

Competition Law and Oil and Gas Sector in India: A Critical Analysis

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ABSTRACT

India has been one of the major importers of crude oil in the world. The legal and regulatory framework of Oil and Gas Sector in India is a bundle of laws ranging from Oil Fields (Regulation and Development) Act 1948 to Petroleum and Natural Gas Regulatory Board Act 2006. With the recent case of Reliance Industries (2008 – 2013), Competition law of India has become one of the essential legal segments of this regulatory framework. The Petroleum and Natural Gas Regulatory Board Act 2006, through its Section 11, empowers the Regulatory Board to ensure fair trade and competition.

The author through this paper wishes to explore the vital impact of Reliance Industries case on the Oil and Gas Law of India. The pertinent question which needs to be explored is whether dominance in the oil and gas sector can amount to the anti-competitive marketing strategy of the field. Another issue which needs exploration and research is pricing and cartelization. Primary and Secondary Sources will be used for research and analysis.

The conclusion of the paper will be based on an overall analysis of applying competition law to oil and gas issues, especially considering India as the market.

Keywords: Competition law, oil and gas sector, India, Petroleum

INTRODUCTION

In the import and export business at a global level, India has been one of the significant importers of Oil and Natural Gas. It is pertinent to note that Oil and Natural Gas contributes significantly to the GDP figure of India. According to recent official documents, India has million metric tons of crude oil and natural gas.¹ As per the published report by the Ministry of Petroleum and Natural Gas, the import numbers of Crude Oil is high. The relevance of crude oil and natural gas as the infrastructure pillars of the country cannot be ignored.

When a country imports a significant amount of infrastructure raw material from other countries around the world, it put forward a very significant question – What a country needs to do to address its critical requirements of basic raw materials such as Petroleum and Natural gas.

The author through this paper aims at bringing the synergy between competition

¹Bilal Abdi, “India’s crude oil production remains flat, natural gas output grows 5.69% in July”, *The Economic Times*, September 4, 2017. <https://energy.economictimes.indiatimes.com/news/oil-and-gas/indias-crude-oil-production-remains-flat-natural-gas-output-grows-5-69-per-cent-in-july/60362599>

law of the country and active participation of the private sector in Oil and Natural gas field. The author seeks to understand as to why the private sector has less penetration in the field as compared to government-owned enterprises. Does it reflect that the government has been able to harness significant infrastructure power in Oil and Gas sector through the help of government-owned enterprises or is it just curtailing tendencies towards new entrants in the market?

MAJOR PLAYERS IN OIL AND GAS SECTOR

Government players significantly dominate the Indian Oil and Gas Sector.² The following table showcases their individual roles in the overall petroleum, natural gas or crude oil extraction, processing and other related activities. The table is as under:

Table 1 – Contribution of Government Players in India’s Oil and Gas Sector

S. No.	Player’s Name	Contribution
1)	ONGC	72% Crude Oil and 48% Natural Gas Extraction
2)	GAIL	Handling Hazira – Vijaypur – Jagdishpur Pipeline Project
3)	IOCL	One of the largest corporates; listed in Fortune’s ‘Global 500’
4)	HPCL	Holds nearly 25% of Market Share
5)	OIL	Premier Company for Exploration, Development and Production of Crude Oil

If a clear inference is drawn from the above table, it can be seen very correctly that central or state government-owned enterprises majorly cover India's Oil and Gas sector. In order to understand the position of market players in the oil and gas sector, especially in reference to India, it is very important to be aware of the legal framework of Oil and Gas sector in India at first hand.

LEGAL FRAMEWORK IN INDIA

India is currently holding a number of laws, rules, and regulations in providing a basic regulatory framework to carry out necessary activities associated with the sector such as exploration, production, refining, processing, and distribution.³ With acts such as Oil Fields (Regulation and Development) Act 1948, the Petroleum Act, 1934, Petroleum and Natural Gas

²Schaffer, Terersita C., *India and the United States in the 21st Century: Reinventing Partnership*, Washington D.C. The CSIS Press, 2009

³Thomson Reuters, “Oil and Gas Regulation in India: Overview”. Accessed 29th March, 2018 [https://uk.practicallaw.thomsonreuters.com/4-635-5648?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-635-5648?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

Rules, 1959, Petroleum and Natural Gas Regulatory Board Act 2006, it is pertinent to note that Competition Act, 2002⁴ in the recent past has become an indispensable part of this legal and regulatory framework.

The author has introduced the bundle of acts at this juncture to make the readers familiar with the basic and conventional legal framework of Oil and Gas Sector in India. But, regarding a growing economy and market competitiveness, it is vital to understand the contemporary role played by the Competition Act, 2002 in this regard.

All the other acts do not provide a regulatory market base to address the key and intricate issues of market share, public and private players harmony and above all the much-needed private sector inclination towards Oil and Gas field. One could question whether private sector inclination towards a field which is majorly run by government enterprises is important after all. From 1989 to 1991, a lot of government Oil and Natural gas policies went into trouble due to payment issues.⁵ In 1994 – 1995, under the chairmanship of Mr. U Sunderarajan⁶, an examination of market-determined prices was done. Further, a planning group was set up to work on the strategic restructuring of the Oil industry in India. It is pertinent to note that due to the government policies for Oil and Natural Gas field during this time, it was observed that Government would be able to take the ownership of this field and it will attribute to a socialist approach to nearly all economic policies.

COMPETITION LAW AND MARKET ENVIRONMENT IN INDIA

The Competition Act, 2002 through its preamble stipulates that as per the economic development of the country, the Commission established under the Act will prevent practices which have a hostile effect⁷ on the market competition as well as which restrains a sustainable

⁴Kumar, Sanjay and Ayush Gupta, 'Natural Gas Markets In India – Opportunities and Challenges', (Singapore : Springer Nature, 2017) Accessed March 28, 2017
<https://books.google.co.in/books?id=6uhyDgAAQBAJ&printsec=frontcover&dq=Act+1948,+the+Petroleum+Act,+1934,+Petroleum+and+Natural+Gas+Rules,+1959,+Petroleum+and+Natural+Gas+Regulatory+Board+Act+2006,+it+is+pertinent+to+note+that+Competition+Act,+2002&hl=en&sa=X&ved=0ahUKEwjFw7Ce6pnaAhVMQo8KHfW0AiUQ6AEIMTAB#v=onepage&q&f=false>

⁵Indian Petroleum Industry, "*Public Enterprises, Government Policy and Impact on Competition*", June 2009 Accessed March 27, 2017

http://www.cci.gov.in/sites/default/files/Indicus_20090420152009.pdf

⁶Indian Petroleum Industry, "*Public Enterprises, Government Policy and Impact on Competition*", Chapter V, Page 14

⁷The Competition Act, § 4 (2002)

competition between various players. It aims at protecting consumer interests and ensuring freedom of trade.

Thus, it can be inferred that Competition law in India aims at welcoming new entrants in the market.⁸ It asserts to bring healthy competition among various players in the same market segment. This helps to ensure a healthy sustaining market.

COMPETITION IN EXPLORATION

Exploration and production of crude oil and natural gas take a heavy amount of financial investments.⁹ Hence, in case there is no significant market competition in the country, corruption tendencies can be seen in this field. As previously mentioned, that Sunderarajan's Committee attempted to strategize the oil and gas industry of India. During this period, in 1997, New Exploration Licensing Policy¹⁰ came into being. This policy aimed at the competition between the bidders on cost recovery with the freedom to sell their oil share to anyone in the country. In other words, this policy aimed at bringing Indian and foreign companies at an equal footing by the competitive process. Further, the policy does not mandate any state participation or government interest in the processes. It allows obtaining of exploration licenses on a competitive rather than nomination basis. It can be ascertained that NELP aimed at safeguarding the spirit of market competition in the field of exploration and production.

NELP came at a time when the Indian governments were engaged in various activities to curb free-spirited competitive exercises in the market. In the Punn – Mukta fields case¹¹ Reliance and British Gas were forced to sell gas to GAIL at a price of its own choice, despite freedom of trade as a clause was included in the concluding agreement.

Further, at this juncture, it is vital to note that bidders in the exploration field have to penetrate a market which is covered by Indian government companies and hence, a fruitful negotiation to be reached is a far-fetched process. As seen in the Cairn Energy case,¹² negotiations between Cairn Energy and Indian Oil Corporation for the crude waxy

⁸The Competition Act, Preamble (2002)

⁹Victor Mallet, "India targets \$ 40 bn of untapped oil and gas" *Financial Times*, March 15, 2016 <https://www.cnbc.com/2016/03/15/india-targets-40bn-of-untapped-oil-and-gas.html>

¹⁰New Exploration Licensing Policy (1997) <http://petroleum.nic.in/sites/default/files/2exp.policy.NELP2015.pdf>

¹¹ Indian Petroleum Industry, "*Public Enterprises, Government Policy and Impact on Competition*", Chapter V, Page 15

¹²--, "High Court dismisses Cairn India's plea to export Barmer Crude" *The Economic Times*, October 18, 2016; <https://economictimes.indiatimes.com/industry/energy/oil-gas/high-court-dismisses-cairn-indias-plea-to-export-barmer-crude/articleshow/54913510.cms>

discovery in the Barmer area of Rajasthan failed. Hence, if the stage of exploration is considered independently, market penetration by a new player is a really difficult task.

COMPETITION IN REFINING INDUSTRIES

Although different stages exist in the Oil and Natural gas business, private participation in the refining and user industry was very minimalistic. In 1998,¹³ refinery licenses were given to the Birla group (jointly with Hindustan Petroleum Corporation, a subsidiary of Indian Oil Corporation). Essar group secured these licenses in 1993 and Reliance Industries in 1996. When these licenses were issued to the private entities, they were successful in the business of oil sales. The author has placed significant discussion surrounding the role of Reliance Industries in the field of oil refining in India in the subsequent subheads.

KEY ISSUES OF MARKET COMPETITION IN THE OIL AND GAS SECTOR

The private sector was first allowed to enter the Oil and Gas sector in India roughly in the 1980s, and these private enterprises have been successful in discovering new resources for the country. Reliance Industries was able to discover Oil in Krishna – Godavari base¹⁴ and the gas reserves estimation reached in trillions. But it is vital to note that the entry of private players apart from the field stage of oil and gas exploration is nearly zero. For instance, the stage of oil refining and distribution does not showcase any private player in the market.

Further, taking into consideration Natural gas businesses, it entails an expensive transport system in the form of pipelines. Hence, entities engaged in the gas businesses will look out for large buyers as compared to small buyers. GAIL's Hazira – Vijaypur – Jagdishpur¹⁵ pipeline is one of the most significant gas pipeline transportation undertaken in the country.

A question can be posed here, as to what restricts a private player to plunge into the

¹³ET Bureau, "25 years of reforms: Aditya Birla group's international footprints made a beeline for success" *The Economic Times*, July 21, 2016

<https://economictimes.indiatimes.com/industry/services/retail/25-years-of-reforms-aditya-birla-groups-international-footprints-made-a-beeline-for-success/articleshow/53310643.cms>

¹⁴Shishir Asthana, "10 things you should know about the Reliance KG – D6 gas deal" *The Business Standard*, February, 18, 2014 http://www.business-standard.com/article/companies/10-things-you-should-know-about-the-reliance-kg-d6-gas-deal-114021200357_1.html

¹⁵--, "GAIL to build pipeline from Vijaywada to Vijaipur" *The Hindu*, April 25, 2009

<http://www.thehindu.com/todays-paper/tp-business/GAIL-to-build-pipeline-from-Vijaywada-to-Vijaipur/article16622812.ece>

oil and gas sector completely and to not restrict its presence in the exploration stage alone.

FAIR TRADE AND COMPETITION

The Competition Act, 2002 aims at fair trade and competition in the country. The act also aims to provide an equal footing for the players to freely trade and compete with each other in a healthy way. In 2002, the government abolished the then existing system for controlling oil prices. With an introduction to direct subsidies, issuance of distribution licenses to Reliance and Essar, an anticipated fair trade and the competition was expected.

India had been in regular talks with world economies at large to ascertain 'reasonable and responsible oil pricing' for developing countries like itself. OPEC or Organization of Petroleum Exporting Countries became one of the significant bodies in these important discussions.

ALLEGED RESTRICTIVE AND UNFAIR TRADE PRACTICES

It is vital to understand that whether these government-based enterprises push the spirit of competition forwards or stales it. In 2006,¹⁶ ONGC or Oil and Natural Gas Corporation came into light with suspicion of cost padding. Cost padding¹⁷ is a process of cost difference exerted by an enterprise to increase its cost reimbursement and falsifies the actual cost. Cost padding comes under the ambit of alleged unfair trade practice and goes against the ambit of market competition as stipulated in the Competition Act, 2002. There have been numerous instances where these entities have been under the radar of cost checks. Oil and gas-based contracts have majorly gone to these government-based companies and which demystify¹⁸ that private players are well placed in this competitive segment. There are a number of reasons as to why the placement of private players¹⁹ in securing these contracts is very less. One of the most pertinent

¹⁶Varun Rai, "Adapting to shifting Government Priorities: An Assessment of the Performance and Strategy of India's ONGC", Program on Energy and Sustainable Development, Freeman Spogli Institute for International Studies, April 2010

https://fsi.stanford.edu/sites/default/files/WP_91_Rai_Adapting_to_Shifting_Government_Priorities.pdf

¹⁷Laffont Jean-Jacques and Jean Tirole. "Cost Padding, Auditing and Collusion", *Annales d'Économie et de Statistique*, (Jan. - Jun. 1992), pp. 205-226 DOI: 10.2307/20075864

¹⁸Sharma Deepak and Haripriya Gundimeda, "Market Structure and Performance of Downstream Oil Industry: A Case study of Indian National Oil Companies", Accessed March 28, 2018, http://www.iaee.org/iaee2017/submissions/OnlineProceedings/DS_IITB_Paper.pdf

¹⁹Mehta Pradeep, "A Functional Competition Policy for India", Academic Foundation and CUTS Centre for Competition, 2006 Accessed March 28, 2018

<https://books.google.co.in/books?id=YrkMLy9Z6OwC&pg=PA224&dq=oil+and+gas+private+companies+india+competition&hl=en&sa=X&ved=0ahUKEwiWydGUvJraAhVEuI8KHT1yCAcQ6AEIKDAA#v=onepage&q=oil%20and%20gas%20private%20companies%20india%20competition&f=false>

causes is numerous restrictions by the government on the discoverer's rights. Even if a discoverer agrees to sell off his share in the Indian market, it will be difficult to secure a rational price as the refining industry's stake is majorly held by public enterprises.

ABUSE OF DOMINANT POSITION, PRICING AND CARTELIZATION

Although Reliance got a license for petrol pumps in 2002,²⁰ it has sold only a small proportion of its petrol and diesel output through pumps; it has exported the bulk.

On 24 March 2008,²¹ Reliance announced that it was closing down all its petrol pumps. The reason was that the government was subsidizing petrol and diesel sold out of its companies' pumps, but did not give the subsidies to private competitors.

Essar did not take a public decision to close down pumps; it simply stopped regular supplies to its pumps.

As stated before by the author few public sector enterprises majorly dominate the oil and Natural gas sector. It is therefore pertinent to explore the chance of cartelization.²² Cartels²³ or the process of cartelization reflects the formation of an informal group among fewer enterprises to restrict market competition. Such formations go against the spirit of competition law. It can include setting minimum prices, restriction of the price formulations, a division of markets, restricting new entrants and thereby creating a market monopoly for the given sector or field. Cartelization has been declared as an anti-competitive practice across the world. The legal reason as to why cartels are considered as anti-competitive is because they are against public interest and order.

As reported in July 2010,²⁴ Reliance Industries moved to Competition Commission of India or CCI to allege that state-owned enterprises such as Indian Oil Corporation, Bharat Petroleum Corporation Limited and Hindustan Petroleum Private Limited have

²⁰--, "BP Plc working with Reliance Industries to start petrol pumps", *Live Mint*, October 19, 2017 <https://www.livemint.com/Industry/ZdVG7waWghNFwtW1ApfscJ/BP-Plc-working-with-Reliance-Industries-to-start-petrol-pump.html>

²¹--, "RIL to restart petrol pump network by March next year", *The Times of India*, May 24, 2015 <https://timesofindia.indiatimes.com/business/india-business/RIL-to-restart-petrol-pump-network-by-March-next-year/articleshow/47403790.cms>

²²Dahremöller, Carsten and Dato, Simon, "Collusive Shrouding and Cartelization", June 8, 2013, <https://ssrn.com/abstract=2306601>

²³Naidu, R.Y., "Cartels Vis – a – Vis Competition Law: Judicial Analysis" *NALSAR Law Review* (2013): 165 – 187

²⁴--, "RIL moves CIC, says PSUs acting as cartel in ATF supply", *The Hindu*, July 14, 2010, <http://www.thehindu.com/business/companies/RIL-moves-CIC-says-PSUs-acting-as-cartel-in-ATF-supply/article16196436.ece>

formed a cartel to supply sources to turbine fuel to Air India. At this juncture, it is significant to note that despite a private player in the market, Reliance had the urge to enter the business of jet fuel supplies. Section 3 and 4 of the Competition Act, 2002 were invoked in the complaint filed by RIL. RIL's complaint is after the alleged cartel formation for oil price rises.

In 2013, the CCI looked into the matter of cartel formations by OMC's or state-owned Oil marketing companies for fixation of petrol prices. At this juncture, CCI alleged that the coordinated pricing mechanism as executed by these public companies violate competition norms as they exist in India. Since 2010, the price revision has been done 34 times roughly.

In 2017, a very strong corollary was made in 'The Hindu' by Mr. Raghuvir Srinivasan²⁵ in this regard. It stated that do telephonic companies like Airtel, Vodafone and Idea charge the same tariffs to all their consumers? No. Then, why these public sector oil companies have the same price at their petrol stations. The situation of such cartel formations has exposed a very peculiar state for market competition in India.²⁶ At one hand, all these public companies have formed cartels to restrict competition, whereas private players, on the other hand, want to fight this strong cartel to penetrate the market.

The Competition Commission of India looked into the matter of collusive behavior²⁷ in this regard. Collusive behavior stipulates a chain of fake actions taken by interested parties to achieve a mutually desired aim. Due to the cartel tendencies of these companies, CCI was dutifully correct in investigating the same in the past. With the overall control and significant market share, these public companies do not need to

²⁵Raghuvir Srinivasan, "Smash the PSU Oil Cartel", *Business Line (The Hindu)*, <https://www.thehindubusinessline.com/opinion/columns/raghuvir-srinivasan/smash-the-psu-oil-cartel/article7170799.ece>

²⁶--, "Oil and Gas Industry in India: Legal, Regulatory & Tax", Nishith Desai Associates, accessed March 28th, 2018 http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Oil_and_Gas_Industry_in_India.pdf

²⁷Sushmi Dey and Shine Jacob, "Oil Companies under CCI scanner for price fixing", *Business Standard*, May 22, 2013 http://www.business-standard.com/article/economy-policy/oil-companies-under-cci-scanner-for-price-fixing-113052101021_1.html

coordinate prices for their petrol stations.

Interestingly, in 2017²⁸ itself, combinations like mergers and acquisitions involving the central public sector enterprises (CPSEs) were exempted from the ambit of Competition Commission of India for five years. As per the official notification, sectors or enterprises adhering to the rules of Oilfields (Regulation and Development) Act, 1948 were exempted from the application of Section 5 of the Competition Act, 2002.

ENTRY/ GROWTH PLANS OF PRIVATE SECTOR

In 2007, Reliance Industries was able to secure 100% EOU status.²⁹ EOU or Export Oriented Unit is a scheme launched in 1980 by the Government of India. This scheme allows manufacturing of resources with an objective to export except the limited sale clause in Domestic Tariff Area or DTA as under the FTP or Foreign Trade Policy. Reliance Industries securing a 100% EOU status will help it to get duty-free access³⁰ to crude material, on the pre-condition that it can secure the balance between its imports and exports. When Reliance closed its petrol pumps, it could not have reached an agreement with the public sector enterprises as it would go completely against its EOU status.

CONCLUSION

India is a developing economy and lacks in basic to advanced infrastructure, and hence, it needs to look upon the various market circumstances as they exist today in the relevant sectors.

When Indian oil companies can become one of the largest companies, the question which comes to the forefront is why the sixth entity in place – Essar – a private entity has the negligible share. Ironically, most of the private entities have low contributions within the country but are exporting their major portion of manufacture to different regions of the world. One of the glaring examples of such a situation is Reliance Industries 16% contribution to oil companies' sales, but 60% of its manufacture being exported to different parts of the world. The pertinent question which needs to be answered is whether central or state government-owned enterprises are monopolizing the Oil and Natural Gas sector.

²⁸--, "Mergers involving Central and Gas PSUs exempt from Competition Commission Nod", *The Hindu*, November 23, 2017 <http://www.thehindu.com/business/Industry/mergers-involving-central-oil-and-gas-psus-exempt-from-competition-commission-nod/article20697454.ece>

²⁹Indian Petroleum Industry, "Public Enterprises, Government Policy and Impact on Competition", Chapter VII, Page 20

³⁰Indian Petroleum Industry, "Public Enterprises, Government Policy and Impact on Competition"

As per the doctoral findings of the author, it can be seen that private parties are resisted for penetrating this market sector efficiently.

As observed in various studies, the domestic market of oil and gas has tilted towards monopoly by few players. With Reliance Industries 100% EOU status, it is significantly clear that competition law in India needs to bring a synergy with the Infrastructure laws of the country as well. If both are not channelized together then successful private entities will not contribute towards basic infrastructure pillars of a country, in this case, being oil and natural gas sector.

On the other hand, it is vital to understand that all the stages of oil and natural gas have to work in harmony. If the exploration and production are hurdle free, but refining is clutched into various regulatory compliances, it will be difficult to implement a smooth chain process. Further, one cannot open the gates to enter this market carelessly. Hence oil exploration licenses need to be channelized and regularized more.

At this juncture, the author feels that synergistic consideration needs to be placed for government subsidies towards private entrance into the sector till the time they can secure a minimum turnover.

There can be a number of ways in which the spirit of competition law can be implemented in the field of oil and natural gas safely and effectively. Among all stages, market competition is mostly required in the distribution sector. Since corruption tendencies are quite frequent in these sectors (here a parallel analysis can be made to the Food Distribution system in India), licensing will not be a very effective regulatory framework for market competition. To make a level playing ground, taxing framework in this regard has needs to be put down into consideration in respect to player placement in the market sector.

In the end, the author concludes that with the intricate and complicated relationship of Competition law and Oil and gas in India, the role of Competition Commission will undergo a massive metamorphosis. While undertaking this discussion, the present overlap between CCI and the Natural Gas Regulatory Board should be taken into consideration.