



CUTS International

Comments on the Report of the Committee for Reforming the Regulatory Environment for Doing Business in India

PREAMBLE

The Committee for Reforming the Regulatory Environment for Doing Business in India (Committee) was set up in wake of the Doing Business Report 2012, released by the World Bank and the International Finance Corporation, which ranked India 132 amongst 183 countries, on the criteria of ease of doing business.

Recommendations of various previous committees/ working groups with respect to reforming regulatory governance, and achieving optimal business regulation, were available to the Committee for reference. In particular, the Working Group on Business Regulatory Framework, Steering Committee on Industry, Planning Commission, Government of India (WGBRF), in its report titled '*Towards Optimal Business Regulatory Governance in India*' (2011), conducted a macro analysis of business regulations and provided exhaustive recommendations to create an enabling business ecosystem for sustainable and inclusive business development in the country. The WGBRF was co-chaired by Mr. Arun Maira, Member (Industry), Planning Commission, and Mr. Naved Masood, Secretary, Ministry of Corporate Affairs, and Consumer Unity and Trust Society (CUTS) acted as Knowledge Partner to the WGBRF.

It was expected that the Committee would take forward the recommendations of the WGBRF, and prepare a credible framework/ roadmap to implement its suggestions. However, it seems that the Committee could not resist the temptation to prepare a comprehensive report covering as many issues as possible, which affect business regulatory environment in India. As a result, the Committee has ended up providing broad recommendations with little details or roadmap on practical implementation, which may make this report an addition to the ever increasing pile of unimplemented reports on various kinds of reforms.

Consequently, while making all the appropriate noises, absent an implementation roadmap, the Committee has lost an opportunity to focus on few critical areas of regulatory reform, and has jumped many boundaries of what should have been done.

Detailed comments from CUTS on the recommendations of the Committee follow in subsequent sections.

CHAPTER 2: LEGAL REFORMS

1. Courts in India suffer huge backlog (paragraph 2.1)

This report focuses on the delayed enforcement of contract as a specific area of concern. However, it's just an outcome of a bigger problem, which is a judicial delay. Several Law Commissions have suggested judicial reforms and corrections but all in vain. There are several reasons for such delays; few of them are:

Shortage of Judges

At present about 19,000 judges are dealing with a pendency of over 3 crore cases. In the year 2011, on an average, each judge disposed 1,372 cases in a span of 12 months.¹ There have been nearly 30 percent vacancies in high courts for the past three years, besides 19 percent vacancies in lower courts.² Even the Supreme Court is plagued by such vacancies.

The Eleventh Law Commission Report in 1987 had recommended 50 judges per million population as against the then-existing 10.5³ (the ratio now (2013) is 15.5 per million, still grossly inadequate, as acknowledged by the Prime Minister himself).⁴ To achieve this ratio, India will need 75,000 judges at the end of the next three decades.

Inadequate case management practices

The Civil Procedure Code, 1908, the Criminal Procedure Code, 1973, and the Consumer Protection Act, 1986 lay down time limits for disposal of cases. In 2005, the Supreme Court directed high courts to formulate rules for fixing a time limit for disposal of civil and criminal cases so that the huge backlog could be cleared expeditiously.⁵ Since these have not yielded the desired results, there is a need to look at successful case management practices prevalent in other jurisdictions.

2. Need for quick resolution of disputes (paragraph 2.2)

In commercial matters, there is a need to resolve the disputes quickly, as delay of each day increases the financial burden on the parties involved. This requires the cases to be heard in specialised courts, dealing specifically with commercial matters or in fast track courts, where case should be resolved in stipulated time.

¹Doing Business Report, 2012, International Finance Corporation, <http://www.doingbusiness.org/reports/global-reports/doing-business-2012>

²Website: Barandbench.com, Pending Litigations 2010, <http://barandbench.com/brief/2/1518/pending-litigations-2010-32225535-pending-cases-30-vacancies-in-high-courts-government-increases-judicial-infrastructure-budget-by-four-times->

³ Law Commission of India – Manpower Planning in Judiciary (Report no.120, 1987) <http://lawcommissionofindia.nic.in/101-169/Report120.pdf>

⁴ More Judges needed, states should take initiative, Manmohan Singh Says, The Times of India, http://articles.timesofindia.indiatimes.com/2013-04-07/india/38345513_1_three-crore-cases-india-altamas-kabir-judicial-reforms, as accessed on May 1, 2013

⁵ Fix time limit for disposing cases' The Hindu, Aug 8, 2005, <http://www.hindu.com/2005/08/08/stories/2005080800930900.htm>

There are some instances of specialised courts in India that should be emulated in commercial cases also. After Australia and New Zealand, India became only the third country to set up a full-fledged environmental court on October 19, 2010 to deal with the environment issues, and make polluters pay.⁶

Similarly, to deal with specific categories of crime like terror, sexual offences, corruption, etc. the concept of fast track courts was also introduced in India. The Law Ministry also allowed morning and evening courts in 2010 but the scheme failed to take off resulting in non-utilisation of scarce funds. The Centre is now contemplating to divert this allocation towards setting up of fast-track courts. However, none of these schemes are applicable for commercial cases.

A large number of commercial cases are under Section 138 of the Negotiable Instrument Act, i.e. dishonouring of cheques. Interestingly, the Eighteenth Law Commission in the year 2008 suggested for Fast Track Magisterial Courts for Dishonoured Cheque Cases but no action has been taken on that recommendation so far.

Moreover, one of the purposes of the Twentieth Law Commission is to identify laws which are not in harmony with the existing climate of economic liberalisation and need change, as mentioned in the terms of reference for the Twentieth Law Commission.⁷

3. Commercial disputes should be encouraged to look at alternate dispute resolution (paragraph 2.3)

The Eighteenth Law Commission in the year 2009 has suggested for need for speedy justice and need for justice dispensation through alternate dispute resolution.⁸ Although it was supposed to deliver quick results but in practice it is taking much more time than expected. In some cases arbitration proceedings take longer than the determination of identical issues by a Civil Court. The reason for such delays are appeal system and the lack of expertise on the part of Arbitrators, therefore, there is a need to review Indian arbitration system to make it more popular and less time consuming.

Twentieth Law Commission (2012-2015), headed by Justice D.K. Jain, Supreme Court of India suggested suitable measures for quick redressal of citizens' grievances in the field of law, as mentioned in its terms of reference. It is also committed for elimination of delays, speedy clearance of arrears and reduction in costs, so as to secure quick and economical disposal of cases.⁹

Few key steps have been taken in the direction to ensure speedy justice i.e. the setting up of the National Mission for Justice Delivery and Legal Reforms, which was approved in June 2011.¹⁰ The

⁶ World Wildlife Fund, Green Tribunal, feature on Indian environmental court http://www.wfindia.org/about_wwf/enablers/cel/national_green_tribunal/

⁷ <http://pib.nic.in/newsite/erelease.aspx?relid=91394>

⁸ 18th Law Commission Report on need for speedy justice & need for justice dispensation through alternate dispute resolution, available at lawcommissionofindia.nic.in/reports/report225.pdf

⁹ Constitution of 20th Law Commission of India, available at <http://pib.nic.in/newsite/erelease.aspx?relid=91394>

¹⁰ Press Information Bureau, National Mission for Justice Delivery and Legal Reform <http://pib.nic.in/newsite/erelease.aspx?relid=77346>

National Mission would help in implementing the two major goals of increasing access by reducing delays and arrears in the system and enhancing accountability at all levels through structural changes and setting performance standards and facilitating enhancement of capacities for achieving such performance standards. A mission mode approach is proposed to improve the infrastructure of Subordinate Courts under National Mission.

CHAPTER 3: REGULATORY ARCHITECTURE

1. Regulatory Authorities: selection, tenure and removal

Prima facie this subject does not fall in the realm of business regulatory framework, which is mainly to do with cutting down red tape and ensuring easy setting up and functioning of systems which can reduce the time and transaction costs. However, since the Report speaks about regulatory authorities, our view is that selection and appointment of regulators is one of the most crucial aspects that need to be addressed squarely. There has been a tendency in recent years to appoint retired bureaucrats, on few occasions others, as heads of regulatory bodies without ascertaining their suitability. Moreover, compensation offered to such posts is not competitive enough to attract younger talent from the market, though efforts have been made to make it remunerative.

The Planning Commission of India in its consultation paper ‘Approach to Regulation: Issues and Options’ stated that, “The terms of service should be sufficiently remunerative to attract qualified and experienced persons. Further, at least one of the members could be drawn from other than public sector background (such as academics, lawyers, chartered accountants, managers etc.). This would enrich the functioning of the respective regulatory bodies.”

A study undertaken by CUTS for Planning Commission, titled , “Comparative study of regulatory framework in infrastructure sector: lessons for India” mentions that appointing retired bureaucrats to regulatory bodies has become the order of the day, which is not a healthy sign, as the very purpose of setting up independent institutions gets defeated. They lack the vigour and rigour required to do such jobs. The job also requires substantial knowledge of law and economics and its intersection. Attracting young blood and talent is the key to making these institutions work in a desirable manner.

Key recommendations which need to be covered in the Report are as follows:

- A standing committee of eminent people (but not retired bureaucrats, who have their own biases in favour of retired/retiring bureaucrats seeking such positions) should be constituted to select regulators for various regulatory agencies at the central level through a transparent process and a similar model should be followed in the states. Furthermore, such appointments should be confirmed by parliamentary/legislative committees dealing with the subject ;
- Proper manpower planning should be carried out to ensure that a regulator is selected in advance of a position falling vacant; applications should be invited against pre-determined selection criteria;
- Regulators should be given a fixed tenure of five years with a maximum age limit of 60 years for appointment, with the reasons for any exceptions recorded in writing;
- Currently, the provisions existing in regulatory laws for such positions are drafted in favour of retiring bureaucrats. These provisions deter people from business/non- government sector to move to regulatory bodies and should therefore be removed;

- The prevailing practice of sinecure needs to be discouraged. The bottom line must be to encourage experts and young professionals to join such positions; and offer attractive compensation to draw young professionals to join regulatory bodies;
- Regulators and their staff should be provided with short-term training prior to induction; and
- Protection of regulators against arbitrary removal by the Government is necessary. A member of a regulatory agency should be removed only in case of proven guilt or inability established by due process.
- The government's Department of Personnel should be designated as the administrative ministry for regulatory bodies, responsible for release of appointment letter and other administrative matters. This will ensure that there is an arms-length relationship between the line ministry and the regulatory agency, which is otherwise under their control

2. Functional Autonomy

It is desirable to maintain arms-length distance between the regulators and the concerned line ministry to ensure that the latter does not unduly influence the former. In India, one example of this is that the Railways Safety Commission operates under the Ministry of Civil Aviation and not the Ministry of Railways. In South Africa, the energy regulator is under the Ministry of Public Enterprises and not the Ministry of Energy. In UK, for example, communications between the Ministry and the regulator are carefully regulated and made public so that it is always clear who is taking which position. In Brazil, regulatory legislation does not provide for the ministry to allow it to supersede the decisions of the regulatory agencies. In Philippines, the energy regulator appears to be more independent compared to its counterpart in the telecom sector. Related ministries are not entitled to issue directives to regulator in either case.

3. Regulatory Accountability

Appropriate mechanisms are required to make independent regulatory agencies accountable. Accountability could be political and legal in form. Political accountability includes submitting reports to legislature, which may have a special committee to scrutinise and debate its contents. Legal accountability enables those aggrieved by a decision to issue a formal complaint or appeal. The following approaches are followed in various countries to make independent regulatory bodies accountable:

- Annual reporting to legislature: In most cases, regulatory bodies are made accountable to legislature through the line minister. Regulators' actions are questioned only when there is an impending crisis or a serious debate in a country. In fact, in most such cases it is the line ministry that is questioned and not the regulator. In Sri Lanka, the minister may ask the commissioners of the multi-utility regulator to appear before the parliament or its sub-committee to clarify matters that might arise from the activity report submitted by the regulator. In UK, the regulatory agencies report to the parliamentary committees on a regular basis and the latter is empowered to scrutinise the former.

- Provision of appeals against orders of regulatory authority, which allows review of regulators' decisions: The judiciary is the common appellate authority but some variations exist. In Australia and UK, appeals lie at the Competition Appellate Tribunal.
- Allowing consumer groups to question and participate in regulatory matters: It is needed to empower civil society organisations (CSOs) and consumer groups to work as watchdogs.
- Arranging for independent/peer reviews on periodic basis: For example, peer review of competition authorities undertaken by the Organisation for Economic Cooperation and Development (OECD) and United Nations Conference on Trade and Development (UNCTAD).

4. Independence of the Institutions

There are different ways the Government exercises the control over independent institutions. For instance, most of the institutions covered under the study (undertaken by CUTS for Planning Commission, titled, "Comparative study of regulatory framework in infrastructure sector: lessons for India") depend upon the concerned ministries for their budgetary allocations. Allowing an institution to become financially self-sufficient (or less vulnerable) is an essential pre-condition for functional autonomy. Powers related to sanctioning and appointing the staff is another equally important matter. It is difficult to justify the power of ministries doing this job on behalf of an independent authority, which is the case with most agencies at present.

Similarly, in many cases, independent authorities have to obtain Government approval before appointing consultants or procuring professional inputs from outside. Hence, virtually it is for the ministry to decide in such matters, which is an encroachment on the independence. Arguably, the Government has the sovereign authority to express its policy and convey the same to the respective authority in a transparent manner. All laws examined in study referred to above empower the Government to issue 'policy directives'. However, what constitutes 'policy' has been left vague and subject to interpretation, in a highly arbitrary manner. Better clarity is needed in this regard. As argued in the study above, policy directives issued to regulators should be made public so that there is a public debate on whether the directive was within the realm of policy and not operations. Unless independent institutions are fully empowered, the expectations would not be met. The presence of a strong leader could tilt the balance in favour of the institution. Experience suggests that such champions have redefined the mandate of the institution, by pushing the limits and making a real difference. Such individual activism subsequently results into setting higher benchmarks for successors. A good example in India is that of the Election Commission, the election regulator.

Though the presence of champions might help in making the institutional independence widely felt, necessary backing from the legislation is a priori condition for that. However, the presence of champions cannot replace institutionalised autonomy. As long as the provisions such as reappointment of commissioners are left to the pleasure of the Government, emergence of such champions is less likely to happen. In fact, functional autonomy is a precondition for effective performance and the absence of that would only create perceptions of the Government driving

from the back seat. It needs to be realised that, other factors remaining constant, a high degree of proportional relationship exists between the degree of institution's autonomy and its credibility amongst the people. Institutional independence should not be mistaken as an objective in itself. It should rather be seen as an important pre-requisite for achieving desired effectiveness, economy, and efficiency in the system. One must carefully understand the difference between imparting functional independence and absence of accountability, as one is not related to the other.

The degree of independence might require varying approaches, depending upon the nature and mandate of an institution. For instance, the job of an electricity regulator cannot be compared with that of the RBI. Therefore, the degree of independence and the relationship with the Government, in particular, is bound to differ on a case-to-case basis. However, there needs to be a defined autonomy an institution must have in order to function effectively and deliver its mandate.

CHAPTER 4: BOOSTING EFFICACY OF REGULATORY PROCESS

1. Two-stage public consultation process (paragraph 4.3)

In order to make public consultation more meaningful, the Committee has recommended a two – stage consultation process i.e. after the first round of consultation, the regulator should attempt a revised approach paper accompanied, wherever possible, by a revised draft of the proposed regulations, to be put for public comment.

The Committee itself acknowledges this to be a time consuming process. More importantly, such approach might not necessarily spell out the rationale behind accepting or rejecting public comments. A better way to ensure that public concerns are adequately addressed is to publish a report summarising key comments from the public and providing the regulator’s response to the same, along with the revised draft of the regulations.¹¹

Another alternative to increase public interaction is doing away with the mandatory written comment requirement and adopting technological solutions to solicit comments, such as e-hangouts, webinars, online consultations¹² etc. Many regulators are already extensively using internet and technology for conducting interaction and real time sessions,¹³ and such format could be easily extended to solicit comments. Many subject experts or stakeholders might not have time or willingness to provide formal written comments and may prefer verbal interaction over written requirement. Allowing verbal comments would thus enhance public participation and stakeholder buy in of the regulatory decision making process.¹⁴ A one- to – one interaction also helps to clear doubts and differences in a short span of time, as against a tedious formal written process.

In case a two stage consultation process is followed, in order to induce efficiency and reduce repetition, first set of intense consultation could happen with the stakeholders expected to be impacted by the rules and comments from the general public could be invited during the second round.¹⁵

It must also be noted that consultation process is only one of the ways to boost efficiency of rule making process. Efficient regulation can be made only when the regulator has absolute clarity about objectives of the regulation. Regulations are essentially made for achieving results that might not be achieved by interplay of market forces within a reasonable time, and owing to inherent imperfect nature of markets. In other words, regulations primarily intend to correct market failures. It is naturally, then, to expect clarity from the regulator about the market failure or problem it is trying to address. Thus, the draft regulations must necessarily be accompanied by an objective document explaining in detail the problem, regulation is trying to address and how the regulation is expected to

¹¹The Report of the Financial Sector Legislative Reforms Commission, envisages the regulator providing reasoned general response to the comments received, and specific response to some comments.

¹²Canada allows online and offline consultations.

¹³ The Reserve Bank of India regularly conducts webinars and the Planning Commission of India regularly hosts Google Hangout sessions.

¹⁴Section 553(c) of the Administrative Procedure Act of United States provides an option to the regulatory agency to provide interested persons opportunity to participate in rule making by making oral presentation. South Africa also allows oral submissions.

¹⁵See, for instance, section 6 of the Executive Order No. 12866 of the United States on Regulatory Planning and Review which provides, “In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation”

resolve the same. It must be noted that the costs of addressing the problem identified and achieving the desired objectives must not outweigh the benefits expected from enforcing the regulations. Thus, the objective document must set out the costs and benefits of assessment of the regulations to establish the necessity of regulations.¹⁶ This would be helpful in ex-post analysis of regulations at a later date, in order to assess if the regulatory objectives were actually met and benefits were realised.

2. Replication of consent scheme in other sectors (paragraph 4.4)

The Committee has recommended that the experience available with respect to the consent scheme in financial sector should be studied so that similar schemes with adequate safeguards can be introduced in other sectors to deal with large volume of systemically unimportant matters.

Consent scheme has had quite a turbulent run in the financial sector. The scheme had invited significant criticism and was substantially redrawn recently.¹⁷ The basic premise of consent mechanism of settlement without admission or denial of guilt is adverse to legal jurisprudence, more so in cases in which victims, howsoever disperse, might be identifiable. Recent international approach to consent mechanism involves requiring admission of the guilt in order to benefit from the mechanism.¹⁸ Thus, consent schemes need to be delicately handled. Detailed principles of eligible cases must be laid down, transparent mechanisms fixing accountability must be developed, and discretion must be minimised, for consent mechanism to be reliable. The consent orders must describe in detail the misconduct and consent terms.

3. Authority of Advance Rulings (paragraph 4.5)

The Committee has recommended that every organisation tasked with writing of regulations should have a provision for an advance authority for rulings (AAR). This is to avoid multiple interpretations of often ambiguously drafted statutes.

Having AAR does not resolve the core issue of ambiguous and complex language often used in regulations. A greater emphasis on clarity and simplicity and a dedicated and revamped drafting division stocked with expert drafters could be a better solution to address this issue. The Plain Language Drafting Technique is being adopted internationally by regulators¹⁹ and has been recommended for India as well.²⁰ This involves adopting plain English words, short sentences, avoiding the use of confusing and archaic phrases²¹ to the extent possible. The idea is to make text

¹⁶Section 1 of the Executive Order No. 12866 of the United States on Regulatory Planning and Review provides, “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.” The United Kingdom also requires regulators to assess costs and benefits of the proposed regulations.

¹⁷SEBI Circular dated 25 May 2012. In addition, SEBI has recently introduced draft of the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2013.

¹⁸In October 2013, US Commodity Futures Trading Commission settled charges Against JPMorgan Chase Bank, N.A., wherein the latter admitted to wrongdoing.

¹⁹The United States has adopted Plain Language technique pursuant to Presidential Memorandum on Plain Language (no. 31885 dated June 1998).

²⁰Report of the Financial Sector Legislative Reforms Commission

²¹ such as notwithstanding, subject to

user friendly.²² Publishing a reader's guide that provides examples of interpretation of the statutes could also be useful.

The experience with AAR in taxation matters been mixed. At times, AAR has provided interpretations that are inconsistent with the intent of the regulations and have been struck down by the appellate authorities. The Committee has also recommended that the AAR must provide clear indication of its view without prevarication or fence – sitting. However, this might be challenged wherein the query is hypothetical in nature (which is often the case) and the query is just testing the waters. Further, the full set of facts might be unknown to the parties at the time of query, which might lead to the AAR taking a different view on a later date. Ambiguity about (non) binding nature of the AAR's opinion on the concerned regulator could also lead to protracted litigation and diminish the value of AAR's opinion.

Further, composition of AAR is also a challenge. Common sense suggests that a drafter is the best person to provide interpretation of the provision she has drafted. In case AAR is staffed with non-drafters, personal experiences and prejudices might lead the AAR to interpret a provision different from the intention. Formulating an AAR also goes against the basic tenet of minimising discretion at the hands of the regulatory staff. In case an AAR is formulated, clear procedure about the matters it will provide interpretation on, requirement of detailed facts, and internal guidelines on interpretation of statutes must be set.

4. Regulatory Review Authority (paragraph 4.10)

The Committee has recommended creation of a Regulation Review Authority (RRA) in each organisation to write rules and regulations and review regulation to examine if it has outlived its utility. This is supposed to reform the issue of multiple and unnecessary regulations. The Committee notes that often regulations are made to deal with solitary non-compliances, wherein constructive interpretation of existing regulations could address the problem.

The Committee has recommended that a RRA be placed in each organisation to write rules and regulations. A body tasked with the function of review, must be independent and at arms – length from the body being reviewed. As recognised by the maxim, *nemo iudex in sua causa*, no one should be a judge in its own cause, due to a possible bias (even if there is actually none). Consequently, a reviewer must not have an interest in the reviewed, and more importantly, should not be under pressure from the reviewed, which is a real possibility if RRA is an in-house body.

Instead, an expert independent body actively debating the draft rules with the rule making body has the potential to produce quality drafts. Further, there are dedicated drafting teams within each rule – making body, staffing such bodies with expert drafters and outsourcing the review function to an independent body could offer long term solutions to the quality issues in statutes. This practice has been adopted in various jurisdictions.²³

²²Section 1 of the Executive Order No. 12866 of the United States on Regulatory Planning and Review provides, “Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”

²³ The Office of Information and Regulatory Affairs in the US reviews draft proposed and final regulations, ensuring integrity and legitimacy of regulatory review and oversight

Further, having separate RRAs within every organisation has the possibility of regulatory overreach and conflicting rules by organisations, as more often than not, market participants are governed by more than one regulatory agency. Having a single independent RRA could negate this possibility by ensuring inter – agency co-ordination. In the alternative, evolving a co-ordination mechanism between RRAs is essential. All RRAs must mandatorily meet in the beginning of the year to exchange notes, share priority rule making areas, and co-ordinate efforts towards efficient rule making.²⁴

While the Committee is guided by the correct objective of having better regulation and not more regulation, no regulation can be made for the future, i.e. no regulation can pre-empt changes in future and extending the scope of existing regulation to a future development, without taking into account sensitivities of business and other stakeholders, might have unintended consequences. There might be cases in future, which in the opinion of RRA are covered under the existing regulations while the stakeholders might feel otherwise. Thus, RRA must be absolutely clear about the objectives of the regulations, which should be stated up front in the regulations. Any novel development must be tested at the touchstone of objectives of the existing regulations, and if not intended to be covered, amendments or new regulations could be proposed. Attaching such high importance to the objectives would require intense discussions about the scope of objectives/ regulations, a document in relation to which must be put out in public domain that spells out the scope of the regulation, to help the stakeholders understand RRA's mindset.

5. Sunset provisions (paragraph 4.14)

The Committee has recommended that the Central and State government and Regulatory Bodies should consider a sunset provision while enacting a new law or creating a new agency or prescribing a new regulation.

While enacting sunset provisions are necessary in order to provide time to the market participants to prepare for compliance with the new regime, it is absolutely necessary that sunset provisions are absolutely clear and unambiguous. At times, regulations are enforced partly and might lead to conflict with existing yet to be fully repealed statute.²⁵ For regulations that create new regulatory bodies, provisions incorporating regulators/ board of the regulators, come into effect immediately, but operative provisions come into force after a lag. This is essential to ensure that the new board has the authority to start drafting new regulations and conduct non-regulatory functions (such as recruiting, and building of infrastructure). Thus, language of sunset provisions must be absolutely clear to give legitimacy to the acts of future regulator while it is not fully functional.

A related point is about validity of acts done and proceedings on going under prior regulations. It must be made amply clear that validity of actions under previous regulations will not be altered once new regulations are in place, and the judicial / quasi – judicial proceedings initiated under the old regulations will continue to be governed by those regulations i.e. grandfather rights. It is also essential that regulations that disincentives market participants are not applicable from a retrospective date and enough lead time is provided in the regulations by way of sunset clause, to prepare for compliance.

²⁴ See, section 4 of the Executive Order No. 12866 of the United States on Regulatory Planning and Review.

²⁵For instance, at present, both the Companies Act, 1956, and the Companies Act, 2013 are partially in force, creating confusion for the regulated entities.

CHAPTER 5: ENABLING MSMEs

1. Sole focus on MSMEs (paragraph 5.1)

The paragraph provides very general idea about the role of MSMEs in Indian Economy. Providing some statistics related to contribution of MSMEs to Indian Economy i.e. number of people employed in the sector, contribution to GDP, revenue generated per year, etc. would make the argument more persuasive. Also the report is about reforming the regulatory environment for doing business in India. So focusing upon MSMEs only in the report makes little sense. Rather approach should be to cover, if not all, some of the most important sectors in terms of economic indicators mentioned above. However, one needs to recognise the distinction between SMEs and large units because of the ability of large units to deploy staff to deal with the regulatory maze as against the ability of SMEs to be able to deal with them easily due to shortage of staff sheerly because of their ability to incur high costs.

2. Coordination between policy formulation and implementation (paragraph 5.2)

The issue of lack of coordination in terms of policy formation and statutory enforcement among various Central Ministries and State Governments is a major issue as far as development of MSMEs is concerned. However, creating an overarching body as mentioned in the Report cannot be considered as the panacea for this problem. Secondly, enabling business to establish and function is mainly under the jurisdiction of States and the Centre can only enact enabling statutes or frame policy frameworks. The Report should deal with step-wise role of such body for overcoming challenges regarding formation and implementation of policies related to MSMEs. The Report could also highlight few examples from other countries where creation of such body has helped in better coordination between central government and states for implementation of policies in effective manner.

3. Insolvency and bankruptcy (paragraph 5.4)

Issues regarding insolvency and absence of bankruptcy laws have been mentioned in this paragraph however both the terms have not been defined at all. Also no proper solution has been mentioned to overcome these problems.

CHAPTER 6: ADDRESSING STATE LEVEL ISSUES

1. Lack of efforts to reduce regulatory complexities (paragraph 6.1)

It has been mentioned in the paragraph that some of the states have devoted adequate attention in order to reduce the complexities in terms of establishing business in India and moving in the direction of single window clearance mechanism. However, no such example of any state has been mentioned in order to justify the argument. Providing such example would help other states to replicate such progressive policies and foster better environment in the state to do business.

It is also required to give example of few sectors where multiple authorities have overlapping functions leading to a large number of approvals for starting business. Pharmaceuticals could be one sector where institutions such as Dept. of Pharmaceuticals, National Pharmaceutical Pricing Authority etc. have conflicting interest.

2. Requirement of a nodal agency (paragraph 6.2)

The paragraph argues that it is necessary for each state government to have a nodal person and a nodal office which can be the single point contact for persons intending to establish business in a state. But the point to be taken under consideration is that different sectors have different requirements and that must be fulfilled to enter the sector. So just mentioning that there should be one nodal office as a contact point for all information will not serve the purpose. Further, report should cover few example of other countries where such approach has been adopted leading to creation of better environment for doing business.

3. Incentives for regulatory reforms (paragraph 6.3)

Again the committee has made sweeping remarks regarding incentivizing state governments for adopting reforms in terms of simplifying regulatory structure and reducing the number of regulations required to start business. It has been mentioned in the report that states adopting such measures would benefit in the long run. However, providing examples of few states where such steps of simplifying regulations have been adopted leading to overall economic growth (state-wise) would substantiate the whole argument.

4. Good practices (paragraph 6.4)

Again it is required to provide examples of good practices in respect of simplifying regulations, adopted by few states that could be replicated by other states rather than reinventing the wheel.
