, economically sound legal framework, to shield violators.

If the regulations are *unsound*, there will be predictable results, but this predictability won't hinder the decision to be *genuinely* anticompetitive. It won't map onto the right set of incentives. But of course, it will hinder the decision to act in ways that the regulations deem illegal—and those ways will be clearly spelled out and known. A net made of such regulations will—thanks to their concreteness—be, in some sense, large and strong (it will be predictable at both the investigation stage and the punishment stage). But it will be a miscast net—it will catch and retain the wrong sorts of fish. So, in

39. Pierce, *supra* note 7, at 16 ("[T]he only reliable source of interpretations of antitrust law [in the U.S.] are contained in judicial opinions. In many cases, there are no recent opinions that address patterns of fact similar to the pattern of facts . . . at issue. 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.") (emphasis added).

40. Pierce, *supra* note 7, at 8. ("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. They update the guidelines frequently to [e]nsure 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.").

this way, unsound but concrete regulations *do* add to certainty—while courts with private plaintiffs *don't*. Both lead to unsound results—genuine violators (anticompetitive actors) go scot-free, and innocents don't. But only one has the concreteness to create certainty—even if that certainty is of a skewed, unsound sort.

All this suggests that the Indian antitrust environment possesses the kind of certainty that the U.S. lacks. Indian violators—either genuine ones (who offend antitrust first-principles), or regulatorily labelled ones (who offend regulations)—have fewer grey areas to hide in, for the law will be mostly sound, and even where it isn't, it will be concrete. They will face a greater likelihood of being investigated, and of losing cases if investigated.

D. Statutory Specificity

The Sherman and Clayton Acts are much more open ended than the Competition Act. So, not only are the American statutes less fleshed out by concrete regulations and more vulnerable to unsound fleshing out without economic expertise, they're also less fleshy to begin with: "The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case."[41] The U.S. Supreme Court has acknowledged that the antitrust statutes have "a generality and adaptability comparable to that found to be desirable in constitutional provisions"[42] and Congress "expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on the common-law tradition."[43] In contrast, the Competition Act specifies, at length and with detailed

41. *The Antitrust Laws*, *supra* note 16; *see also* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 632, at 49 (2d ed. 2002) ("[T]he question whether judicial intervention under §2 requires more than monopoly is not answered by the words of the statute."); ROBERT H. BORK, THE ANTITRUST PARADOX 57 (1978) ("The bare language of the Sherman Act conveys little . . . ."); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136 (1984) ("The language of the Sherman Act governs no real cases."); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L. J. 1623, 1623 (2005) ("Over its 114-year history, Section Two of the Sherman Act has been a source of puzzlement to lawyers, judges and scholars, a puzzlement derived in large part from the statute's extraordinary brevity."); Pierce, *supra* note 7, at 7 ("The substantive standards in the Sherman and Clayton antitrust statutes are broad and vague."); *Competition & Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, DEP'T OF JUST., https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_82_ ("The statutory language of section 2 [of the Sherman Act] is terse. Its framers left the statute's centerpiece—what it means to 'monopolize'—undefined, and the statutory language offers no further guidance in identifying prohibited conduct.").

42. Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 360 (1933).

43. Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 688 (1978).

definitions and explanations, outlawed firm conduct.[44] It reads like a code. This statutory specificity contributes to certainty.

1. Synergy

It is worth taking stock of some of the discussion so far. In the U.S., three related things contribute to a lack of certainty, each adding to the certainty-reducing effect of the other. First, the statutes are open-ended. Second, adjudications rather than regulations flesh-out the statute—amplifying the certainty-reducing effect of the statutory open-endedness, because, in general, regulations are less amorphous than doctrine. Third, the adjudicators are often deprived of economic expertise, because of private plaintiffs—amplifying the certainty-reducing effect of adjudicatory amorphousness. I discussed each of these individually in Parts II.D, II.C, and II.A respectively; and in II.C I also discussed the combination of concreteness and economic soundness in agency regulation, contrasted with the lack of both in courts with private plaintiffs (and even the joint effect of that combination and investigatory obligation). Here I point out how *all* three points are closely linked, and work together: institutions prone to vagueness are interpreting vague things without the expertise that could reduce vagueness. As one American scholar and professor put it:

> [An] 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.[45]

44. *See* Competition Act, *supra* note 11. The Act as presented in the document on the CCI's website (available at https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf) is 61 pages long, with 66 sections.

45. Pierce, *supra* note 7, at 13; *see also* Richard Pierce, *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2045-47 (2015).

E. Interim Relief

The plaintiff in the U.S. needs to seek permission from a court to get a preliminary injunction. A court may grant the FTC temporary relief "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[46] And the DOJ needs to meet a higher bar.[47] Either way, a bar must be met. The CCI, on the other hand, has the power to issue temporary injunctions at its discretion, without the green light from any court.[48]

This, I believe, adds to the certainty of punishment in India. It could be seen, instead, as contributing to severity; but certainty is the more accurate characterization, given that such relief is temporary. The low bar for temporary relief simply eases and thus encourages investigations. The easier—and thus more frequent—the investigations, the higher the *chance* of final punishment, regardless of the magnitude of that punishment.

F. Treble Damages

American private actions not only reduce certainty, but increase severity, because of the treble damages provision, which is absent in India. "The treble damage remedy acts as a powerful deterrent . . . . 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

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46. 15 U.S.C. § 53(b); *see also* F.T.C. v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008); F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001).

47. *See, e.g.*, U.S. v. New York Telephone Co., 434 U.S. 159 (1977); *see also* Pierce, *supra* note 7 at 2, 7 ("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."); Richard Pierce, *The Rocky Relationship Between the F.T.C. & Admin. L.*, 83 GEO. WASH. L. REV. 2026, 2031 (2015) ("As interpreted in recent court decisions, the standard the FTC must satisfy to obtain a temporary injunction is much easier to meet than the standard the DOJ must satisfy to obtain a temporary injunction."); Jessica Fricke, *FTC v. Whole Foods Market: A New FTC Preliminary Injunction Standard?*, 8 DEPAUL BUS. & COM. L. J. 173, 189 (2010) ("[T]he FTC's standard for review of a preliminary injunction is more relaxed than the standard faced by the DOJ.").

48. Competition Act, *supra* note 11, at § 33.

law is detected."[49] In contrast, the CCI can impose a fine of no more than 10% of the firm's average turnover, calculated over the three preceding years.[50] Indeed, India has a leniency regime, in which defendants can apply for smaller penalties.[51]

III. CAUSES AND CONSEQUENCES: ATTITUDES TOWARD RISK

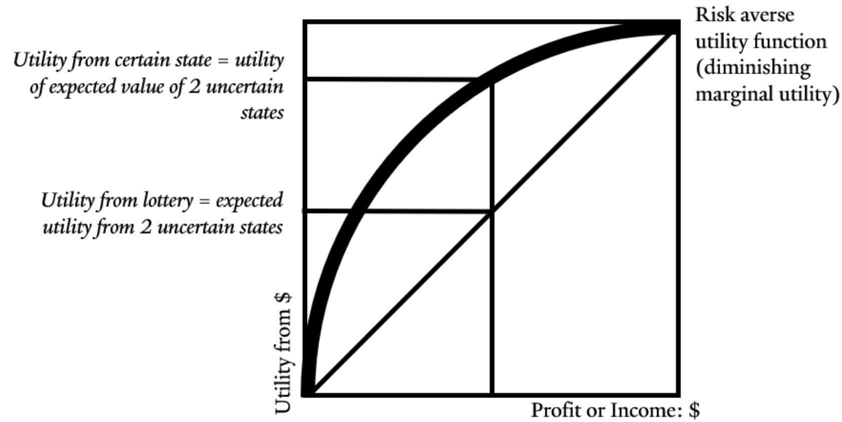
What *drives* India's and the U.S.'s divergent decisions? Why does one go for certainty, and the other for severity? And what does the answer to that question imply about the *consequences* of these decisions (India's, in particular)?

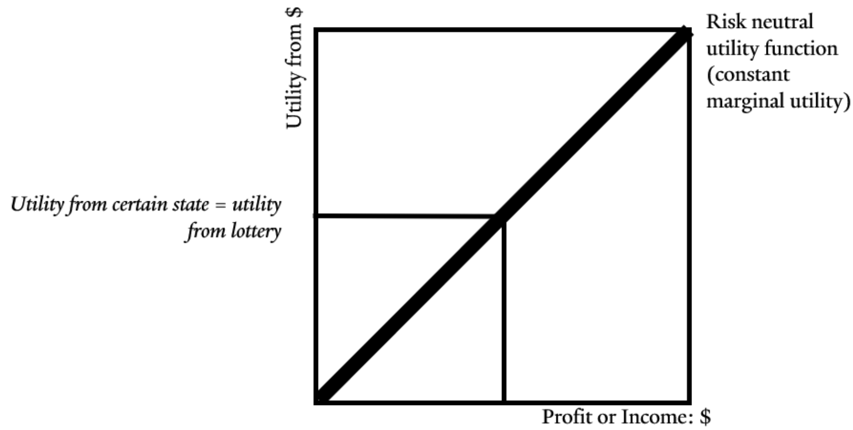
In a risk neutral system, the certainty-severity tradeoff isn't a tradeoff at all. A risk neutral actor is indifferent between a certain low penalty and a lottery with two uncertain states—no penalty and high penalty—if the expected value of the lottery equals the low penalty. A risk averse actor prefers the certain low penalty. A risk seeking actor prefers the lottery. If actors are rational, their decision—certainty or severity—reflects their attitudes toward risk. (In the figure below, I show the basic microeconomic logic of the relationship between risk and preferences.) So, assuming rationality, a difference in attitudes toward risk might cause the difference between India's and the U.S.'s institutional, administrative design in antitrust: perhaps India is risk averse, and the U.S. is risk seeking. ***[Figure on next page.]***

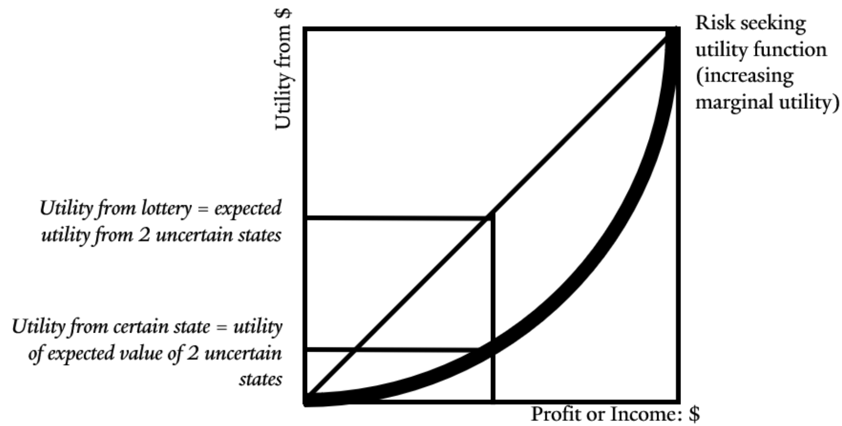
49. Pierce, *supra* note 7, at 9.

50. AZB & Partners LLP, *India – Antitrust & Competition Guide 2016*, CONVENTUS L. (Apr. 21, 2016), http://www.conventuslaw.com/report/india-antitrust-competition-guide-2016/.

51. Competition Act, *supra* note 11, at § 46; Khan, *supra* note 25 ("The amnesty/leniency programme in India is governed by Section 46 of the Competition Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPRs). The CCI may grant the first applicant a reduction of penalty of up to 100%. The second applicant may be granted a reduction of penalty of up to 50% and the third applicant may benefit with a reduction of penalty of up to 30%. It is important to note that the benefit of the leniency programme is not available once the DG's investigation report has already been received by the CCI."); AZB & Partners LLP, *supra* note 50.







Lottery bad state (uncertain, high penalty, low profit or income) | *Non-lottery state (certain, low penalty); Expected value of 2 uncertain states* | *Lottery good state (uncertain, zero penalty, high profit or income)*

Indeed, there is evidence suggesting that Indian firms—and Indian culture at large—are risk averse, and that the U.S. is risk seeking. Economists assume firms to be risk neutral. The source of this neutrality is the fact that, to a firm, every additional dollar of profit is as valuable as—not more valuable than—the next. Individuals are assumed to be different from firms—they display diminishing marginal utility of consumption, which is the source of their risk aversion. But, of course, cultural forces or legal forces (which may be shaped by cultural ones) may make reality differ from these assumptions.[52]

In the U.S., much of contract and organizational law is designed to forgive—and even encourage—risk. The Business Judgment Rule in organizational law, the default rule system in contract law, and so on, all encourage risk. And contract law applies not just to firms, but to individuals too. Risk has been a hallmark of the American economy and attitude.[53] America—firms and individuals—seems to be, on the whole, quite risk seeking. Its law reflects, enables, and fuels that attitude. And its antitrust system's decision for severity coheres with that attitude. India, on the other hand, hasn't embraced risk as much. Even businesses, which standard economics assumes to be risk neutral, are thought to be risk averse in India. And the common Indian individual is also thought to be particularly risk-averse.[54] The cultural,

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52. *See, e.g.*, Roy L. Crum, et al., *Risk-Seeking Behavior and its Implications for Financial Models*, 10 FIN. MGMT. 20, 20 (1981) ("The emerging view of risk preference is one that includes a mixture of risk-seeking and risk-averse behavior, risk-seeking occurring when returns are below a target return or aspiration level and risk-aversion occurring when returns are above a target return."); Jens O. Zinn, *The Meaning of Risk-Taking – Key Concepts and Dimensions*, J. RISK RES. (2017), https://www.tandfonline.com/doi/full/10.1080/13669877.2017.1351465 ("[P]olicies and strategies to reduce people's risk-taking are often less successful than expected. Experts are puzzled about common people not following good advice[.] . . . [R]ather than being merely ignorant or misinformed, people often have good knowledge when taking risks. A growing body of research provides knowledge about the complexities, dynamics and contradictions of people's risk-taking. . . . [R]isk-taking is part of developing and protecting a valued identity. . . . [T]here is good evidence for how structural and cultural forces combine and shape risk-taking while people take risks to develop a valued identity and to protect it.").

53. *See, e.g.*, Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096 (2000); David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Bus. Judgment Rule*, 6 BERKELEY BUS. L .J. 216 (2009); *Inequality & the American Dream*, ECONOMIST (June 15, 2006), https://www.economist.com/leaders/2006/06/15/inequality-and-the-american-dream ("The hallmarks of American capitalism [include] a willingness to take risks.").

54. *See, e.g.*, Hans Peter Binswanger, *Attitudes Toward Risk: Experimental Measurement in Rural India*, 62 AM. J. AGRIC. ECON. 395, 395 (1980) ("virtually all [subjects] are moderately risk-averse"); Sanjit Oberai, *Risk Averse Indians Invest Less in Equities Versus World*, MONEY CONTROL (Jan. 1, 2016), https://www.moneycontrol.com/news/business/markets/chart-risk-averse-indians-invest-lessequities-versus-world-1053300.html ("Indians traditionally prefer investing in less riskier products (by conventional wisdom) like debt,

sociological reasons for this difference in attitudes toward risk are a topic for another paper. For now, I speculate that the cultures' different approaches to family, community, and the individual cause—or, are at least consistent with (and may share a cause with)—the difference in attitudes toward risk.

One might ask whether it is rational to be risk averse. In this paper, I have kept the rationality question separate from the question of attitudes toward risk. I have treated the latter as exogenous; rationality guides the decision-maker from that exogenous fact to either certainty or severity (depending on the exogenous fact). But, of course, that fact—the attitude toward risk—needn't be exogenous; perhaps rationality has something to say about it. That is a topic for another paper—perhaps one which seeks to prescribe the right antitrust approach from head to toe. My paper just describes, attempts to probe the causes of, and says just a little bit about the consequences of the main difference between two sophisticated approaches to antitrust.

One might also ask: are we really rational? Perhaps the rationality assumption is unsound: perhaps India's decision for certainty is not simply the rational consequence of risk aversion. Perhaps it coexists *irrationally* alongside a risk *seeking* attitude. This is different from the question raised above: it doesn't ask whether India *should* be risk seeking; it wonders whether India *is* risk seeking—and irrational. If it is, that has implications for the consequences of India's decision. Irrationality breeds bad consequences: certainty over severity in a risk seeking system fails to maximize utility. If India is risk seeking, and assuming the U.S. is too, then India has simply got antitrust wrong, and should copy the U.S.

This could well be the case. But, as I have discussed, there is evidence suggesting India is risk averse. And regardless, I think the rationality assumption is sound. Systems don't just come up divorced from cultural attitudes. Indeed, systems are symptoms of underlying traits—and thus a good indicator of them. The idea that symptoms reveal traits justifies the rationality assumption in this context: India's attitudes and systems—traits and symptoms, risk aversion, and the decision for certainty—cohere, rather than contradict; and, as discussed, rationality is the bridge.

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real estate and precious metals. . . . Globally, investments in equities ranks just next to debt investments, Indians however rank equities at the bottom with merely 16 percent contribution. . . . [T]he Indian investor prefers investing in gold compared to other countries."); IANS, *Indian Companies Risk-averse, Complacent: Hamid Ansari*, BUS. STANDARD (July 18, 2017), https://www.business-standard.com/article/news-ians/indian-companies-risk-averse-complacent-hamid-ansari-117071801643_1.html ("Indian businesses have traditionally been risk averse . . . . [P]rolonged government protection has left the Indian companies too complacent to wage battles with global firms."); *Why Are Indian People So Risk Averse?*, QUORA (Mar. 22, 2014), https://www.quora.com/Why-are-Indian-people-so-risk-averse (providing anecdotal evidence of the common perception that Indians are particularly risk averse).

CONCLUSION

India's antitrust regime is still young. It is poised to be a regime of economic soundness rooted in expertise (in adjudication and regulation), code-like concreteness (statutory and regulatory), robust investigation, and speedy justice, tempered with leniency—a regime of certainty, not severity. The U.S. seems to be on the other side of the line, using treble damages—as opposed to certainty—to deter. This difference may be justified—efficient—if India is risk averse and the U.S. is risk seeking. And evidence suggests that the two cultures' attitudes toward risk differ in this way. Only time will tell whether India, as it matures, retains this environment of certainty, and whether it bears fruit.