

Analysis of NCLAT's Functioning as Competition Law Appellate Tribunal

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Abstract

In this paper, we present a critical analysis of the functioning of the appellate authority of the Competition Commission of India (CCI). Specifically, we evaluate the performance of the National Company Law Appellate Tribunal (NCLAT) – the current appellate for competition law in India – by comparing and contrasting its functioning with that of the erstwhile Competition Appellate Tribunal (COMPAT). We use data from publicly available sources such as annual reports of CCI, NCLAT's website, etc., as well as replies to the Right to Information (RTI) applications construed and filed by the authors of this paper. We suggest a remedial orientation in this paper to enable a resolution of the hurdles in the present mode of appeals and move forward while minimising deliberations on the apportionment of fault for the present modalities.

Keywords: competition law, appellate authority, COMPAT, NCLAT

1. Introduction

The story of India's modern competition law jurisprudence has been full of ups and downs in its roughly two decades of existence. Although India

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had an earlier avatar of market regulation in the form of the Monopolies and Restrictive Trade Practices Act (MRTP Act) since 1970¹, a modern and efficient competition law regime was established in the country only after the enactment of a modern and forward-looking law in the form of the Competition Act 2002² (“the Act”). Under the Act, the competition law regulator, Competition Commission of India (CCI), was established in 2003,³ without a regular Chairman, dedicated staff, or functions, owing to a judicial challenge to the Act through a writ petition (*Brahm Dutt vs. Union of India*, 2005) in the Supreme Court of India (SC). Subsequently, following the directions of the Supreme Court in this case, substantial changes were made in the Act through the Competition (Amendment) Act 2007, wherein the Competition Act 2002 was amended. Through this amendment, Section 40 was deleted and Chapter VIIIA was introduced, which provided for an appellate tribunal, namely, the Competition Appellate Tribunal (COMPAT). With the notification of the substantive enforcement provisions of the Act from May 2009, CCI began full-fledged functioning, as did COMPAT, functioning as CCI’s appellate body. COMPAT handled numerous appeals arising out of 221 CCI orders under various provisions of the Act till the financial year 2016-17 (CCI, 2019). However, the Government of India, through the Finance Act 2017,⁴ amended the Act to merge COMPAT with the National Company Law Appellate Tribunal (NCLAT).⁵ Through the notification S.O. 1696(E) dated 26 May 2017 issued by the Department of Revenue under the Ministry of Finance, COMPAT stood merged with NCLAT, and thus, NCLAT became the appellate authority for competition law in India.

The aforementioned Finance Act 2017 was challenged in *Rojer Mathew vs. South Indian Bank Ltd & Ors.* (2019) before the Supreme Court of India, primarily questioning the constitutional validity of its Chapter XIV. On 13 November 2019, a Constitution Bench⁶ delivered its judgement in this case. The Court, by its majority decision – while referring to the core question of whether or not Part VI Chapter XIV of the Finance Act 2017 could have been validly enacted as a Money Bill to a larger bench – pronounced unanimously that the rules⁷ formed under Chapter XIV are not valid. Apart from this, the Court in its decision highlighted a number of measures to be taken to streamline the functioning of the tribunals which find a mention in the Finance Act 2017. These measures include carrying out a judicial impact assessment and a financial impact assessment. One

of the key measures identified by the Supreme Court in this regard is the direction given to the Union Government “to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment” (*Rojer Mathew vs. South Indian Bank Ltd & Ors.*, 2019).

The aforementioned directions by the Supreme Court make it clear that the decision of the merger of various tribunals undertaken by the Union Government in the Finance Act 2017 need to be revisited and taken on an objective basis, such as considering the workload and the commonality of subject matters. Thus, through this paper, we make an attempt to critically evaluate the performance of NCLAT as an appellate body under the Act by comparing and contrasting its functioning with that of the erstwhile COMPAT. We analyse the functioning of NCLAT both qualitatively and quantitatively with respect to the orders that it has passed arising out of appeals from the orders of CCI.

2. Literature Review

The critical assessment of the functioning of bodies such as tribunals or adjudicatory bodies has been attempted earlier in India. The topic has been included within the overall assessment of the reforms that could be introduced in the functioning of the aforementioned tribunals. In *Reforming the Tribunals Framework in India: An Interim Report* (2018), the authors attempted to undertake a holistic overview of the functioning of tribunals in India and came out with broad guidelines such as: “The tribunals framework can operate under an independent statutory body, provisionally called the National Tribunals Commission (NTC) (Ghosh, Sanyal, Chandrashekar, & Sekhar, 2018, p. iv); the existing 37 central tribunals can be merged into nine distinct subject-matter divisions (Ghosh, Sanyal, Chandrashekar, & Sekhar, 2018, p. iv)” and so on. In fact, some of these recommendations, such as: “There will be no direct appeal to the Supreme Court from a tribunal” (Ghosh, Sanyal, Chandrashekar, & Sekhar, 2018, p. iv) even found mention in the aforementioned judgement of the Supreme Court in *Rojer Mathew vs. South Indian Bank Ltd & Ors.*, 2019. However, this study lacks substantive quantitative or qualitative analysis of the functioning of any tribunal, and instead, is more focused on structural reforms.

Similarly, the *Assessment of Statutory Frameworks of Tribunals* report (Law Commission of India, 2017) has analysed issues related to the appointment process, provisions of direct appeal to the Supreme Court, and other issues related to the functions of the tribunals. The Law Commission in the aforementioned report also came out with a number of recommendations like “the members of tribunals should have similar qualifications as that of judges of the High Court (Law Commission of India, 2017, p. 96) and “Conditions on appointment, tenure and service conditions of members of the tribunal needs to be standardised” (Law Commission of India, 2017, p. 96). However, the focus of this report was also on the structural aspects and not on the impact assessment of the merger of the tribunals.

3. Research Methods and Data

For quantitative assessment of the functioning of NCLAT as the appellate body, data regarding appeals of CCI orders has been collected from the annual reports of CCI available on its website – from the 2009–10 report to the 2019–20 report. These reports have data with regard to the number of CCI orders appealed against before the appellate body, the disposal of appeals by the appellate body over the years, and the number of appeals received and disposed of by COMPAT and NCLAT. This data is then visualised through graphs to highlight the difference between the functioning of these two bodies. Notably, the interval of time in the first part of the analysis, which is based on the annual reports of CCI, has been taken as the financial year as prescribed by the Union Government, i.e., 1 April to 31 March, rather than the calendar year, as CCI follows this format for its records. However, the date on which the erstwhile COMPAT was merged with NCLAT is 26 May 2017, which is when Part VI Chapter XIV of the Finance Act 2017 had been notified by the Government of India. Thus, in the CCI Annual Report 2017-18, the data pertaining to COMPAT was from 1 April 2017 to 26 May 2017, which is almost two months and thereafter all matters before COMPAT stood transferred to NCLAT. Thus, assumptions for doing the analysis have been made accordingly.

For qualitative analysis of the functioning of the NCLAT, a comparative analysis has been done for the number of effective hearings vis-à-vis the number of times a matter was posted for hearing in the calendar year

2019. The sample for this analysis comprises 36 competition appeals pending in NCLAT in 2019. The appeals considered for this category include matters currently pending before NCLAT that involve penalties imposed by CCI under Section 27 of the Act. Thus, these cases are selected only on one basis, i.e., that they involved CCI orders under Section 27 of the Act. Cases involving CCI orders under other sections, such as 26(2) and 43, have not been taken up for analysis. The selected cases are taken up as they involve important questions regarding the interpretation of law and substantial amount of monetary penalty. Further, the definition taken for effective hearing is the same as that adopted by the CCI in its *Guidelines for Empanelment of Advocates/Law Firms for Representing and Assisting Competition Commission of India and the Director General Before Various Courts/Tribunals*, which defines effective hearing as “a hearing in which either one or both or all the parties involved in a case are heard by the court. If the case is only mentioned and adjourned or only directions are given or judgment is pronounced, it would not constitute an effective hearing for the purposes of these guidelines but as a non-effective hearing” (Competition Commission of India, 2012, p. 1). The data with regard to effective hearings has been collected and collated by perusing the daily orders of NCLAT in various competition appeals, as available on its website. Further, these cases are not taken up as individual appeals but as a set of appeals arising out of a common CCI order. Hence, these are to be considered as one set of connected appeals regarding connected matters by the tribunal.

4. Analysis and Discussion

In this section, we present the analysis from the data employing both quantitative and qualitative approaches, as mentioned in the earlier section.

4.1. Analysing the Number of Final CCI Orders and Appeals Arising Out of These Orders Handled by NCLAT/COMPAT

Every year, CCI passes a number of final orders under various sections of the Act, and any party or person aggrieved by CCI's order⁸ may approach the Appellate Tribunal (earlier, COMPAT and now NCLAT) in appeal⁹.

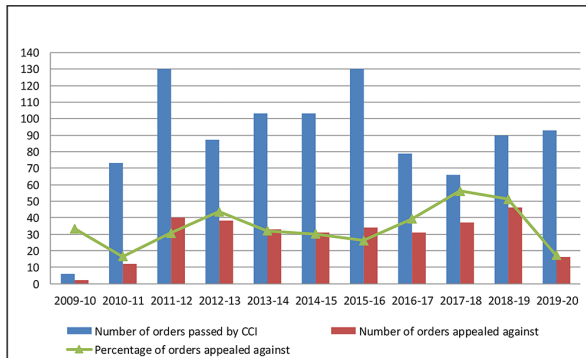
Analysis of this data pertaining to the number of orders passed by CCI each year, and among these, the number of orders challenged each year, gives us an assessment of the workload of the appellate authority. Table 1 gives this information:

Table 1. Final Orders of CCI Appealed Against in NCLAT/COMPAT

Year	Number of Orders Passed	Number of Orders Appealed Against	Percentage of Orders Appealed
2009-10	6	2	33.33
2010-11	73	12	16.44
2010-12	130	40	30.77
2012-13	87	38	43.68
2013-14	103	33	32.04
2014-15	103	31	30.10
2015-16	130	34	26.15
2016-17	79	31	39.24
2017-18	66	37	56.06
2018-19	90	46	51.11
2019-20	93	16	17.20
Total	960	320	33.33

Source: CCI Annual Reports 2009-10 to 2019-20.

Figure 1. Appeals Against CCI’s Final Order: No. of Orders, Appeals, and Percentage of Orders Appealed Against.



Source: Drawn by the authors based on data in CCI Annual Reports from 2009-10 to 2019-20.

The above data can be visualised graphically through Figure 1. Key takeaways from this data are as follows:

- Since 2017-18, when NCLAT took over,¹⁰ the percentage of CCI orders that have been appealed against has seen an increase and crossed the 50% mark; in 2017-18, it was approximately 56% and in 2018-19, it was approximately 51%.
- Thus, the workload of NCLAT as an appellate authority over CCI has definitely increased compared to the erstwhile COMPAT, where the percentage of CCI orders appealed against never went beyond 43%, its highest point being in the initial years of 2012-13.
- Further, in absolute numbers as well, the last two financial years, namely, 2017-18 and 2018-19, witnessed 37 and 46 CCI orders being appealed against in the NCLAT respectively, which were the second highest and the highest ever since 2009-10 till 2018-19.
- After 2018-19, there has been a marked decrease in the number of appeals to NCLAT against CCI orders. This may be inferred as arising out of dejection in the minds of litigants regarding the efficacy of NCLAT.

4.2. Analysing Disposal of Appeals by COMPAT/NCLAT and the Nature of Disposal

Out of those appeals which were received by COMPAT/NCLAT, the number of appeals that were disposed of by the appellate authority provides us a glimpse of the disposal rate as well as the trends of disposal in terms of whether the appeal was allowed or disallowed. Table 2 collates the information regarding the total disposal of appeals by COMPAT/NCLAT as well as the nature of the decision taken regarding the allowance or disallowance of appeals and the remanding of matters to CCI.

Here, it is important to note that an “appeal disallowed” by the appellate authority means that the order passed by the CCI has been upheld, and “appeal allowed” refers to the order being set aside by the appellate authority. In the latter, COMPAT and NCLAT have also had an option to remand the matter back to the CCI. One important point to note here is that datasets on which Tables 1 and 2 are based cannot be compared, as one order of CCI may lead to multiple appeals, and

Table 2. Disposal of Appeals by COMPAT/NCLAT

Year	Number of orders passed by COMPAT/NCLAT			
	Disallowed (Upholding CCI's Orders)	Allowed (Setting Aside CCI's Orders)	Out of Appeals Allowed Remanded to CCI	Total
2009-10	-	1	-	1
2010-11	8	-	-	8
2011-12	15	1	1	16
2012-13	35	5	-	40
2013-14	64	44	44	108
2014-15	45	6	2	51
2015-16	49	87	67	136
2016-17	47	69	19	116
2017-18	23	2	-	25
2018-19	27	2	-	29
2019-20	17	2	1	20
Total	330	219	134	550

Source: CCI Annual Reports from 2009-10 to 2019-20.

COMPAT/NCLAT may have passed more than one order in such cases where multiple appeals arose from one order by CCI.

Key takeaways from the data in Table 2 are as follows:

- After the initial years, the disposal of appeals (in absolute numbers) by COMPAT was high, especially two years prior to 2017-18, when it was merged with NCLAT. For instance, in 2015-16 and 2016-17, this figure touched 136 and 116 orders respectively.

The two years¹¹ of NCLAT, i.e., 2017-18 and 2018-19, have shown a remarkable fall in the disposal of cases compared to COMPAT, as the total cases disposed of came down to 25 and 29 orders from absolute numbers of 136 and 116 orders in 2015-16 and 2016-17, respectively. This is indicative of a high level of pendency that has built up in competition law appeal cases at the level of NCLAT, as the number of orders passed by the CCI orders that have been appealed against (from Table 1) have been increasing during the same period. The nature

of orders passed by the appellate authority over the years has also changed as the number of appeals allowed, i.e., the number of orders of CCI set aside by the appellate authority, has come down drastically since the constitution of NCLAT. For instance, in the last two financial years of 2017-18 and 2018-19, the percentage of CCI orders set aside by the appellate authority and orders upheld by the appellate authority has plummeted to 8% and 6.8% respectively compared to 59.4% in 2016-17 and 63.9% in 2015-16. In the last two years, with NCLAT as the appellate authority, out of appeals that have been allowed, none have been remanded to CCI, whereas, barring the initial years, this number was substantial in the years of COMPAT. For instance, in 2013-14, the percentage of cases remanded out of the appeals allowed was 100%, which means that all allowed appeals were sent back to CCI. Further, in 2014-15, this figure was 33.33% and rose to 77% in 2015-16 and was 27% in 2016-17.

- The number of appeals disallowed by NCLAT and those remanded back to CCI by NCLAT have both reduced substantially in the last three years of the given dataset. When these statistics are read conjunctively, it shows the absence of critical thinking by NCLAT and refusal to delve into the merits of the appeals either itself or by recommending CCI to do so.

4.3. Analysing Appeals Received by NCLAT from COMPAT and their Disposal

When Chapter XIV of the Finance Act 2017 was notified on 26 May 2017, all the appeal matters pending before COMPAT stood transferred to NCLAT. These cases were at various stages but were again listed afresh before NCLAT. Figure 2 and Table 3 show such transferred cases. Key takeaways from this data are as follows:

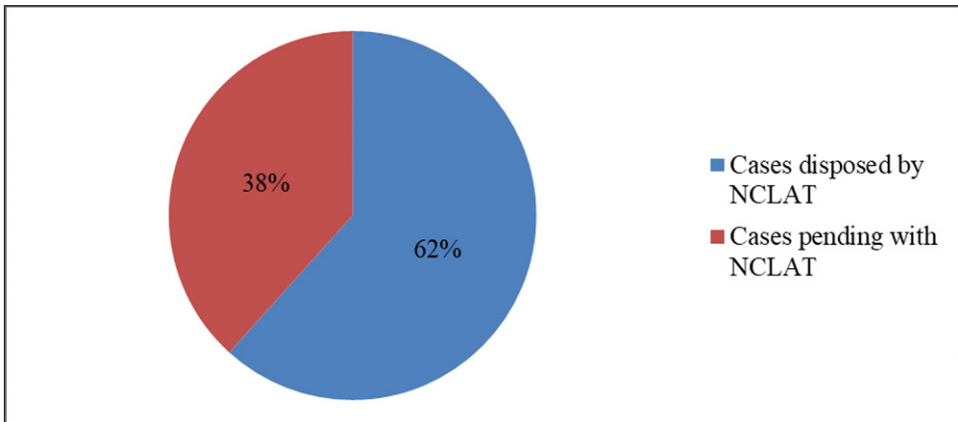
- As mentioned above, these cases were treated afresh by NCLAT and hence, the time taken for their disposal was at par with other fresh cases.
- Time taken for their disposal, i.e., the fact that 38% of these cases are still pending from cases mentioned over nearly 2.9 years (26 May 2017 to 1 March 2020), displays the higher amount of time taken to dispose of competition appeals by NCLAT. This becomes evident with the analysis of data in Table 2.

Table 3. Number of Cases Transferred to NCLAT from COMPAT and their Disposal

Description of cases	Number of cases
Total number of cases transferred from COMPAT to NCLAT (As on 26.05.2017)	47
Out of these total cases, cases decided by NCLAT (As on 01.03.2020)	29
Out of these total cases, cases pending before NCLAT (As on 01.03.2020)	18

Source: RTI Application No. NCLAT/R/E/20/00017 dated 19.03.2020; information provided in the reply contained data as on 01.03.2020.

Figure 2. Disposal of Cases transferred from COMPAT to NCLAT.



Source: Drawn by authors.

- The total number of appeals or cases, i.e., 47 cases, that stood transferred to NCLAT from COMPAT at the time of their merger is not large enough to have created such pendency in NCLAT.
- Furthermore, this shows the deleterious effect of the combination of the Insolvency and Bankruptcy Code (IBC) and company law appeals along with appeals against CCI orders before NCLAT. The efficiency of NCLAT in disposing of appeals against CCI orders is markedly diminished in comparison to that of COMPAT, which only had appeals against CCI orders on its roster.

4.4. Analysing the Disposal Rate of COMPAT and NCLAT: Year-on-Year (Y-o-Y) Comparison

Though the overall disposal of appeals by both COMPAT and NCLAT has been provided in Table 2, yet, in order to highlight the pendency level at the appellate authority, it is imperative to look at the year-on-year disposal of appeals by the appellate authority along with the pendency figures. Figure 3 and Table 4 compile this information from years 2010-11 to 2019-20, i.e., seven years under COMPAT and the next three years under NCLAT.

Table 4. Disposal Rate of Appeals by COMPAT and NCLAT from 2010-11 to 2019-20

Year	Appellate- COMPAT /NCLAT	Total cases before the appellate authority in the year (Opening Balance + Fresh Cases)	Cases disposed by the appellate authority during the year	Percentage of disposal
2010-11	COMPAT	17	8	47.1
2011-12	COMPAT	45	16	35.6
2012-13	COMPAT	176	40	22.7
2013-14	COMPAT	181	64	35.4
2014-15	COMPAT	197	51	25.9
2015-16	COMPAT	232	136	58.6
2016-17	COMPAT	155	116	74.8
2017-18	NCLAT	107	26	24.3
2018-19	NCLAT	192	29	15.1
2019-20	NCLAT	269	28	10.4

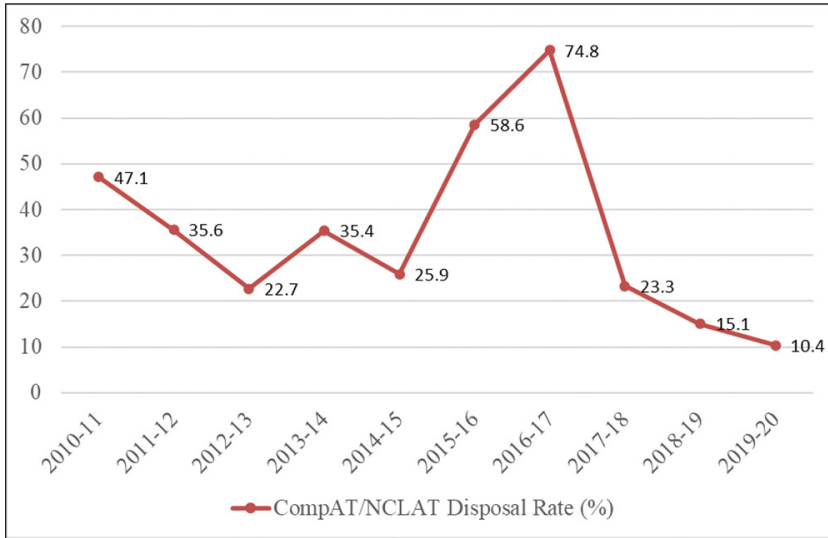
Source: CCI Annual Reports from 2010-11 to 2019-20.

One more note of caution that is reiterated here is that data of these tables does not match with that of Table 1 as an order of the CCI may be appealed through multiple connected applications.

Key takeaways from this data are as follows:

- The rate of disposal of NCLAT is coming down steadily; it was roughly 23% in 2017-18 and 15% in 2018-19 which, when compared to COMPAT,

Figure 3. Disposal Rate of Cases by COMPAT and NCLAT from 2010-11 to 2019-20.



Source: Drawn by authors.

is very less, as COMPAT disposed of appeals at the rate of 58% in 2015-16 and 74% in 2016-17.

- Pendency of competition law appeals is increasing in NCLAT, primarily due to two factors: increase in the number of cases and lower rate of disposal of appeals by NCLAT.
- It is additionally concerning that NCLAT itself has referred to the sanctity of timelines prescribed for the disposal of appeals in IBC cases and has attempted to adhere to them due to repeated castigation by the Supreme Court. For competition law appeals, timelines as prescribed under Section 53D(5) of the Competition Act have not been treated with similar sanctity.
- Current pendency at NCLAT of competition law cases at the end of 2018-19 cannot be attributed to the legacy of COMPAT as the disposal rate of COMPAT was much higher than that of NCLAT, and there were no huge arrears left for NCLAT to handle.

Table 5. Effective Hearings and Total Hearings of Competition Appeals in the NCLAT in Calendar Year 2019

Case title	Appeal number	CCI case number & decision date of order	Total number of hearings/ listed for hearing in 2019	Total effective hearings in 2019	Percentage of effective hearings
Adani Gas Limited v CCI (and other connected matter) ¹²	TA (AT) 33/2017 (Old Appeal No. 50/2014)	71/2012 03.07.2014	8	4	50
Super Cassette Industries v CCI (and other connected matter)	TA (AT) 35/2017 (Old Appeal No. 18/2015)	40/2011 01.10.2014	6	0	0
Chemist and Druggist Association, Goa v CCI & Others	TA (AT) (Comp.) 46 of 2017 (Old Appeal No. 53/2015)	<i>Suo Moto</i> Case No. 05/2013 27.10.2014	7	1	14.3
Shree Cement Limited v CCI & Others	TA (AT) (Comp.) 10 of 2017 (Old Appeal No. 48/2016)	RTPE 52/2006 31.08.2016	5	1	20
Coal India Ltd Ors. v CCI (and other connected matters)	Competition Appeal (AT) No. 01/2017	03/2012, 11/2012 & 59/2012 24.03.2017	6	2	33.33
Khanduja Coal Transport Co. v CCI & Others (and other connected matters)	Competition App (AT) No. 23/2017	34/2015 14.09.2017	6	1	16.6

Gujarat Alkalies and Chemicals Ltd. v CCI (and other connected matter)	Competition Appeal (AT) No. 31/2017	Ref. Case No. 03 & 4 /2013 05.10.2017	6	0	0
All Kerala Chemists & Druggists Association & Others v CCI & Others (and other connected matters)	Competition Appeal (AT) No. 06/2018	54/2015 31.10.2017	5	0	0
The Board of Control for Cricket in India v CCI & Another	Competition Appeal (AT) No. 07/2018	61/2010 29.11.2017	9	2	22.22
Karam Chand Thapar & Bros. (Coal Sales) Ltd. v CCI & Others (and other connected matters)	Competition Appeal (AT) No. 12/2018	61/2013 10.01.2018	6	1	16.66
Federation of Gujarat State Chemists and Druggists Association & Another v CCI & Others (and other connected matter)	Competition Appeal (AT) No. 15/2018	97/2013 4.01.2018	6	1	16.66
Matrimony.com Ltd. v CCI & Others (and other connected matter)	Competition Appeal (AT) No. 17/2018	07/2012 & 30/2012 08.02.2018	4	1	25
Eveready Industries India Ltd. (Eveready) v CCI & Others (and other connected matters)	Competition App. (AT) No. 22/2018	<i>Suo Motu</i> Case No. 2/2016 19.04.2018	4	1	25
Interglobe Aviation Ltd. (Indigo Airlines) v CCI (and other connected matters)	Competition App. (AT) No. 23/2018	Case No. 30/2013 07.03.2018	6	2	33.33

Ghaziabad Development Authority v CCI (and other connected matter)	Competition App. (AT) No. 26/2018	Case No. 86/2016 28.02.2018	6	0	0
Manoj Gupta (Proprietor of Mahalaxmi Steels) v CCI & Others (and other connected matters)	Competition Appeal (AT) No. 43/2018	Case No. 50/2015 01.05.2018	8	1	12.5
Hetero Health Care Ltd. & Others v CCI & Another (and other connected matters)	Competition Appeal (AT) No. 55/2018	Case No. 65, 71, 72/2014 & 68/2015 12.07.2018 & 30.08.2018	6	0	0
Federation of Gujarat State Chemists and Druggists Association v CCI & Others (and other connected matter)	Competition Appeal (AT) No. 20/2019	Case No. 65, 71, 72/2014 & 68/2015 12.07.2018 & 30.08.2018	5	3	60
Ecoman Enviro Solutions Pvt. Ltd. & Others (and other connected matters)	Competition Appeal (AT) No. 56/2018	<i>Suo Moto</i> Case No. 03/2016 31.05.2018	8	1	12.5
Raghunath Industry Pvt. Ltd. & Another v CCI & Another (and other connected matters)	Competition Appeal (AT) No. 59/2018	<i>Suo Moto</i> Case No. 04/2016 31.05.2018	8	1	12.5
Hindustan Petroleum Corporation Ltd. v CCI & Others (and other connected matter) ¹³	Competition Appeal (AT) No. 69/2018	Case No. 76/2011 11.07.2018	13	8	61.53

Planetcast Media Services Ltd v Competition Commission Of India & Others (and other connected matter)	Competition App. (AT) No. 71 of 2018	<i>Suo Moto</i> Case No. 02/2013 11.07.2018	5	1	20
All India Chess Federation v Competition Commission of India & Others	Competition App. (AT) No. 74 of 2018	Case No. 79 of 2011 u/s 27 12.07.2018	6	1	16.66
Hyundai Motor India Ltd. v CCI	Competition App. (AT) No. 79 of 2018	Case No. 03/2011 27.07.2015	6	0	0
India Glycols Limited v CCI & Others (and other connected matters)	Competition App. (AT) No. 83 of 2018	Case No. 21, 29, 36, 47-49/2013 18.09.2018	5	1	20
Ms. Pushpa M. v CCI & Others (and other connected matters)	Competition App. (AT) No. 87 of 2018	<i>Suo Moto</i> Case No.02/2017 30.08.2018	11	2	18.18
Karnataka Film Chamber of Commerce (KFCC) & Another v CCI & Another	Competition App. (AT) No. 96/2018	Case No. 42/2017 30.08.2017	11	3	27.27
J K Cement Ltd. v CCI & Another (and other connected matters)	Review Application No.04 /2018 in TA(AT) (Competition) No. 17/2017	Case No. 29/2010 25.07.2018 (Order of NCLAT in this case)	3	1	33.33
Godrej & Boyce Manufacturing Co. Ltd. v CCI & Others (and other connected matter)	Competition Appeal (AT) No. 18/2019	<i>Suo Moto</i> Case No. 03/2017 15.01.2019	3	3	100

General Motors India Pvt. Ltd. v CCI & Others	Competition Appeal (AT) No. 22/2019	Case No. 03/2011 25.08.2014	6	1	16.66
Nimish Chudgar v CCI & Others (and other connected matters)	Competition Appeal (AT) No. 24/2019	Case No. 64/2014 03.06.2019	8	5	62.5
SAAR IT Resources Pvt. Ltd. & Others v CCI & Another (and other connected matters)	CA (AT) No. 30/2019	Case No. 12/2017 02.08.2019	6	3	50
Jalgaon District Medicine Dealers Association (JDMDA) & Ors. v CCI & Another	CA (AT) No. 34/2019	Case No. 61/2015 20.06.2019	4	2	50
International Cylinders Pvt. Ltd. v CCI	CA (AT) No. 52/2019	<i>Suo Moto</i> Case No. 01/2014 09.08.2019	3	3	100
Jaiprakash Associates Limited v CCI	CA (AT) No. 78/2019	99/2014 09.08.2019	2	1	50
J.K. Lakshmi Cement Ltd. v CCI (and other connected matters)	TA (AT) (Comp.) 39 of 2017 (Old Appeal No. 02/2017)	Ref. Case No. 05/2013 19.01.2017	2	0	0
			219	58	26

Source: Compiled by authors based on NCLAT daily orders.

4.5. Effective Hearings: A Qualitative Analysis

This segment is assessed differently as it involves assessing the quality of hearings of listed competition law appeals by NCLAT. This involves analysis of effective hearings (Competition Commission of India, 2012, p. 1), which may or may not have taken place in competition law appeals before NCLAT in the calendar year 2019. This includes analysing whether the matters entailed in the cause list were being heard by the bench or

adjourned due to paucity of time or some other reason. All these cases deal with CCI orders under Section 27 and monetary penalty under it. Table 5 compiles this data:

Though, as mentioned above, a few of the above listed appeals have been subsequently disposed by NCLAT with final orders, for the purpose of calculating effective hearings in the calendar year 2019, those are included in this table. Figure 4 and Figure 5 depict this data:

Mean Value of effective hearings:

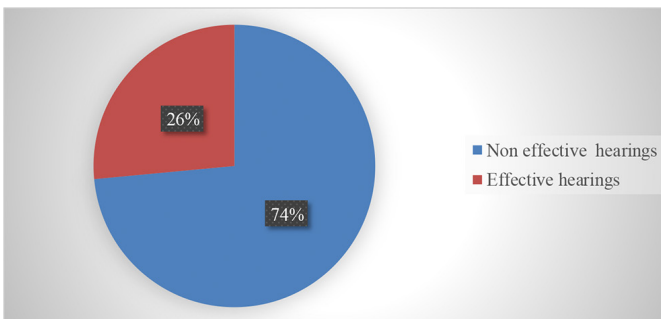
$$\text{Mean} = \sum x_i/n. = 58/36 = 1.6$$

Thus, the average effective hearing in the above listed sample has been quite low, as it was 1.6 per case in the calendar year 2019.

Key takeaways from this data are as follows:

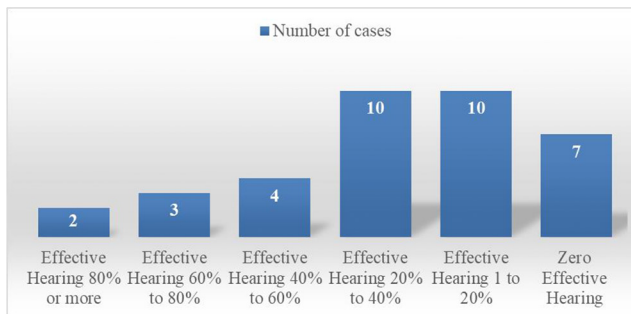
- Only 26.4% of hearings, which is hardly one-fourth of the total hearings before NCLAT, were effective hearings, whereas 73.6% hearings were non-effective, implying that, in these cases, only dates were given without any arguments or developments in the case.
- At least seven cases out of the total 36 cases selected witnessed “zero” effective hearings in NCLAT, wherein these were simply relisted without any arguments throughout 2019.
- Further, only in seven cases did the percentage of effective hearings touch 50% or more; in the remaining 22 cases (for seven cases, this

Figure 4. Classification of Competition Law Appeals Heard in NCLAT in 2019 – Effective and Non-Effective Hearings.



Source: Drawn by authors.

Figure 5. Percentage of Effective Hearing in Competition Appeals in NCLAT During 2019.



Source: Drawn by authors.

percentage was zero), the percentage of effective hearings was less than 50%.

- In 3/4 cases, i.e., 75% of cases, the effective hearing was less than 40%.
- The average value of effective hearings in the selected cases at NCLAT has been quite low, at only 1.6 per case in the entire year of 2019.
- On more expansive examination, it can be made out that a majority of the cases disposed of by NCLAT pertaining to CCI orders are based on Section 26(2) and a meagre seven cases have been decided on merits, wherein the penalty levied by CCI has been adjudicated upon.

5. Recommendations and Conclusion

As inferred from the analysis in previous sections, one thing that has clearly emerged is that the volume of competition law appeals is increasing at the level of the appellate authority, with a simultaneous drastic reduction in the disposal of appeals. Thus, on the basis of analysis of the working of NCLAT and its predecessor, COMPAT, in previous sections, the following recommendations are suggested for improvement in the working of NCLAT as the competition law appellate tribunal:

- A separate dedicated bench to deal exclusively with competition law appeals should be created in NCLAT (Ministry of Corporate Affairs, 2019, p. 31).¹⁴

- There should be a daily hearing of competition law appeals by the aforementioned bench of NCLAT.
- At present, on the bench of NCLAT, there is no technical member with knowledge or background in competition law.¹⁵ Thus, there is a need to revive some sort of qualification for technical members for being appointed to the competition law bench in NCLAT that were there for COMPAT under Section 53D,¹⁶ which was later omitted by the Finance Act of 2017. This is because it is important to have experts in competition law on the bench of NCLAT to understand and appreciate competition law matters.
- Some expert help and support are a requisite for NCLAT to deal with complex competition law issues; for example, the nuanced economic angle of competition law cases (OECD, 1996; Biggar, 1997) and technology in e-commerce cases. Keeping this in mind, the Competition Law Review Committee (CLRC) had recommended an amendment to Section 35 of the Act to expressly allow a person, enterprise, or the Director General to call upon experts in the field of economics, commerce, and international trade, or from any other discipline during proceedings before CCI (Ministry of Corporate Affairs, 2019). The same mechanism, through an amendment in the relevant rules or regulations, could provide for expert help and assistance to NCLAT for dealing with competition law appeals involving complex issues. This will result in early processing of competition law appeals by NCLAT.
- Expert officers from CCI or other organs of state that are involved in the enforcement of economic legislation, such as the Serious Fraud Investigation Office, besides experts from the advocate community, could be sent on deputation to NCLAT for short durations to ensure in-house assistance to the tribunal for a better understanding of the complex issues such as allegations of manipulation of search pages, appreciating network effects in platform cases, and so on. Akin to clerks of judges, particularly in the Supreme Court, who are considered to hold prestigious positions and are often qualified legal professionals, an opportunity to breed a similar work culture in NCLAT would benefit both the professionals so deputed and the members of NCLAT. However, procedural safeguards should be put in place to ensure the

impartiality and non-partisan attitude of such on-deputation officers from executive agencies to a judicial body like NCLAT.

- The COVID-19 pandemic has led the Supreme Court to hear cases online through video conference, and this could also be implemented for competition law cases in NCLAT. The particular preference to competition law cases is in light of the dynamism of markets, as mentioned earlier. It will make filing appeals more accessible and convenient for many, since litigants would not be mandated to travel to New Delhi to be heard by NCLAT.
- There is a pressing need to augment the research facilities at NCLAT for law clerks and for grants to ensure the state of infrastructure, such as a well-stocked library, resource materials, and access to international research and new developments the world over in competition law. Such infrastructure support will go a long way in ensuring robust and well-balanced judicial orders in an area as dynamic as competition law. To conclude, the importance of judicial scrutiny in competition law jurisprudence can be summarised in two main aspects: one, ensuring the compliance of principles of natural justice by competition law authorities, thereby ensuring that due process of law has been followed, and two, ensuring the correct and consistent application of competition law in a given case. In the first aspect, Indian competition law jurisprudence has reached maturity, whereby the ground work was done by COMPAT, with its orders ensuring procedural fairness and consistency in competition law enforcement. This inference can be observed by the fact that no cases have been remanded to CCI on grounds of procedural lapses in the last few years.

The second aspect is now assuming more significance on account of new and complex cases that are coming up in appeals before NCLAT in relatively new areas, such as cases under Lesser Penalty provisions, platform, and e-commerce sector cases. Apart from the aforementioned two functions of NCLAT as a judicial forum of competition law, in common law countries such as India, where competition law jurisprudence is relatively newer than in their western counterparts, NCLAT as a judicial body has an equally significant role to fill in the gaps in the competition law regime through its decisions in various cases. Thus, the significance

and importance of NCLAT as the competition law appellate forum is manifold and it needs to stand up to these challenges as well as new ones that may arise in a rapidly developing economy such as India.

In light of the aforementioned analysis in this paper, it is imperative that policymakers should forthwith take up the strengthening and capacity building of NCLAT in its role as the competition law appellate body. The recommendations in this paper are aimed towards the augmentation of NCLAT's capacity to handle increasing litigation in competition law in a time-bound manner. As a consequence of the implementation of such recommendations, timely disposal of competition law appeals along with enhanced clarity and consequent predictability of decisions of NCLAT and impartial scrutiny of orders by CCI would not only increase the credibility of both CCI and NCLAT but also give their orders greater weight in terms of enforceability. Otherwise, in the near future, NCLAT will be overwhelmed with the sheer number of competition law appeals and thus, be rendered ineffective in timely adjudication, thereby rendering the whole regime of competition law in India as present only on paper.

As the competition law appellate body, an NCLAT that is proactive, efficient, and stable in its functioning will serve as a beacon for other appellate forums in India. It would also instill confidence in common citizens and the small and medium enterprises on which governments have come to place increasing importance that they would have recourse against unfair practices and a duty-bound organ that redresses their concerns and stands by them.

Endnotes

¹Monopolies and Restrictive Trade Practices Act 1969 came into force on 1 June 1970.

²Competition Act 2002 received the assent of the President on 13 January 2003 and came into force on 30 March 2003.

³CCI was formed on 14 October 2003.

⁴See Section 171 of Chapter XIV in Part VI.

⁵Originally, the NCLAT was institutionalized with effect from June 1, 2016, under Section 410 of the Companies Act 2013 as an appellate body

for the National Company Law Tribunals (NCLTs). Besides that, NCLAT also acts as an Appellate Tribunal for hearing appeals against the orders passed by National Company Law Tribunals (NCLT) under Section 61 of the Insolvency and Bankruptcy Code 2016 (IBC), with effect from 1 December 2016. Further, in addition to these aforementioned functions, NCLAT discharges the functions of an Appellate Tribunal against orders under Section 202 and Section 211 of the IBC by the Insolvency and Bankruptcy Board of India. Thus, at present, NCLAT is the appellate body for three commercial legislations, namely, The Companies Act 2013, The Insolvency and Bankruptcy Code 2016, and The Competition Act 2002.

⁶This bench comprised then-Chief Justice Ranjan Gogoi, Justice N. V. Ramana, Justice D. Y. Chandrachud, Justice Deepak Gupta, and Justice Sanjiv Khanna.

⁷Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules 2017

⁸Under sub-sections (2) and (6) of Section 26, Section 27, Section 28, Section 31, Section 32, Section 33, Section 38, Section 39, Section 43, Section 43A, Section 44, Section 45, or Section 46 of the Competition Act 2002.

⁹Under Section 53A(1).

¹⁰26 May 2017, COMPAT stood merged with the NCLAT as Part VI Chapter XIV of the Finance Act 2017 was notified by the Government of India.

¹¹For financial year 2017-18, the considered period is 26 May 2017 to 31 March 2018, and thus, it is 56 days short of a full 365 days.

¹²This set of appeals was disposed of by NCLAT by disallowing appeals on 5 March 2020 (CCI Order was upheld by NCLAT).

¹³This set of appeals was disposed of by NCLAT by disallowing appeals on 18 December 2019 (CCI Order was upheld by NCLAT).

¹⁴Ministry of Corporate Affairs (2019), in its Report of the Competition Law Review Committee (CLRC) submitted on 26 July 2019, recommended the same in para 8.4, p. 31.

¹⁵Section 411(3) of the Companies Act, 2013, that lays down qualifications of a technical member in NCLAT does not provide for expertise in

competition law and policy or economics, as it was initially an appellate body only for issues pertaining to company law.

¹⁶Section 53-D. Qualifications for the appointment of Chairperson and Members of Appellate Tribunal: (1) The Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court. (2) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.

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