IMPERFECT ALTERNATIVES: ECONOMIC EVIDENCE IN INDIAN REGULATORY LANDSCAPE

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I. INTRODUCTION

This review deals with the book, "*Courts, Regulators, and the Scrutiny of Economic Evidence – Comparative Perspectives*" by Despoina Mantzari.[1] The book primarily deals with the often-ignored question of whether the increased usage of economic evidence in regulatory disputes challenges the error-correction function of judicial review.

While dealing with this question, the book also highlights the limits of judicial review of economic evidence in appeals from utility regulators in the US and the UK. There are broadly three arguments that the author makes and defends in the entirety of the book- (i) due to epistemic and polycentric disputes, and institutional legitimacy concerns, the role of courts ought to be of restraint; (ii) the best way to promote an error-correction function of judicial review in the assessment of economic evidence requires a balance to be struck, in which deference is accorded to agencies on the grounds of institutional competencies and some degree of epistemic diversity is introduced in courts; (iii) courts should, in the most part, adopt a deferential posture towards the agencies' discretionary economic assessments predicated upon institutional competencies considerations. The book addresses all of the above using a mixof doctrinal and empirical approach.

The author makes clear at the beginning of the book that the discussions in the book pertain to only the regulatory landscape of the utility sector in the US and the UK. Hence, it becomes increasingly important that we apply the discussions of the book to the Indian legal framework to understand whether the discussions can provide any guidance to utility regulation in India. In any

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[1] Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence – Comparative Perspectives* (1st edn., Oxford Univeristy Press 2022) 1 ('**Mantzari**')

event, the usage of economic evidence in the context Indian competition law has already been well-recognized.[2]

Considering that in India, almost all the regulations dealing with the utility sector have been adopted in the 21st century, both the specialist and generalist courts dealing with the same are relatively new in analysing economic evidence that comes along with utility regulation. Thus for India, whether the answer lies in complete deference to specialised bodies and their deliberations or the introduction of some expertise in the form of epistemic diversity in generalist courts, is something that shall also be addressed in this book review.

This review aims to demonstrate that Mantzari's book provides a workable framework for the usage of economic evidence in the regulation of the utility sector in Indian jurisprudence.

This book review employs the 'rule of three': it analyzes *three* case-laws dealing with utility regulation in *three* different sectors. This methodology has been used to test the book's analysis on the touchstone of the Indian regulatory landscape. This review utilizes three case laws across the sectors of (a) securities market, (b) telecom market and (c) the airports sector in India to examine how the use of economic evidence in these factual matrices could have contributed to more efficacious and well-reasoned verdicts. These verdicts are efficacious and well-reasoned due to them being premised on efficiency considerations and nuanced economic analyses respectively. Mantzari also notes these benefits in her book, by highlighting the role essayed by economic evidence in tackling the 'epistemic asymmetry'[3] plaguing generalist courts dealing with utility disputes.

This review is divided into five parts. With an introduction in Section I, Section II deals with the securities market. Section III applies Mantzari's framework in the context of the telecom market. Section IV extends the framework to the airport sector. Finally, Section V concludes.

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[2] Rahul Singh, 'Whither evidence (Act) based reasoning? Towards an effects-based approach in Indian competition jurisprudence' (2017) 5(2) Journal of Antitrust Enforcement 239-259.
[3] ibid 7.

II. THE SECURITIES MARKET: *BOMBAY DYEING*

We commence the review via a brief analysis of the Securities & Exchange Board of India (SEBI)'s final order in the matter of the Bombay Dyeing and Manufacturing Company Ltd.[4]
In its order dated 21st October, 2022, SEBI mentions the major parties involved as:

1. *Bombay Dyeing and Manufacturing Company Ltd. (BDMCL)* - BDMCL, established in 1879, is situated in Mumbai. BDMCL is part of the Wadia Group and is engaged in the business of real estate, polyester and retail/ textile. The equity shares of BDMCL are listed at BSE and NSE.[5]

2. *Promoters of BDMCL* - Wadia Group Companies [Bombay Dyeing Real Estate Company Limited (BDRECL), Pentafil Textile Dealers Limited (Pentafil), Archway Investment Company Limited (Archway), BDS Urban Infrastructures Pvt Ltd (BDS) and Springflower Investments Pvt Ltd] along with Mr. Nusli N Wadia, Ms Maureen N Wadia, Mr. Ness N Wadia and Mr. Jehangir N Wadia.[6]

3. *Scal Services Ltd. (Scal)* - Scal is an unlisted company incorporated in 1983 and had its registered office in Mumbai. During the Investigation Period (IP) from FY 2011-12 to FY 2018-19, (i) the shareholding of Scal was held by various Wadia Group entities and (ii) Scal was primarily engaged in the business of Real Estate and Trading.[7]

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[4] 2022 SCC OnLine SEBI 152 ('*BDMCL*').
[5] ibid [¶2.1].
[6] ibid [¶2.3].
[7] ibid [¶2.5].

A timeline of the relevant events has been constructed as follows:

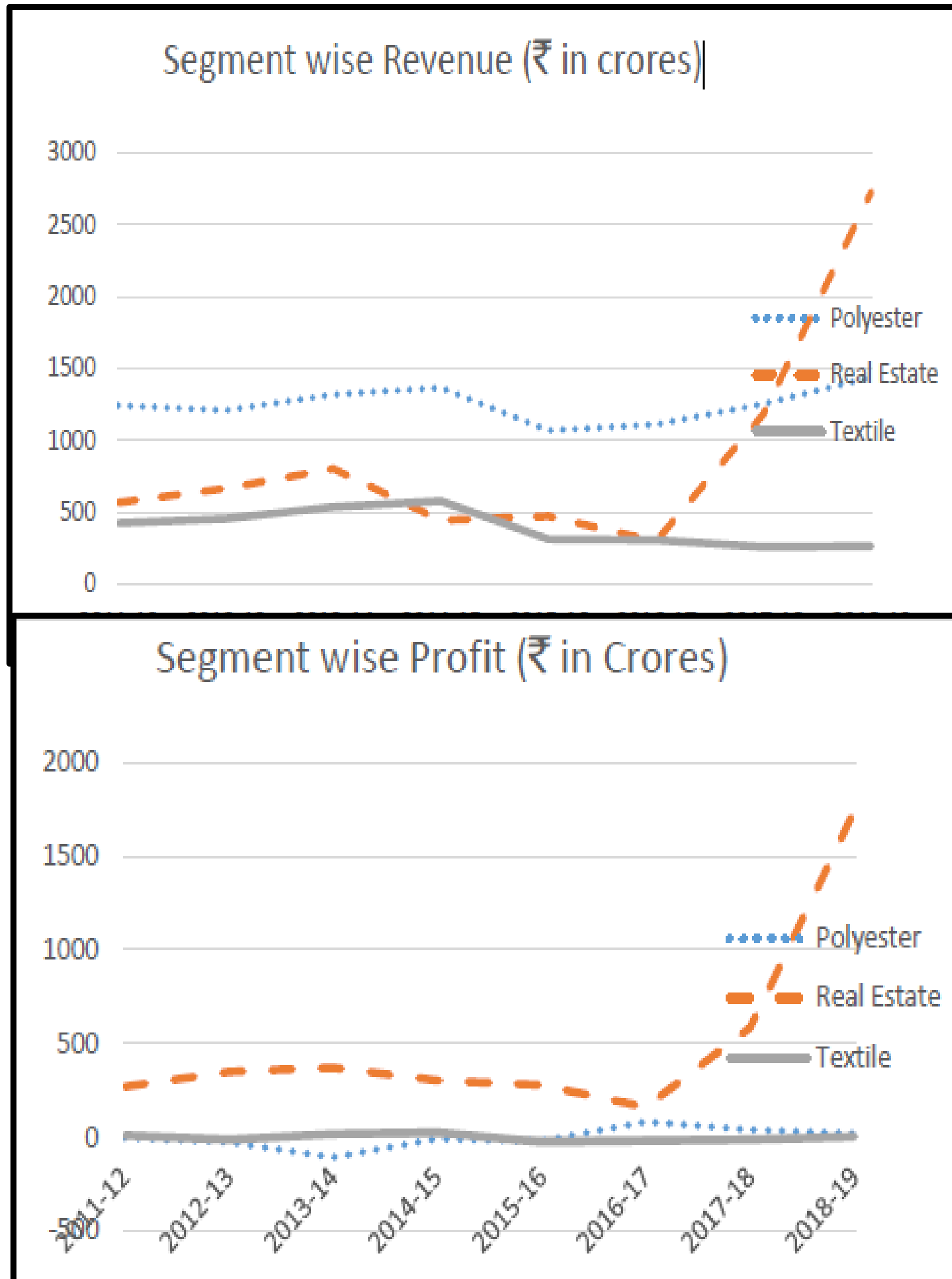
Incident	***Date***
BDMCL sells 30% stake in Scal to BDRECL	March 29, 2012[8]
BDMCL enters into 2 MOUs with Scal for sale of flats/allotment rights in Project One ICC and Project Two ICC, Dadar, Mumbai amounting to ₹744 crores	March 30, 2012[9]
The Real Estate Business Undertaking of Scal is demerged and vested into BDMCL, with effect from July 01, 2018, pursuant to an order passed by the NCLT, Mumbai Bench	February 21, 2019[10]
BDMCL states the amount realised from the 11 MOUs entered into with Scal as ₹186 crores	October 17, 2019[11]
BDMCL confirms the sale of 30% stake in Scal to BDRECL, effectively reducing its individual shareholding to 19% in Scal	September 15, 2020[12]
JMD-CFO Mr. Durgesh Mehta of BDMCL states that the aforesaid sale was in furtherance of preventing the consolidation of Scal's accounts with that of BDMCL's	January 7, 2021[13]
Mr. Nusli Wadia, Mr. Ness Wadia and Mr. Jehangir Wadia state that the aforesaid sale was a restructuring of BDMCL's investment portfolio but do not furnish reasons justifying the same	March 8, 2021[14]
SEBI issues a Show Cause Notice (SCN) to the Noticees, including BDMCL and Scal	June 11, 2021[15]

[8] ibid [¶2.13].
[9] ibid [¶2.16].
[10] ibid [¶2.5].
[11] ibid [¶2.16].
[12] ibid [¶2.13].
[13] ibid [¶2.15].
[14] ibid.
[15] ibid [¶1].

Post a perusal of the facts and evidence on record, SEBI held that BDMCL had defrauded its investors via the misrepresentation of inflated profits between 2011-12 and 2017-18.[16] The regulator cited BDMCL's act of selling away 30% of its stake in Scal to BDRECL as an attempt to preclude the inclusion of Scal's consolidated financial statements under that of its own.[17] Had this inclusion materialised, BDMCL wouldn't have had to account for the sale of flats to Scal, and accordingly mitigate the sales and profit figures in its own consolidated financial statements. Finally, SEBI barred BDMCL from the stock market for two years, in addition to its promoters.[18] Scal was barred for 1 year from the stock market and imposed with a penalty of ₹1 crore for facilitating fraudulent misrepresentation.[19]

To arrive at its final verdict, SEBI utilizes economic evidence, albeit in a nascent fashion. In the initial portion of the order, the regulator utilizes a simplified version of the 'hockey stick divergence' to deconstruct and explain the financial performance of BDMCL, instead of relying upon more advanced tools of economic analysis, such as cost-benefit analyses. These pictorial diagrams represent the aforesaid divergence:[20]

[16] SEBI (Prevention of Fraudulent and Unfair Trade Practices relating to securities market) Regulations 2003, regs3(b), 3(c), 3(d), 4(1), 4(2)(e), 4(2)(f), (4)(2)(k) and 4(2)(r); Securities and Exchange Board of India Act 1992, ss 12A(a), 12A(b), 12A(c).
[17] The Accounting for Investment in Associates in Consolidated Financial Statements 2001, Accounting Standard 23.
[18] *BDMCL* (n 4) [¶53(i)].
[19] ibid [¶53(ii)].
[20] ibid [¶2.8].



Hockey stick divergence, vis-à-vis economic evidence is indicative of a phenomenon where a data series or graphical representation exhibits a sudden, sharp downward or upward trend, following a relatively stable period.[21] This terminology refers to the handle of a hockey stick, wherein a phase

[21] Jón Steinsson, 'Capital Accumulation and Growth: The Solow Model' (*University of California, Berkeley*, 2023) 6 <https://eml.berkeley.edu/~jsteinsson/teaching/Solow.pdf> accessed 2 December 2023.

of stability is succeeded by an unanticipated and substantial change, bearing resemblance to the blade of the stick.

In economics, this phenomenon is often reflective of a criticality or turning point that interrupts the established trend. Hockey stick divergence is observable across a plethora of economic indicators including employment figures, GDP growth, inflation rates, stock market indices, etc.[22] The dramatic disruption in the trend is frequently predicated off of unexpected occurrences, policy modifications, technological advancements, in addition to other factors that considerably affect the economy.[23]
It is to be noted that Professor Mantzari commences her book by highlighting the ever-increasing role of economic experts and economic evidence vis-à-vis the functioning of regulatory agencies.[24] While acknowledging the behemoth that is expert knowledge within the regulatory framework in utility sectors, she juxtaposes specialist courts with generalist judges.[25] She notes that despite their lack of subject matter knowledge, generalist judges furnish decisive opinions on judgments delivered by experts.

In the SEBI Order under consideration, the use of economic evidence heralds a positive change in the direction that Mantzari advocates for. For the purpose of this book, she limits the ambit of economic evidence to theoretical frameworks and methodologies employed by experts of neoclassical economics, leaving out the popular tool of 'cost-benefit'[26] analysis.

Hockey stick divergence is not considered to be part of neoclassical economics, with the latter being a school of thought laying emphasis on the principles of supply and demand, the role of individuals as 'rational actors' and markets as efficacious allocators of resources.[27] It is more

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[22] Alessio Terzi, 'Economic Policy-Making Beyond GDP: An Introduction' (2021) Discussion Paper No. 14 European Commission 15 <https://commission.europa.eu/system/files/2021-06/dp142_en.pdf> accessed 2 December 2023.
[23] United Nations Department of Social and Economic Affairs, *World Economic and Social Survey* (World Economic and Social Survey, July 2011) 2-3 <https://www.un-ilibrary.org/content/books/9789210547581c005/read> accessed 2 December 2023.
[24] Mantzari (n 1) 1.
[25] ibid 2-3.
[26] Jean Dreze and Nicholas Stern, 'The Theory of Cost-Benefit Analysis' in A.J. Auerbach and M. Feldstein (eds.), *Handbook of Public Economics: Volume II* (Elsevier Science Publishers B. V. (North-Holland) 1987) 909-985.
[27] Robert A. Solo, 'Neoclassical Economics in Perspective' (1975) 9(4) Journal of Economic Issues 634-641 <https://www.jstor.org/stable/pdf/4224456.pdf?refreqid=fastly-

closely associated with efficiency, equilibrium states, and the optimization of individual and market behaviour.[28]

In the latter parts of the order, hints of what Mantzari considers as economic evidence, appear. SEBI refers to Scal's admission that it was acting as an 'agent' of and not as a 'bulk buyer' of BDMCL.[29] The regulator then flags that since Scal did not consider the sale of flats as 'purchases' and lacked the ability to pay for these purchases as a negative networth company, it did not add any value to the supply chain of allotment rights in the Indian real estate sector.[30]
On November 7, 2022, Bombay Dyeing approached the Securities Appellate Tribunal (SAT) against the SEBI Order, claiming that all of its transactions were in adherence with the law and applicable accounting standards.[31] While the SAT is yet to pronounce its verdict on Bombay Dyeing's appeal, it will be interesting to note the Tribunal's approach towards SEBI's reliance on economic evidence, howsoever piece meal it may have been.

In light of Mantzari's advocacy for and SEBI's own use of economic evidence in judicial decision-making, one can only hope that the SAT's upcoming order will at least comprehensively address the significance of economic evidence in adjudication, if not accord deference[32] to the same. As a specialist forum, it would be ideal for the SAT to analyse this evidence and finally commence the era of its usage in dispute resolution across the utility sectors in India.

III. THE TELECOM MARKET: *CELLULAR OPERATORS ASSOCIATION*

The departure point of Mantzari's book is that economic evidence in regulatory disputes and decisions poses a challenge to the error-correction function of judicial review. The challenge is that judges do not possess the technical knowledge and skills necessary to understand regulatory

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[28] ibid.
[29] *BDMCL* (n 4) [¶24.3].
[30] ibid [¶24.4].
[31] Priyanka Gawande, 'Bombay Dyeing moves SAT against SEBI Order' (*Livemin*t, 7 November 2022) <https://www.livemint.com/companies/news/bombay-dyeing-moves-sat-against-sebi-order-11667839863678.html> accessed 2 December 2023.
[32] David M. Hasen, 'The Ambiguous Basis of Judicial Deference to Administrative Rules' (2000) 17 Yale Journal on Regulation 330-361 <https://core.ac.uk/download/pdf/72838122.pdf> accessed 2 December 2023.

issues (referred to as 'epistemic asymmetry' in the book).[33] The rest of her book attempts to find the answer to the question- how should the court deal with the discretionary decisions of utility regulators? Through a comparative institutional assessment, she descriptively compares the experience of the United States and the United Kingdom and concludes that the standard for judicial review should be informed by numerous institutional factors that stem from the nature of the institution under the review and the nature of regulatory agency. In other words, the standard of review should follow (rather than precede) the institutional choice.[34]

This part of the paper takes the case of the telecom sector in India and explores how Mantzari's insights from her comparison of utility regulation in the U.K. and the U.S. can be used to rethink the test suite, i.e., *Cellular Operators Association of India v Union of India.*[35] The Telecom Regulatory Authority of India ('TRAI') decided to allow fixed service operators ('FSPs') that provided landline services to also provide mobile telephone services through the WLL (wireless local loop) facility. This decision was taken after the Prime Minister constituted the Group on Telecom and IT ('GOT-IT') which consisted of experts in the telecom sector. This policy was a reversal from the previous stance of the TRAI and the Department of Telecommunication ('DOT') and was controversial because the WILL technology was a competitor to the global system for mobile communication ('GSM') technology and would have adversely affected existing cellular operators. Therefore, the Cellular Operators Association of India ('COAI') challenged this policy decision before the Telecom Disputes Settlement Authority ('TDSAT'). Section 14 of the TRAI Act, 1997 establishes the TDSAT and confers on it the power to adjudicate 'any dispute' between licensor and licensee, between two and more service providers, and between a service provider and a group of consumers. The TDSAT in a ten-page order refused to interfere with the new policy because the decision to allow the WLL facility was that the TDSAT cannot interfere with a policy decision that was taken after consultation with GOT-IT which consisted of cabinet ministers, economists, eminent lawyers, among others. It held that TDSAT has unfettered jurisdiction to adjudicate the dispute on merits.[36] Thereafter, on appeal, the Supreme Court remitted the matter back to the TDSAT because of failure to consider relevant material and the absence of a finding

[33] Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence* (Oxford University Press, first published 2022).
[34] ibid 193.
[35] [2003] 3 SCC 186.
[36] See *COAI* (n 35) [10].

on ‘ensuring a level playing field’ between operators- which was one of the goals of the amendment that established the TDSAT.[37]

The court clarified the scope of judicial review when the TDSAT reviews the decision of the TRAI and the grounds of such review when the Supreme Court reviews the decision of TDSAT. These two scenarios squarely fit the two situations which Mantzari identifies in the context of the UK in Chapter 6 of the book- i.e., the specialist/specialist situation and the specialist/ generalist situation. In the U.K., the specialist/specialist situation occurs when a specialist Competition Appellate Tribunal (‘CAT’) reviews the decision of specialist/expert regulators in the UK.

In Chapter 6, Mantzari shows how in the specialist/specialist situations the intensity of review is higher because of the statutory mandate to decide the issue ‘on merits’.[38] The CAT has interpreted this to mean that it has full jurisdiction to find facts, make its appraisals of economic issues, and apply the law to those facts and appraisals.[39] The CAT undertakes a ‘profound and rigorous scrutiny’ of the decisions of regulators which includes scrutinizing economic models employed, their underlying methodology, how these work and the choice of these models over competing models, and how the regulator has reached a particular conclusion regarding a policy by using these models?[40] However, Mantzari points out that even expert tribunals like the CAT defer to assessments of specialist regulators because of institutional competence considerations in ‘polycentric disputes’ (Mantzari uses this term to refer to cases that involve multiple stakeholders- much like COAI where multiple industry players with different interests were adjudicating).[41] She explains how in a generalist-specialist situation the Court of Appeals pushes the CAT toward deference because of institutional competence considerations.[42] Following the observations of the Court of Appeals the CAT has held that it will be averse to overturning a decision of the regulator where alternative solutions to a problem or a policy issue exist and the regulator chooses one over the other.[43] The CAT gives the regulator a ‘margin of appreciation’ in policy decisions- a quite

[37] TRAI (Amendment) Act, 2000.
[38] see Mantzari (n 1) 142.
[39] ibid 146.
[40] ibid.
[41] ibid 162.
[42] see Mantzari (n 1).
[43] ibid 164.

well-established test in English jurisprudence wherein courts as a general rule defer to factual determination of regulators with respect to complex, technical subject matter.[44]

In *COAI*, the Supreme Court can be seen directing TDSAT towards exercising a more intensive judicial review on the lines of the CAT. However, the Supreme Court does not lay down a clear standard for the TDSAT in the future whenever someone challenges a policy decision before it. Mantzari's framework is useful in thinking about what such a standard could have been. She argues that the intensity of the review should follow an institutional analysis. The TRAI is currently headed by a retired bureaucrat and does not even have any economists as its members (even though there are subject matter experts). The decision to allow the WLL facility was indeed taken after extensive consultations with experts (GOT-IT) but not every policy decision needs to be taken after such consultation because constituting a GOT-IT like committee is not a mandate. The intensity of review should therefore be alert as to whether indeed the regulator has considered all the possible alternatives and evaluated them in the context of India. Additionally, the TDSAT cannot blindly borrow standards of review of economic evidence from the UKor the U.S. (which it normally does) because regulators in these countries have a long institutional history of using economics for carrying out their respective mandates. This is why such regulators are considered legitimate. The point to note is that such legitimacy is *earned*. Regulators are not entitled to deference; they have to demonstrate that they deserve it. Therefore, blind reproduction of UK case laws on judicial review of utility regulators may not be helpful in the Indian context. E.g., if the present dispute had come up in the U.K. the court of appeals would probably have expected the CAT to defer to the agency because allowing WLL is a polycentric policy issue. However, just because policy decisions are accorded a 'margin of appreciation' in the UK does not mean this should also be the case in India. The *COAI* implicitly appreciates this point but fails to articulate a clear standard. It merely states that expert assessments ought to be given 'due weight'.

Another way in which Mantzari's book is useful in thinking about *COAI* is how the Supreme Court exercised its jurisdiction. Section 18 of the TRAI Act allowed appeals to the Supreme Court only if a 'substantial question of law' was involved in the appeal. The TDSAT had argued that there was no substantial question of law in this appeal as allowing WLL was a policy choice that was

[44] ibid 165.

legally allowed. However, the Supreme Court held that the TDSAT failed to consider the material and render any finding on ensuring a 'level playing field' between operators- which was one of the goals when the TDSAT was constituted through an amendment to the TRAI Act in 2002 and non-consideration of the material itself was a question of law.

In her book, Mantzari argues that the error-correction function does not mean that a judge has to become an expert herself.[45] Law is a 'normatively closed but cognitively open system'. The discipline of economics works with the categories of true/false that are based on probabilistic inferences.[46] On the contrary, the discipline of law works with normative reference to legal/illegal.[47] When an internalist judge is faced with decisions based on an external discipline like economics she assesses it based on her internalist methodology. Thus, Mantzari argues that when a judge is faced with economic evidence in regulatory disputes, she should ensure that discretion exercised based on it should conform to 'thin legality' and 'thick legality'.[48] Thin legality refers to assessing whether the decision is legal as per the applicable law. Thick legality encompasses substantive (e.g., rationality) and procedural (e.g., due process requirements) values. In *COAI* the Supreme Court conceptualized non-consideration of material as a legal question. Thus, the court's notion of legality is based on 'thick legality'. The TDSAT, on the contrary, was merely concerned with thin legality, i.e., the fact that the decision was a policy decision that was not legally prohibited was sufficient for it to conclude that the decision was correct. The framing of non-consideration of relevant materials as a question of law is useful for future tribunals because it is a clear signal from the Supreme Court that tribunals in general and the TDSAT, in particular, should not be satisfied with thin legality but instead ensure thick legality of regulatory decisions. This is important because courts in India (epitomized by TDSAT's deference to TRAI) are averse to interfering with the policy decisions of a regulator.

To conclude, Mantzari's framework provides an illuminating framework to analyze and re-think the *COAI* decision because *first*, it helps us to coherently think about the gap in the judgment viz, the standard of deference in the case of expert regulators. Using her framework, it can be argued

[45] see Mantzari (n 1) 7.
[46] ibid.
[47] ibid.
[48] ibid 8.

that mere reproduction of the standard of review from other jurisdictions is inappropriate because the standard of review should follow an 'institutional analysis'. In the context of the TRAI, such an institutional analysis (incorporate procedure as well) suggests that the TDSAT should not defer to the TRAI and the intensity of review should be high; *second,* Mantzari's conceptualization of thick and thin legality further illuminates the logic of *COAI* and increases its precedential value.

IV. THE AIRPORT SECTOR: *DELHI INTERNATIONAL AIRPORT LIMITED*

A case selected for interacting with *Mantzari's* book, is *Delhi International Airport Ltd. v. Airport Economy Regulatory Authority of India & Ors.*[49] The background of this case is that during the 1990s, India was going through the era of modernization of airports. This led to the Airport Infrastructure Policy in 1997, through which India wished to enhance its airport infrastructure. This policy promoted private sector participation by way of the Public Private Partnership Model. Consequently, the AAI was amended for permitting the setting up of private airports and leasing of existing airports to private operators.

In furtherance of this policy, the GMR and the GVK consortiums won over the rights to manage and develop the IGIA Delhi and the CSIA Mumbai airports respectively. There was a Joint Venture ("**JV**") agreement executed between the GMR and the Airport Authority of India ("**AAI**") for Delhi International Airport Ltd. ("**DIAL**") and between the GVK and the AAI for Mumbai International Airport Ltd. ("**MIAL**"). A formula was created here for the sharing of revenue between the Airport Operators and the AAI. Revenues were earned by DIAL and MIAL through two avenues, i.e. Aeronautical and Non-Aeronautical. While they had liberty to fix prices for the latter, the prices of the former were controlled by the Airports Economic Regulatory Authority of India ("**AERA**").

There was some dissatisfaction with regards to AERA's determination of the aeronautical tariff fixed. Thus, DIAL and MIAL approached the Airports Economic Regulatory Authority Appellate Tribunal ("**AERAAT**") (and later the TDSAT). Aggrieved by the determination of the TDSAT, DIAL and MIAL then approached the Supreme Court. FIA, Lufthansa and AERA were also

[49] CIVIL APPEAL NO.8378 OF 2018.

respondents in the appeals filed by DIAL and MIAL. Appeals were also filed by FIA, Lufthansa and others on similar issues in respect of the TDSAT's impugned orders.

Before moving into the issues before the court, the SC discussed the limits of judicial review by a generalist court when reviewing a specialist court's decision. Referring to its observation in *Shri Sitaram Sugar Company & Anr. v. Union of India & Ors.*[50] the SC stated that during judicial review it must only ensure that the readings of the body prior to it, is supported by evidence as judicial review is not really concerned with matters of economic policy and the endeavor cannot be the substitution of its view for that of the legislature or the expert body. However, with that observation in place, the SC was quick to point out that in the present facts, before the complete legislative structure was set in place, operations were proceeded on the understanding of the agreement between parties, thus aspects of the agreement were pre-legislative and was something that could be looked into by the court through judicial review. It thus created a scenario where the principle that legislative intent prevails over a prior agreement, would not apply in the present scenario. This effectively meant that the judicial review in the present matter could re-appreciate evidence submitted by both parties. Thus, the appeal was to be treated different than a Special Leave Petition and evidence was to be re-appreciated.

A worthwhile connect at this stage, to *Mantzari*, could be through the discussion of how economic evidence is reviewed in the USA and how it is similar to India's. As discussed in Chapter IV, in the US, the review of economic evidence is 'internal' and economic evidence is first dealt with by specialist regulatory agencies then the ALJ and finally the federal courts. The ALJ acts as the body of first appeal and its duty is to preside over the tasking of evidence and to act as fact finders in the course of formal adjudicatory and rule-making administrative proceedings. The federal courts act as second body for appeals after the ALJ. As per the Administrative Procedure Act ("APA"), the test for the review of the decisions of specialist agencies is through the arbitrary and capricious test. In such a review, the courts review the component parts of the decisions which agencies make and strike them down if they are unsupported by evidence.

[50] [1990] AIR 1277.

India's system of review of economic evidence is very similar to the US system, a specialist appellate body/tribunal is usually present and the second body of appeals is usually the Supreme Court. Just like the US and as discussed in the present case as well, courts are supposed to merely see to that the readings of the specialist body prior to it, is supported by evidence as judicial review should not lead to the substitution of the opinion of specialised regulators and the legislative thought. However, a notable digression from the US system, is the fact that there, courts achieve specialisation through the sheer number and types of cases that come before it, e.g. DC Circuit Courts, and here, i.e. India, the same specialisation cannot be said to have developed. This can perhaps be down to the fact that utility regulation in India is relatively recent when compared to the US. Apart from this, the similarity between both jurisdictions is also evident because the *Chevron* doctrine followed by the US federal courts squarely fits into what the Supreme Court's discussion was in the present case about how to handle the observation of specialised regulators. As per the doctrine, courts while reviewing the decision of specialised regulators must follow two tests:- (i) Using the tools of statutory interpretation, the court has to verify whether Congress has directly spoken to the precise question at issue; (ii) If the statue is still ambiguous, the court has to examine whether the agency's construction of the statute is permissible or reasonable.

Using the discussion in the book, another observation that can be made in the given case is that it has followed a light touch review rather than a hard touch review. A hard touch review as described by *Mantzari* would entail that the agencies develop 'rule making' records and follow all necessary procedural requirements while also proving to the court that it considered all dimensions of the matter before it and while engaging in reasoned decision making. In the present case however, the Supreme Court agreed with the TDSAT on all issues except the issue relating to corporate tax pertaining to aeronautical services. Moreover, the Supreme Court itself, while dealing with the issue of the application of CPI-X for calculation of tariff, mentions that its engagement with the formula must be restrictive, given that a specialised body and a tribunal has gone through this aspect. [51]

[51] ibid [¶ 82].

A constraint that *Mantzari* talks about when it comes to the use of economic evidence in discretionary assessments by regulatory bodies and tribunals, is 'institutional constraint' i.e. the greater the threat of the decision being appealed in courts, the weaker the weight of economic evidence in the final decision reached and the more legalistic the regulator becomes in the approach. Given that in India, appeals of specialised utility regulators often end up in the Supreme Court, the regulators therefore must also face such 'institutional constraint'. *Mantzari's* assertion is proved right in the present case as the TDSAT when engaging with economic evidence in the issue of the application of CPI-X for calculation of tariff, ignores the equation (economic evidence) suggested by DIAL by merely mentioning that the formula is different from what was provided in the SSA.[52]

Another issue that *Mantzari's* discussion allows us to identify, is the issue of 'partisan expert evidence'. The expert evidence provided by the airport operators in the present case was not met with any objections from the end of AERA, AERA also did not produce any expert witnesses from their end. Although the Supreme Court was not influenced by the expert evidence presented as it adopted its own rationale while deciding the issue, *Mantzari* says that courts might often face the danger of adoption of partisan expert witnesses i.e. courts might get motivated to consider only one economic rationale which might be biased towards a single party, if it hears expert witnesses from only one party. According to *Mantzari*, the same can be tackled by courts asking 'neutral' experts to prepare reports of their own and then using those reports to then deliberate and decide. The same would prevent a single economic rationality taking hold of the court's thinking.

Therefore, *Mantzari's* framework allows us to appreciate the parallels of judicial review of economic evidence carried out in India with jurisdictions such as the US, which can in turn help us predict the scope of development of such review, as with time the generalist court will slowly develop specialisation over regulatory matters with the number of utility regulation cases it would have tackled. The book also allows us to understand why regulatory bodies might be a little averse to the use of economic evidence when exercising their discretion, given the threat of appeal in front of a generalist court. This means that if there is some degree of specialisation developed through handling a number of utility regulation appeals by the Supreme Court i.e. elimination of

[52] ibid [¶ 74].

its epistemic assymetry, and if it starts deferring to the expertise of the specialised regulators more often, then regulators might just increase the usage of economic evidence. Lastly, *Mantzari's* observations allowed us to highlight the issue of 'partisan expert evidence' in the given case, which could have had implications to the deliberations in the court, due to the generalist court's deliberations being poached by a single economic rationality, biased towards a party.

V. CONCLUSION

Despoina Mantzari's book offers a comprehensive exploration of the challenges posed by the increased use of economic evidence in regulatory disputes. The author adeptly navigates through the complexities of judicial review, particularly in the context of utility regulation in the US and UK. The three main arguments presented—restraint in the face of epistemic and polycentric disputes, the need for a balanced approach in the usage of economic evidence to promote error-correction, and the importance of deference to agencies' institutional competencies—provide a nuanced framework for understanding the dynamics between courts and regulatory bodies.

Mantzari's mixed approach of combining both doctrinal and empirical analysis allows us to understand how utility regulators and generalist courts in jurisdictions like the US and the UK have developed and how they exist in the present day. By using the analysis of the book and applying it to three Indian cases namely, the 'Cellular Operators Association' case, 'Delhi International Airport' case and 'Bombay Dyeing and Manufacturing Company Ltd' case, which are all cases from different utility sectors, the relevance of the book's insights was tested on the touchstone of the evolving regulatory landscape in India. According to the authors of this book review, the insights of the book allowed for critically analysing the judgments and to better understand what the judicial landscape in India still lacked when it came to utility regulation.

As the Indian legal system grapples with utility regulations adopted in the 21st century, Mantzari's work prompts important considerations for the Indian context. The question of whether to advocate for complete deference to specialized bodies or introduce expertise through epistemic diversity in generalist courts becomes particularly pertinent. This book review underscores the importance of adapting and applying Mantzari's arguments to the specific challenges faced by India, shedding

light on potential avenues for addressing economic evidence in utility regulation within the Indian legal framework.

In essence, Mantzari's book not only contributes significantly to the understanding of the regulatory dynamics in the US and the UK but also serves as a catalyst for further scholarly inquiry into the applicability of its insights in the distinctive context of India's utility regulation. Through its empirical and doctrinal methodology, the book opens avenues for future research and discourse, inviting legal scholars and practitioners to engage with its findings and explore their implications in shaping the trajectory of utility regulation within diverse legal landscapes.